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* *In re* East Yorkshire Gravel Co. Ld.'s Application - Harman J. 1 W.L.R. **88**

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* Gahan (Inspector of Taxes) *v.* Chloride Batteries Ld. - C.A. 1 W.L.R. **277**

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THE
WEEKLY LAW REPORTS
Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1954
Dec. 6.

Lord Goddard C.J., Cassels and Devlin JJ.

*REGINA *v.* BULLOCK.

Criminal Law—Accessory before the fact—Knowledge of crime—How specific — Motor-car over which appellant had control used for purposes of housebreaking—Appellant's knowledge that motor-car was being used for criminal purpose—Whether necessary to direct jury as to knowledge of some particular crime in view.

The appellant was charged on two counts alleging breaking and entering on two separate occasions, one house being in Leicestershire and the other in Wiltshire. There was sufficient evidence to suggest that the appellant had some connexion with both crimes and on each occasion a (different) car hired by him was seen in the vicinity of the house broken into. The appellant's defence was an alibi and at the trial the case for the prosecution and the summing-up proceeded on the basis that he was concerned in the breaking and entering. After the jury had been absent for about three-quarters of an hour they returned and asked the judge what was the law regarding a person who had knowledge of the fact that his car was being used for an unlawful purpose. The judge directed the jury, in effect, that if they were not satisfied that the appellant was present at the house broken into but found that to his knowledge the car was being driven by a thief or thieves, and he knew beforehand that it was going to be used for that purpose, then the appellant would be an accessory before the fact. The appellant was convicted of being an accessory before the fact and, relying on *Rex* v. *Lomas* (1913) 9 Cr.App.R. 220; 30 T.L.R. 125, he appealed on the ground that the judge's direction was, in the circumstances, inadequate:—

Held, that the direction to the jury had to be considered in the background of the facts. The appellant had had control of the car, and if he knew that it was going to be used, he must have formally or informally lent it for a specific purpose, and, therefore, once the jury were satisfied that he knew it was going to be used for an unlawful purpose there was, in the circumstances of the case, and in view of the defence, no need to give an elaborate direction as to whether the unlawful purpose was merely a general purpose or

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1954

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the intent to commit one or other of the crimes. The direction, accordingly, was adequate, and the appeal failed.

Rex v. *Lomas* (1913) 9 Cr.App.R. 220; 30 T.L.R. 125 distinguished.

The second part of the headnote to *Rex* v. *Lomas*, 9 Cr.App.R. 220, "there must be some particular crime in view," is not derived from anything in the judgment to that case.

Quaere, whether mere suspicion that something lent may be used by the borrower for a general criminal purpose is sufficient to make the lender an accessory before the fact.

APPEAL against conviction.

The appellant and one Beyer were jointly charged with between January 14 and 17, 1954, breaking and entering a house in Leicestershire, and alternatively, with receiving articles stolen from the house. The same indictment also contained another count charging the appellant alone with, between November 23 and 26, 1953, breaking and entering a house in Wiltshire from which a quantity of property was stolen.

Motor-cars were used for the purposes of both crimes and, although different cars, the car seen in the vicinity at the time of each crime had been hired by the appellant. His explanation was that he had in fact hired the two cars on those two occasions but that their use for the purposes of the robberies was entirely unknown to him, and he could only suggest that on each occasion the car had been taken away from the place where it had been parked at night, used for the robbery, and brought back again without his being any the wiser. In one case the car had done a considerable mileage and, as he had already stated that he had never used it outside London, the appellant found some difficulty in giving an adequate explanation of the mileage.

The appellant's defence was that on neither occasion could he have been away from London, and at the trial the case was presented by the prosecution, and summed up to the jury, on the basis that the appellant was himself concerned with the breaking and entering and that he had produced an alibi.

After the jury had been out for about three-quarters of an hour they came back.—

The foreman: "What is the law regarding a person who has "knowledge of the fact that his car is being used for an unlawful "purpose?"

The judge: "That is rather difficult. I do not understand "the question."

The foreman: "May I continue? We are of the opinion— "but we have not finally decided—that Bullock may have driven "the car to Misterton Hall. We cannot reach a unanimous "decision on that point and the other members of the jury—"

The judge: "Is it this you want to know: if you are not "satisfied that he was there, whether to his knowledge the car "was being driven by a thief or thieves?"

The foreman: "Yes."

The judge: "Although he may not have been the person "driving the car, he knew beforehand that it was going to be "used for that purpose?"

The foreman: "Yes."

The judge: "Then he would be an accessory before the fact "and would be liable to be punished accordingly."

The jury found that the appellant was an accessory before the fact to the breaking and entering in each case and he was convicted as such. Relying on *Rex* v. *Lomas*,[1] he appealed against his conviction on the ground that the judge's direction was wrong in law; alternatively, that the question asked by the foreman of the jury had put a new complexion on the case and that the judge's answer, even if it was right in law, was inadequate having regard to the nature of the case and the circumstances.

F. H. Lawton for the appellant.
J. A. Grieves for the Crown.

The following cases were referred to in argument: *Rex* v. *Lomas*[2]; *Rex* v. *Jones*[3]; and *Harris* v. *Director of Public Prosecutions*.[4]

LORD GODDARD C.J.: I will ask Devlin J. to give the judgment of the court in this case.

DEVLIN J. stated the facts as set out above and continued: There was abundant evidence to suggest that the appellant had some connexion with both the crimes. It was too much to ask the jury to believe that on two separate occasions separated by a couple of months and with two separate cars, the car had in each case been used without his knowledge.

The way in which the case was presented at the trial and the way it was summed up to the jury was on the basis that the appellant was concerned with the breaking and entering and that he had produced an alibi to show that upon neither of these occasions could he have been away from London. There was, however, an alternative possibility, which apparently suggested itself to the jury during their deliberations, that it was conceivable that the alibi might have been true and that the two sets of facts could be reconciled if, although he did not go himself, the appellant had lent his car for the purpose on each occasion. Accordingly, after they had been out about three-quarters of an hour, the jury came back and the foreman of the jury put this question.

[1] (1913) 9 Cr.App.R. 220; 30 T.L.R. 125.
[2] 9 Cr.App.R. 220.
[3] [1949] 1 K.B. 194; 64 T.L.R. 616; [1948] 2 All E.R. 964; 33 Cr.App.R. 33.
[4] [1952] A.C. 694; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044; 36 Cr.App.R. 39.

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[His Lordship stated the questions put by the foreman and the answers of the judge, as set out above, and continued:] That direction has been criticized on the ground that in the circumstances of this case it was not adequate enough, and in particular that the jury ought to have been told that unless the appellant knew that his car was being used for this particular crime and did something by way of encouragement, there was not enough to constitute being an accessory before the fact in law. No doubt, had the case for the prosecution been more directed towards that alternative, the summing-up would probably have dealt with it more elaborately than it did, but the judge was dealing with the question which was put to him after he had concluded his summing-up, and the only point which we have to determine is whether he answered it sufficiently clearly and gave the jury an adequate direction for the purposes of this case. We think that he plainly did.

Mr. Lawton has cited and relied upon *Rex* v. *Lomas*.[1] The headnote to that case reads: "Mere knowledge that the principal "intends to commit crime does not constitute an accessory before "the fact: there must be some particular crime in view." The first part of that headnote, that is, "Mere knowledge that the "principal intends to commit crime does not constitute an "accessory before the fact" is unexceptionable as far as it goes; mere knowledge is not of itself enough, there must be something further. But in the circumstances of this case, once it was plain that the appellant had hired the car and had control of it, it was equally plain, if he knew that it was being used, that he must also have permitted it to be used. He must formally or informally have lent it for that purpose, and that is certainly enough. *Rex* v. *Lomas*[2] is upon this point quite different. The appellant in that case had a jemmy which belonged to the burglar, a man named King, and he handed back to King King's own jemmy. The appellant was not in a position to withhold the jemmy or permit King to use it. In the present case, where the appellant had control of the car, the position is quite different.

The second part of the headnote to *Rex* v. *Lomas*,[2] "there "must be some particular crime in view," is not derived from anything contained in the very short judgment of Lord Reading C.J. The conclusion which is there stated is[3]: "it is sufficient "for us to say that the facts as found by the jury are not enough "to constitute the offence." The reference to a particular crime in view comes from the rider or something in the nature of a rider which the jury attached to their verdict. The jury found the accused guilty and[4] "that he had a certain knowledge that "the jemmy was wanted for an illegal purpose—that he handed "the jemmy to King with the knowledge that it was wanted for "a burglary. He did not know that it was wanted for this

[1] 9 Cr.App.R. 220.
[2] 9 Cr.App.R. 220.
[3] Ibid. 222.
[4] Ibid. 220.

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"particular burglary." But there is nothing in the judgment to show that that point was taken by the court as being the decisive point, and the case could have been decided equally well on the ground that the accused had no control over the jemmy. It is no doubt true that if an accused person merely suspects that if he lends something it may be used for a general criminal purpose, that may not be enough to make him an accessory before the fact; it is not necessary, for the purposes of this case, that we should express a view one way or another on that point. If an accused person lends a man a revolver believing that it may be used to commit a crime of violence but with nothing specific in mind, it may not be enough, but this is not a case of that sort. This is a case in which a man had hired a car and, having hired it, he was plainly not going to put it at the disposal of anybody who wanted to borrow it; it must have been borrowed, if borrowed at all, for a specific purpose. If the appellant's case had been: "Yes, I did lend the car to Beyer. "I had not an idea what he wanted it for, and I lent it to him "without knowing that he was going to commit any particular "crime," then it might be that a more careful direction than the one given was required. But we must consider the direction given in this case with the background of the admitted facts. The appellant was saying that he had never lent the car to anybody, and that he did not use it or know that it was being used for any unlawful purpose. Once the jury were satisfied, as they apparently were, that he did know that it was being used for an unlawful purpose, there was no need to give an elaborate direction as to whether the unlawful purpose was merely a general purpose or the intent to commit one or other of these crimes. In our judgment the direction was, in the circumstances, quite adequate and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sampson & Co.; B. F. Chapman, Leicester.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

* *In re* BRIXHAM URBAN DISTRICT COUNCIL.
In re SALCOMBE URBAN DISTRICT COUNCIL.
In re TOTNES URBAN DISTRICT COUNCIL.

1954
Oct. 4.

Hilbery, Lynskey and Parker JJ.

PRACTICE NOTE.

Rates and Rating—Practice—Appeal—Appeal by valuation officer to local valuation court—Rating authority in agreement with valuation officer's proposal—No steps taken by rating authority in reliance on

1954

BRIXHAM URBAN DISTRICT COUNCIL, *In re.*

valuation officer's proposal—Withdrawal of appeal by valuation officer—Rating authority not entitled to be heard—Local Government Act, 1948 (11 & 12 *Geo.* 6, *c.* 26), *s.* 48.

APPLICATIONS ex parte for leave to apply for orders of mandamus.

In the application by the Brixham Urban District Council the following were among the facts relied upon: A local valuation officer made a proposal to alter the valuation list and, objection having been made, served notice of appeal on the local valuation court under section 48 of the Local Government Act, 1948. The applicants, the rating authority, were in complete agreement with the valuation officer's proposal and therefore they took no steps themselves. When the appeal was due to be heard the valuation officer wrote to the clerk of the valuation court withdrawing his appeal, and when the court sat he did not appear. The court refused to hear the rating authority or to determine the appeal, and the rating authority applied for leave to apply for an order of mandamus directing the valuation court to hear and determine the appeal of the valuation officer on the grounds that, once notice of appeal had been given, a duty was imposed by section 48 [1] on the valuation court to hear it, and that, since subsection (3) entitled certain persons to appear as parties to the appeal, those persons had a right to have the appeal heard.

The other two applications turned upon the same point.

[1] Local Government Act, 1948, s. 48: (1) "Where notice of appeal "to a local valuation court is served "... by or on the valuation officer, "the valuation officer shall forthwith "notify the clerk to the local valuation panel from the members of "which the local valuation court "which is to hear the appeal falls "to be constituted, and it shall be "the duty of the chairman of that "panel to arrange for the convening "of such a court. (2) The procedure "of local valuation courts shall, subject to such regulations, if any, as "may be made in that behalf by "the Minister, be such as the court "in question may determine, and "every such court—(*a*) shall, unless "the court otherwise order, on the "application of any party to the "appeal and upon being satisfied "that the interests of either party "would be prejudicially affected, sit "in public; ... (3) On the hearing "of an appeal to a local valuation "court—(*a*) the appellant; and (*b*) "the valuation officer, when he is not "the appellant; and (*c*) the owner "or occupier of the hereditament to "which the appeal relates, when he "is not the appellant; and (*d*) the "rating authority for the area in "which the hereditament in question "is situated, when that authority is "not the appellant; and (*e*) in the "case of an appeal against an objection, the objector, where he is not "one of the persons aforesaid, shall "be entitled to appear and be heard "as parties to the appeal and to "examine any witness before the "court and to call witnesses. (4) "After hearing the persons mentioned in the last preceding subsection, or such of them as desire "to be heard, the local valuation "court shall give such directions with "respect to the manner in which the "hereditament in question is to be "treated in the valuation list as "appear to them to be necessary to "give effect to the contention of the "appellant if and so far as that contention appears to the court to be "well founded, and the valuation "officer shall incorporate in the list "as settled, or, as the case may be, "cause to be made in the list, such "alterations as are necessary to give "effect to those directions."

G. D. Squibb for the applicants. Proceedings were set on foot by the local valuation officer. In reliance on that, the rating authority did nothing, relying upon the right given to them by subsection (3) to appear as parties to the appeal. It is submitted that, even if the valuation officer did not want to appear to support his own appeal, the appeal was still there, and the rating authority were entitled to be heard as a party to it.

[HILBERRY J. But the appellant is in control of whether he wants to go on with an appeal or not. What is there in the Act to show that once such a notice of appeal had been given it could not be withdrawn?]

The inference is that once a notice of appeal has been given there is a duty imposed by subsection (1) to hear it, and there is a right to have it heard conferred by subsection (3) because the persons named in subsection (3) are entitled to appear as parties to the appeal.

[HILBERY J. It does not say that there is a right to have it heard; it says that on the hearing of the appeal the parties shall have certain rights. That presupposes the hearing, for the simple reason that you cannot hear an appeal if there is no appeal.]

The duty to hear arises because a notice of appeal has been served under subsection (1). Where a notice of appeal has been served, the Act specifically says that it is the duty of the chairman to arrange for the convening of a court.

[HILBERY J. Is your point that it was not an effective withdrawal or that he had not power to withdraw?]

It can be put on both grounds. The document which the valuation officer wrote had no legal effect at all; for there was another appellant, namely, the rating authority.

[LYNSKEY J. They were not appellants; they were a party entitled to be heard.]

Yes, on whichever side they liked. The rating authority were lulled into a sense of false security; they themselves could have made a proposal, but it was obviously foolish for both them and the valuation officer to do so.

[HILBERY J. They could have given a cross notice of appeal if they had wished.]

They were in entire agreement with the proposal made by the valuation officer.

[HILBERY J. In *Rex* v. *Hampstead and St. Pancras Rent Tribunal, Ex parte Goodman*[2] the tribunal said: "No, you "cannot withdraw like that as you have given us seisin of this "matter. We have a right to act on the res in the matter," that is, the premises; "we shall do what we think is right with "regard to them," and we held that they could not do it.]

[PARKER J. My recollection is that one of the arguments against the power to withdraw was that the local authority had a right to be heard. I think that was the argument.]

[2] [1951] 1 K.B. 541; [1951] 1 T.L.R. 37; [1951] 1 All E.R. 170.

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[HILBERY J. It was almost precisely this point in connexion with another Act.]

In that case the tribunal were saying: "No, you cannot "withdraw this appeal; we are going on, even though you do "not want to." It was not a case of the borough council saying: "No, you cannot do it because we have an interest." It is true that the fact that the borough council could have appeared was used in argument, but that it not quite this case because here the local authority themselves are aggrieved, and it is they who are saying that it ought to go on.

[LYNSKEY J. You are ignoring the provisions of subsection (4). Subsection (4) only gives the authority the right to deal with the contentions of the appellant, and if an appellant chooses to withdraw his appeal there is no contention of the appellant before them. How can they say: "We will listen to the local "authority and listen to the contentions and come to a con- "clusion upon them"?]

Under subsection (3) the rating authority are entitled to be heard as a party to the appeal. A party can be a respondent, and if he chooses to be heard as an appellant it is his contentions to which effect have to be given under subsection (4). A rating authority cannot appear as party to an appeal without taking sides. They must appear as appellant or respondent, and they can choose to put themselves in the position of appellant even if the original appellant has put forward no contentions at all on the hearing.

[LYNSKEY J. Subsection (3) in terms distinguishes between the appellant and the parties because under (*a*) it says that the court shall hear the appellant, and the rating authority is not the appellant.]

As soon as the rating authority exercise the right which is given them by the subsection to appear as parties, they can then either become appellant or respondent at their choice. In this case they would have chosen to be appellant and then their contentions would have been the appellant's contentions. If this had been a case in which the local valuation court in the absence of the appellant and in the absence of the rating authority had said: "A notice of appeal having been given, we are going to "hear it, although there is nobody here," that would have been like the landlord and tenant case as I understand it, but here it was not the case of the court themselves taking the bit between their teeth; there were persons appearing before them who wanted to be heard.

[HILBERY J. They only had a right to be heard on the appeal. There was nothing before the court and nothing to hear them upon.]

Under section 48 (1), once a notice of appeal has been served —and a notice of appeal had been served—it became the duty of the chairman to convene the court.

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[HILBERY J. That only means what it says, that having got a notice of appeal, that somebody wants to appeal, he is to convene a court. When the court was convened, it had notice that the appellant abandons his appeal; then there was nothing upon which the parties having a right to be heard on the appeal had a right to be heard upon.]

It is submitted that the appellant had not any right, having given a notice of appeal, to abandon his appeal once other persons had an interest in the proceedings through him. Amongst the powers and duties conferred by statute upon the valuation officer are the powers of making proposals and putting in notices of appeal. He is given no power at all to withdraw an appeal once he has given notice of it. If he is the only person interested in the appeal, he can secure the same effect merely by not attending or by attending and saying that he does not wish to put forward any contention. He cannot withdraw his appeal because there are other persons interested in having the appeal heard.

[HILBERY J. There are other persons who have a right to be heard and put forward their contentions and, if they were successful, to have those contentions made effective on the hearing of the appeal.]

The only reason why effect should be given to the contentions of the third party is that they would have become the contentions of the appellant under subsection (4). If effect is given to the contentions, it is because they have to be themselves in the position of appellant.

HILBERY J. You have a right to appeal against our decision on this point, but we are of opinion that this application must be refused.

Applications refused.

Solicitors: *Sharpe, Pritchard & Co. for T. Owen Davies, Brixham.*

J. F. L.

[COURT OF APPEAL.]

*WARD *v.* LEWIS AND OTHERS.

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[1953 W. No. 2227.]

Denning and Morris L.JJ.

Libel and Slander — Slander — Conspiracy — No allegation of special damage—Amendment of statement of claim alleging conspiracy and special damage—No nexus alleged between slanders and damage—Amendment refused.

In an action for slander the plaintiff, an osteopath, in answer to the defendants' request for particulars of damage replied that

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no special damage was alleged. In his pleadings he alleged conspiracy between the defendants "wrongfully to make and publish "false and malicious oral and written statements defamatory of" [him]. That allegation of conspiracy was struck out by the master on the ground that it omitted any allegation of damage—an essential averment. In those circumstances the plaintiff obtained from the master leave to amend the pleadings by substituting an allegation of conspiracy by the defendants to defame, whereby he had suffered damage by reason of a severe falling off in his practice. Gerrard J. affirmed the master's order, and the defendants appealed:—

Held, that the allegation of conspiracy failed for the reason that no nexus was alleged between the falling off in the plaintiff's practice and the alleged slanders. The amendment should therefore not have been allowed and the appeal succeeded.

APPEAL from Gerrard J.

The following facts are substantially taken from the judgment of Denning L.J.:—

The plaintiff in the action, Mr. Stephen Ward, an osteopath, sued the defendants for alleged slander. The defendants asked for particulars of the damage and the plaintiff replied "No special "damage is alleged." But in the same pleading, by paragraph 8, he alleged that "the defendant Lewis conspired with the defen- "dants Taylor and Tracey wrongfully to make and publish false "and malicious oral and written statements defamatory of the "plaintiff." He gave particulars of overt acts but they were simply the alleged slanders. That allegation of conspiracy was struck out by the master because it omitted an essential averment, viz., an allegation of damage. In those circumstances counsel who then appeared for the plaintiff sought and obtained from Master Clayton leave to amend the allegation of conspiracy by substituting for paragraph 8 the following: "From in or about "July, 1952, until the month of November, 1952, or thereabouts, "the defendant Lewis conspired with the defendants Taylor and "Tracey and the defendant company [London Express News- "papers Ltd.] by their servants or agents as alleged in para- "graph 1 aforesaid, wrongfully to make and publish false and "malicious oral and written statements defamatory of the "plaintiff, whereby the plaintiff has suffered damage." In the particulars of special damage the plaintiff said: "The plaintiff "alleges that as a result of the allegations herein contained the "practice of the plaintiff has suffered severely and the value "thereof has been approximately halved." He gave the names of some 12 or 15 persons who, he alleged, no longer attended him.

Gerrard J. having on November 9, 1954, affirmed the master's order, the defendants appealed.

Bernard Gillis Q.C. for Lewis.
H. P. Milmo for the London Express Newspapers Ltd.
Colin Duncan for the plaintiff.

DENNING L.J., having stated the facts, continued: The question is whether the plaintiff should be given leave to amend his statement of claim in the way proposed. The important thing to notice about the new allegation is that no connexion is shown between the slanders and the damage. There is no allegation that the slanders which are charged against the defendants were either authorized to be republished by anyone or were likely to be republished, nor that they were in fact republished by anyone. In the slander action some such allegation would be a necessary averment, because a man who speaks a slander is not responsible for its republication unless he authorizes it or he knows or ought to know it is likely to be republished.

But Mr. Duncan, for the plaintiff, says that on the conspiracy allegation it is only necessary to allege conspiracy to injure or to do an unlawful act, and then to allege damage without alleging the connexion between the two. I cannot agree. It is important to remember (and we had a case only last week on this point) that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort. It is sometimes sought, by charging conspiracy, to get an added advantage, for instance in proceedings for discovery, or by getting in evidence which would not be admissible in a straight action in tort, or to overcome substantive rules of law, such as here, the rules about republication of slanders. When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy, on the simple ground that the conspiracy adds nothing when the tort has in fact been committed.

In this case the allegation of conspiracy fails for the simple reason that there is no nexus alleged between the falling off in the practice and the slanders which are alleged. I understand that the judge thought this was a borderline case. I have come to the conclusion that this is on the other side of the line. Leave to amend should not be granted in regard to the proposed paragraphs 8 and 16 of the statement of claim. I suppose that the other and minor amendments are unobjectionable and I need say nothing about them. I would allow the appeal accordingly.

MORRIS L.J. I agree, and there is very little I would desire to add. In the original statement of claim the concluding paragraphs alleged that the plaintiff had suffered damage. Particulars which were asked for were delivered in July of 1953 and it was said categorically that no special damage was alleged. Following upon that, in November, 1953, paragraph 8 of the statement of claim was struck out. The present application is for leave to amend the statement of claim. It does not seem to me that leave should be given unless the new plea is in adequate form.

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The particulars given under the desired new paragraph 8 seem to me simply to be stating that at one date the practice was in a certain state and that at a later date it had declined. It does not seem to me that there is any sufficient allegation in the pleading of connexion between the conspiracy and the pleaded special damage. I think this is emphasised, inasmuch as the particulars still stand which say that no special damage is alleged in regard to the slanders. It is, of course, quite right, as Mr. Colin Duncan has pointed out, that it may not be necessary when considering the claims made in reference to the slanders themselves to allege any special damage having regard to the nature of the alleged slanders; but the fact remains that it is still said that there is no special damage from the slanders. There is no allegation that there was any likelihood or intention that the slanders would be repeated. In my judgment, in the present form of the application it would not be proper to give leave to amend.

Appeal allowed.

Solicitors: *Zeffertt, Heard & Morley Lawson; Allen & Overy; Summer & Co.*

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[COURT OF APPEAL.]

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* *In re* REYNOLDS, DECD.
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[1953 R. 2179.]

Probate—Practice—Particulars—Allegation that testator was not of sound mind—Request for detailed particulars of allegation—Extent to which particulars must be supplied—R.S.C., Ord. 19, *r.* 25A.

Order 19, r. 25A, of the Rules of the Supreme Court provides: "In the Probate actions it shall be stated with regard to every "defence which is pleaded what is the substance of the case on "which it is intended to rely: and further where it is pleaded "that the testator was not of sound mind, memory, and under-"standing, particulars of any specific instances of delusion shall "be delivered before the case is set down for trial."

In an action in which the plaintiff sought probate of a will of which he was an executor, the defendant pleaded that the testatrix at the time that she made the will was not of sound mind, memory or understanding. In reply to the plaintiff's application for particulars giving specific incidents relied upon, with dates and places, the defendant gave at considerable length incidents on which he based his defence, but was unable, in most cases, to specify the dates. The plaintiff having obtained an order for further and better particulars from Davies J., affirming an order of the registrar, the defendant appealed:—

Held, that Order 19, r. 25A, did not require a highly detailed and particularized statement of incidents on which a defendant

relied, and the defendant having stated the substance of his case had complied with the rule and no further particulars should be ordered.

Dictum of Cotton L.J. in *Salisbury (Lord)* v. *Nugent* (1882) 9 P.D. 23, 26 applied.

APPEAL from Davies J., affirming an order of Registrar Kinsley.

The plaintiff, Pearkes, a solicitor, put forward for probate three wills made by Mrs. Prudence Reynolds, deceased, in February, 1949, March, 1951, and April, 1952. He was himself a residuary legatee in the last will. The defendant, Anthony Bernard Reynolds, as executor of the will of Francis Godfrey Bailie Reynolds, deceased, husband of Prudence, contended that, at the time of making the wills, she was not of sound mind, memory or understanding. He pleaded that: "The deceased had for many "years been of unstable temperament, and for several years prior "to her death [July, 1953] had been addicted to excessive con- "sumption of alcohol which caused a continuous process of "mental deterioration," and in nearly a page of pleading further stated the substance of the defence. The plaintiff applied for particulars giving "the date from which it is alleged that the "deceased became of unstable temperament, stating how the "alleged instability manifested itself and giving any specific "incidents relied upon, with dates and places." In answer to that application the defendant stated that the deceased was in the habit of flying into unreasonable rages and of swearing violently in public; that on many occasions, the dates of which the defendant could not now specify, she in public restaurants kissed the waiters, flew into a temper with the guests whom she was entertaining, and sent for the police to "sling them out," and (among a number of general allegations) that, in 1946, she insisted on going for a drive when there was not enough petrol, and when the petrol ran out hit her husband over the head with an umbrella.

In the above circumstances the plaintiff obtained from the registrar an order for still further particulars, setting out facts or specific incidents relied on, with dates or approximate dates. Davies J., on November 2, 1954, affirmed the registrar's order, and the defendant now appealed against that order.

A. H. Ormerod for the defendant.
A. Richard Ellis for the plaintiff.

Salisbury (Lord) v. *Nugent*,[1] and *In re Shrewsbury*[2] were referred to in argument.

DENNING L.J. This is a probate action. Mrs. Reynolds died in July, 1953. She made three wills, one in February, 1949, another in March, 1951, and another in April, 1952. The plaintiff,

[1] (1882) 9 P.D. 23, 26.
[2] [1922] P. 112; 38 T.L.R. 203.

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Mr. Pearkes, who was her solicitor, is putting them forward for probate. The defendant says that at the time she was not of sound mind, memory or understanding. At one time in the Probate Division it was not the practice to order particulars of an allegation of unsoundness of mind. There were reasons which appeared good to the judges of that time. Lindley L.J. said in *Salisbury (Lord)* v. *Nugent* [1]: "the case may depend on a multitude of circumstances of which it is impossible to give particulars." Fry L.J. said [2]: "to adopt any other form of order would lead to great prolixity and to expensive contests as to the sufficiency of the particulars." So no particulars were ordered at that time.

In 1901 R.S.C., Ord. 19, r. 25A was brought in, which provided: "In the Probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely: and further where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial." That rule, of course, altered the practice; it brought it into line with what Cotton L.J. thought was the proper way. In the case to which I have already referred he said [3]: "If we were dealing with a new practice I should say that it was reasonable to require from the defendant a general statement of the facts on which he means to rely." Order 19, r. 25A, carries into operation Cotton L.J.'s view.

In the present case the defendant set forward in her original particulars nearly a page of the substance of the case saying that "The deceased had for many years been of unstable temperament, and for several years prior to her death had been addicted to excessive consumption of alcohol which caused a continuous process of mental deterioration. . . ." There was nearly a page in the original pleading which stated the substance of the case. Particulars were asked, especially of the first allegation, of: "The date from which it is alleged that the deceased became of unstable temperament, stating how the alleged instability manifested itself and giving any specific incidents relied upon, with dates and places." In answer to that application the defendant gave two and a half pages more showing how the testatrix was of unstable temperament. For example: "The deceased was in the habit of flying into unreasonable rages. The deceased was in the habit of swearing violently in public. On many occasions the dates of which the defendant cannot now specify the deceased in public restaurants kissed the waiters . . . On many occasions the dates of which the defendant cannot now specify the deceased flew into a temper with the guests whom she was entertaining at her house, 32 Grove End Road,

[1] (1882) 9 P.D. 23, 26.
[2] Ibid.
[3] Ibid. 25.

" and sent for the police to ' sling them out.' " There are a number of general allegations of that kind together with some specific occasions such as an incident when in 1946 she insisted on going for a drive when there was not enough petrol, the petrol ran out and she hit her husband over the head with an umbrella.

The plaintiff now asks for still more particulars. There is a whole series of requests going halfway through the alphabet and they have been ordered by the registrar and by the judge. The first request is for particulars " Of the unreasonable rages alleged, " setting out any facts or specific incidents relied on, with dates " or approximate dates." Then: " Of the deceased's swearing " in public," setting out dates and places and so forth. Then: " Identifying the occasions on which it is alleged that the deceased " kissed the waiters in public restaurants," and so on. In other words, it is a whole series of further applications demanding further particulars, needing further investigation. The question is whether Order 19, r. 25A, requires particularity to such an extent. In my judgment, it does not. Cotton L.J. referred to a " general " statement of facts," not to a highly detailed and particularized statement. The rule requires the " substance of the case " to be stated, not all the details. I think that the substance of the case has already been sufficiently stated and we should not order these further particulars. Applications of this kind make litigation much too expensive and cause too many delays. In my judgment, the order which has been made goes beyond that which the rule warrants, and I do not think any further order should be made upon the defendant, but that the case should be brought to trial.

I, therefore, would allow this appeal and vary the order which has been made. I am encouraged in taking this view by the fact that Davies J. himself must have hesitated as to how far particulars ought to be given, as he gave leave to appeal in this case. It seems to me that his doubts were well-founded, and I would allow the appeal accordingly.

MORRIS L.J. I entirely agree, and I do not think that there is anything that I can usefully add to what my Lord has said.

Appeal allowed.

Solicitors: *Arnold, Fooks, Chadwick & Co.; Pettiver & Pearkes.*

A. W. G.

[PRIVY COUNCIL.]

J. C.† 1954 Dec. 13.

* CLARICE HADAWAY, ADMINISTRATRIX OF THE ESTATE OF W. H. C. BOARDMAN (DECEASED) . APPELLANT;

AND

WILMOT HENRY HADAWAY AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR THE WINDWARD ISLANDS AND LEEWARD ISLANDS.

Charity—Agriculture—Bank—Will—Trust to establish bank—Primary object to assist planters with loans at low interest—Whether valid charitable trust — Construction — Not confined to "the general "improvement of agriculture"—Windward and Leeward Islands.

A testator by his will devised and bequeathed the residue of his personal estate upon trust for the purpose of establishing and founding a bank, and declared by clause 8 that "the object of the "bank will be primarily to assist the planters and agriculturalists "of St. Vincent by way of loans at a sufficiently low rate of "interest as is compatible with the proper operation of the "bank":—

Held, that the trust was not a valid charitable trust. A trust for the granting of loans at a low rate of interest to a class of persons carrying on a particular trade or business or profession could not be regarded as charitable unless at least there was a condition that loans so made should be employed for a purpose which could itself be regarded as charitable. Accepting as good law the statement by Lawrence L.J. in *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* [1928] 1 K.B. 611, 636; 44 T.L.R. 59, 61 that "the general improvement of agriculture is "a charitable purpose," the will here could not, on construction, be regarded as creating a trust for the general improvement of agriculture only or for such a purpose and purely ancillary purposes only, for it would be competent for the directors of the bank to make loans to planters in any financial emergency whether due to crop failure or other farming disaster or to some personal distress. Such loans which might or might not be used for agricultural purposes could not properly be described as made for the general promotion of agriculture, however much the individual planters might benefit. Restrictive words confining the loans to agricultural purposes should not be imported into the terms of the trust, and without them the trust was invalid.

Judgment of the Court of Appeal for the Windward Islands and Leeward Islands reversed.

APPEAL (No. 36 of 1953), by special leave, from a judgment of the Court of Appeal for the Windward Islands and Leeward Islands (August 6, 1952) which reversed a judgment of Jackson C.J. (October 9, 1951).

The following facts are taken from the judgment of the Judicial Committee: By his will, dated November 28, 1944, the testator, Henry Langlie Wilmot Hayward, who died on

† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and LORD SOMERVELL OF HARROW.

June 2, 1946, after appointing William Horatio Boardman and Wilmot Henry Hadaway to be his executors and trustees, devised and bequeathed to them all his property upon trust for conversion and after payment of his funeral and testamentary expenses to hold (subject as to some parts thereof to certain life interests) upon the trusts set forth in paragraphs 4 to 8 thereof, which were as follows:—

"4. Upon trust as to my personal estate to set aside and "invest in proper securities a sum sufficient to produce an "annuity to be paid as follows:—

"To William Horatio Boardman the sum of £100 per annum "payable in equal monthly instalments for the term of his "natural life. Provided nevertheless that my executors may in "their discretion invest the sum to be set aside under this para- "graph in the shares, securities or stock of the bank to be "established in accordance with my direction hereinafter "contained.

"5. Upon trust as to the residue of my personal estate to "pay and transfer the same to a body corporate established under "the laws of Saint Vincent for the purpose of establishing and "founding a bank within two years of the grant of the probate "of this my will on the terms, directions and conditions herein- "after set out.

"6. I hereby direct my trustees to use their best endeavours "in corporating by statute a body to manage and direct the "said bank, the directors of which shall be composed of the "Administrator, the Colonial Treasurer and four other persons "to be appointed annually at the general meeting of the body "corporate or if any vacancy necessitates it by the Executive "Council of Saint Vincent.

"7. I hereby empower the said directors to appoint or dismiss "a managing director of the bank, who is to be subject to their "control and discretion.

"8. I hereby declare that the object of the bank will be "primarily to assist the planters and agriculturalists of Saint "Vincent by way of loans at a sufficiently low rate of interest "as is compatible with the proper operation of the bank."

The will was in due course proved by the executors named therein, of whom William Horatio Boardman was stated to be the sole heir and next-of-kin of the testator. The residuary estate amounted to about £80,000.

In those circumstances an originating summons was issued in the Supreme Court of the Windward Islands and Leeward Islands, in which the testator's executors were plaintiffs and the respondent, the Attorney-General of the Windward Islands, was defendant, to have it determined whether the trust contained in clauses 5 to 8 of the will was a valid and effectual public or charitable trust or failed for uncertainty or any other reason, and for certain consequential relief.

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That summons coming on for hearing before the Chief Justice of the Supreme Court (Jackson C.J.), that judge, in a long and careful judgment, in the course of which he recited many of the leading authorities in this branch of the law, concluded that the will did not effectually create a charitable trust and declared that the testator's residuary estate was divisible among the next-of-kin of the testator as upon an intestacy.

From that judgment the respondent Attorney-General appealed to the Court of Appeal, and that court by a majority (Cools-Lartigue and Manning JJ., dissentiente Date J.), allowed the appeal. The majority of the court in effect held that the trust in question was intended to benefit, and would benefit, agriculture, and further that any profit made by the bank by any business other than loans to persons engaged in agriculture could only ultimately be used for the dominant and primary purpose of assisting agriculture, and that consequently any activities of the bank other than the assistance of planters and agriculturists must be ancillary or subservient to that primary or dominant object. Therefore, they held, the trust was charitable. In his dissenting judgment, on the other hand, Date J. took the view that, if the testator intended the loans to be expended on the promotion of agriculture, he had failed to use words which adequately conveyed that intention and that the trust was not beneficial to the community in a sense which the law recognized as charitable and was therefore invalid.

In the meantime William Horatio Boardman had died, and the appellant Clarice became his representative by virtue of a grant of administration of his estate with the will annexed made on May 2, 1952. She had by special leave appealed from the order of the Court of Appeal, the respondents being the surviving executor, Wilmot Henry Hadaway, and the Attorney-General of the Windward Islands.

1954. November 17. *L. M. Jopling* for the appellant.

Pascoe Hayward Q.C. and *Denys Buckley* for the Attorney-General of the Windward Islands.

Peter Foster for Wilmot Henry Hadaway.

The following cases were cited in argument: *Houston* v. *Burns* [1]; *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* [2]; *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* [3]; *Hunter* v. *Attorney-General* [4]; and *In re Pleasants, Pleasants* v. *Attorney-General.* [5]

December 13. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and

[1] [1918] A.C. 337, 342; 34 T.L.R. 219.
[2] [1944] A.C. 341, 370; 60 T.L.R. 492; [1944] 2 All E.R. 60.
[3] [1928] 1 K.B. 611; 44 T.L.R. 59.
[4] [1899] A.C. 309; 15 T.L.R. 384.
[5] (1923) 39 T.L.R. 675.

continued: In this appeal no general question of law arises, but the issue depends on the construction of the will of the testator. At the hearing before their Lordships much argument was directed to the nature of the machinery by which the trust declared by paragraph 8 of the will was to be brought into existence, and it may be conceded that in this respect the testator's intentions are not very clearly expressed. But it does not appear to their Lordships that there is any materiality in the argument, for ultimately the only question is whether the trust set out in paragraph 8 is a valid trust, and upon this question they are of opinion that the judgments of the Chief Justice and Date J. are correct. It appears to them to be impossible to regard as charitable a trust for the granting of loans at a low rate of interest to a class of persons carrying on a particular trade or business or profession, unless at least there is a condition that loans so made should be employed for a purpose which could itself be regarded as charitable. Their Lordships do not wish to cast any doubt upon the correctness of the decision in *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*.[1] "It is plain to my "mind," said Lawrence L.J. in that case, "that the general "improvement of agriculture is a charitable purpose falling within "the fourth class of Lord Macnaghten's well known classification "of legal charities in *Pemsel's* case.[2]" Their Lordships accept this as an accurate statement of the law, but it appears to them impossible to regard the will of the testator as creating a trust for the general improvement of agriculture only or for such a purpose and purely ancillary purposes only. But it is conceded by the appellant that, unless the will can be thus construed, the appeal must fail: for if the trust fund may be devoted either to charitable or to non-charitable purposes the gift is invalid. This is the question of construction upon which, as has already been said, apart from any other difficulties, the issue in this case turns. Their Lordships do not dissent from the general proposition, which has been stated in various terms, to the effect that, where possible, a benignant construction in favour of charity should be adopted. But this does not justify the insertion of words in order to restrict the plain meaning of an expression and thus give validity to an otherwise invalid bequest. If there is a real ambiguity, it may be resolved in favour of charity: where there is no ambiguity, no question arises: the plain meaning of the words must be accepted and so must the ensuing legal effect.

In the present case their Lordships entertain no doubt that the ambit of the trust is wide enough to include loans which could not fairly be described as being for the promotion of agriculture or as being ancillary to that purpose, and that it is only by inserting restrictive words that loans could be so confined. For it is clear that it would be competent for the directors of the bank, which is to be established under the will, to make loans to planters in

[1] [1928] 1 K.B. 611, 636. [2] [1891] A.C. 531; 7 T.L.R. 657.

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any financial emergency, whether due to crop failure or other farming disaster or to some personal distress. But such loans which might or might not be used for agricultural purposes cannot be properly described as made for the general promotion of agriculture however much individual planters may benefit. The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative and remote to justify the attribution to it of a charitable purpose. It would be equally easy and equally wrong to regard as charitable a trust for the granting of loans on generous terms to any member of any other class which performs a useful function in the social or economic life of the country. If their Lordships had come to a different conclusion on this point, the respondent had other difficulties to meet. It is, however, sufficient to say that their Lordships, being of opinion that upon a proper construction of the will restrictive words cannot be imported into the terms of the trust and that without them the trust is invalid, will humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal except so far as it relates to costs set aside, and the order dated October 9, 1951, of the Chief Justice restored.

In the special circumstances of this case their Lordships think it right to direct that the costs of all parties to this appeal should be paid as between solicitor and client out of the testator's estate.

Solicitors: *Hy. S. L. Polak & Co.; Burchells; Druces & Attlee.*

[COURT OF APPEAL.]

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Dec. 6, 7.
Jenkins and Hodson L.JJ., Vaisey J.

* *In re* VANBERGEN (A BANKRUPT).
Ex parte THE TRUSTEE *v.* VANBERGEN.

[No. 218 of 1954.]

Bankruptcy—Appeal—Extension of time—Application to registrar ex parte out of time—Dismissal by registrar of motion by trustee to set aside order extending time for appeal—Right of trustee to have order set aside—Discretion of registrar to extend time for good cause shown—Whether established practice should be altered by judicial direction—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 102, 109 (4), 147 (1)—*Bankruptcy Rules*, 1952 (*S.I.* 1952, *No.* 2113 (*L.* 14)), *rr.* 4 (1), 8 (1) (*g*) (2), 9, 31, 32, 261, 389.

On June 21, 1954, the trustee in bankruptcy of a debtor served on the wife of the debtor, who claimed to be a creditor entitled to prove in the bankruptcy, a notice of rejection of her proof of debt. On July 19, 1954, one week after the expiry of the 21-day period allowed for appeals, the wife applied ex parte to the registrar for extension of time for appeal; and on July 20, the registrar

made an order extending the time to August 3. On October 22, the trustee applied to the registrar to have the order set aside. The registrar dismissed that motion on October 26 without considering the merits. On appeal by the trustee:—

Held, that as the effect of the expiry of time for appealing from the rejection of a proof of debt was to vest in the trustee a right to the bankrupt's estate which could be disturbed only if good cause were shown, the registrar should not have entertained an ex parte application for extension of time for appeal after the time for appealing had expired, though he might, if good cause were shown, make such an order in the presence of both parties. The order made on the ex parte application must accordingly be set aside by allowing the trustee's appeal from the registrar's refusal to set it aside.

Decision of Mr. Registrar Cunliffe reversed.

APPEAL from order of Mr. Registrar Cunliffe.

The facts, as stated by Jenkins L.J., were as follows: In January, 1954, Ethel Anne Vanbergen, the wife of a debtor, Charles Vivian Vanbergen, put in a proof of debt in respect of a sum of £20,245, claiming to be a creditor entitled to prove in the debtor's bankruptcy. The trustee in bankruptcy rejected that proof and gave notice of rejection on June 21, 1954. The time for appealing from such rejection, as provided by rule 261 of the Bankruptcy Rules, 1952, being 21 days, the last day for appealing was July 12, 1954. On July 19, one week after the time had expired, the wife applied ex parte to the registrar for an extension of time; and on July 20 the registrar made an order extending the time by 14 days from the date of his order, namely, to August 3.

Having obtained that extension on her ex parte application, the wife gave notice of appeal; but that notice contained no reference to the order, of which the trustee had not otherwise been apprised, so that it appeared, on the face of it, to be irregular. The trustee, nevertheless, made an application for particulars of the matters stated in the affidavit in support of the wife's notice of motion of appeal. For the trustee it was said that that was done merely in order that the trustee might be ready if the notice, on the face of it appearing to be irregular, was upheld as a good notice. There were subsequent applications, but these, or one of them at least—an application for discovery—was expressed to be made without prejudice to the trustee's rights to contend that the notice was bad. On October 22, 1954, the trustee applied to the registrar by motion to have the ex parte order of July 20 set aside. That motion was dismissed with costs by order of the registrar dated October 26, 1954. The trustee appealed from that order, asking that the order of July 20 be set aside.

Muir Hunter for the trustee.

I. H. Jacob for the wife.

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The following cases were cited in the argument: *In re Phillips, Ex parte Trustee* [1]; *In re Barley* [2]; *In re A Debtor (No. 36 of 1952), Ex parte The Debtor* v. *Richardson* [3]; *In re Muscovitch, Ex parte Muscovitch* [4]; *In re Manchester Economic Building Society* [5]; *In re Macadam (No. 2), Ex parte Guillaume* v. *The Trustee* [6]; *Gatti* v. *Shoosmith.* [7]

JENKINS L.J. stated the facts as set out above, said that there was no substance in the submission for the creditor that any irregularity in the notice must be taken as having been waived by the trustee, and continued: Mr. Muir Hunter for the trustee takes three points. First, he says that the order extending the time for the creditor's appeal ought not to have been made ex parte and, therefore, should be set aside. Secondly, he says that on the true construction of the Act and the rules made thereunder, which are now the Bankruptcy Rules, 1952, an application for the extension of time for appealing from a rejection of proof is a matter not within the jurisdiction of the registrar, but one which should be dealt with by the judge in bankruptcy in court. Thirdly, he says that, on the merits, no "good cause" (to use the language of the rule) was here shown for an extension of time.

The Bankruptcy Rules and provisions of the Bankruptcy Act, 1914, so far as are material to Mr. Muir Hunter's first submission, are as follows: by rule 261, "No application to reverse or vary "the decision of an Official Receiver or trustee rejecting a proof "shall be entertained after the expiration of twenty-one days "from the date of the decision." That is subject to section 109 (4) of the Act, which provides: "Where by this Act, or by "general rules, the time for doing any act or thing is limited, the "court may extend the time either before or after the expiration "thereof, upon such terms, if any, as the court may think fit to "impose." Then, by rule 389: "The court may, for good cause "shown, extend or abridge the time appointed by these rules or "fixed by an order of the court for doing any act or taking any "steps in any proceedings." It thus appears that the strict provision of rule 261, that no application to reverse or vary a decision rejecting a proof shall be entertained after the expiration of 21 days, is relaxed to the extent of allowing the court, for good cause shown, to extend the time and, as appears by section 109 (4), to extend it as well after as before the time limited by the rule has expired.

It is next necessary to consider whether, after the time for appealing from a rejection of a proof has expired, as in the present

[1] (1895) 2 Mans. 206.
[2] [1923] 1 Ch. 177.
[3] [1953] Ch. 144; [1953] 2 W.L.R. 561; [1953] 1 All E.R. 776.
[4] [1939] Ch. 694; 55 T.L.R. 364; [1939] 1 All E.R. 135.
[5] (1883) 24 Ch.D. 488.
[6] [1950] W.N. 142; [1950] 1 All E.R. 659.
[7] [1939] Ch. 841; 55 T.L.R. 1023; [1939] 3 All E.R. 916.

case, an application for the extension of time can properly be made ex parte. The relevant rules on that appear to be these: Rule 31: "Except where these rules otherwise provide, every "application to the court shall, unless the court otherwise directs, "be made by motion supported by affidavit"; rule 32: "(1) Where any party other than the applicant is affected by "the motion, no order shall be made except with the consent of "that party, or upon proof that notice of the motion and a copy "of the affidavits in support thereof have been duly served upon "him: Provided that where the court is satisfied that serious "mischief may result from delay caused by proceeding in the "ordinary way, it may make an order ex parte upon such terms "as to costs and otherwise, and subject to such undertaking, if "any, as the court thinks just. (2) Any party affected by an "order made ex parte may move to set it aside."

Those are the relevant provisions bearing on Mr. Muir Hunter's first submission. Having regard to those provisions, I am satisfied that the order extending time in this case ought not to have been made ex parte and, accordingly, that the registrar ought, if he had strictly adhered to the proper practice, to have set it aside. The expiry of the time limited by rule 261 for appealing from the rejection of the proof had the effect of conclusively determining that the creditor was not entitled to share in the assets of the bankrupt, and that was a benefit or advantage conferred on the trustee as representing the general body of creditors, inasmuch as by the rejection of the proof the fund available for distribution among the effectively proving creditors would be increased. Accordingly, it is clear that the trustee, in his representative capacity, was a person who would be prejudiced by an extension of the time for appealing against such rejection, for an order extending it would have the effect of depriving him of a vested interest. Therefore, it seems plain on principle and on the rules that the application ought to have been made by motion on notice, as contemplated by rule 32. That is in accordance with the practice in regard to appeals to this court, for I understand it to be well settled that an ex parte application for the extension of time will not be entertained after the time for appealing has expired. That appears from *In re Lawrence.*[1]

I have said that, in my view, strict adherence to the rules demanded that the registrar should set aside the order of July 20 on the trustee's application. I should qualify that statement by referring to section 147 of the Act, subsection (1) of which is in these terms: "No proceeding in bankruptcy shall be invalidated "by any formal defect or by any irregularity, unless the court "before which an objection is made to the proceeding is of "opinion that substantial injustice has been caused by the defect "or irregularity, and that the injustice cannot be remedied by "any order of that court." On that principle, it might be open

[1] (1876) 4 Ch.D. 139.

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to the registrar in a case of this sort, while holding that the order ought not to have been made ex parte and should be set aside, to proceed nevertheless on an application by the party aggrieved to set aside the order, to hear the matter de novo in the presence of both parties, and either to make a fresh order extending the time or, for convenience, allow the order made ex parte to stand, if satisfied that this would have been the result if he had heard both parties on the original occasion. But, in my view, the registrar cannot, by reference to his note, be taken to have disposed of the matter in that way. There was some difference of recollection between counsel about what exactly happened before him, but the position he took in the matter is reasonably plain from the following passage in his note. He made a note that Mr. Muir Hunter wanted to know if he was entitled to be heard on the merits. Then follows this: "(Self): It does not "seem to me to be necessary. I have decided on an application "conforming with the practice of this court of upwards of 60 "years, i.e. ex parte to the registrar—that a good prima facie "case has been made out for extending the time for Mrs. "Vanbergen appealing against the trustee's rejection of her "proof. I see no good reason for altering that decision. "After all, I am not allowing Mrs. Vanbergen's appeal; I "am only exercising my discretion as to whether in the "circumstances she shall be allowed an extension of time "for bringing that appeal." That passage from his note makes it reasonably plain that the registrar was adhering to the view, on which he had previously acted, that the regular procedure was that an ex parte application after time expired for extension of the time for appeal from rejection of proof was an application which could properly be entertained, and, having made an order, as he thought a regular and valid order, on such an ex parte application, he saw no good reason for altering it. In my view, the registrar was in error in treating the matter in that way, and the result must therefore be, in accordance with what, in my judgment, is the strict and proper procedure, that the order of July 20 extending the time ex parte should be set aside. That does not involve entertaining here, by a side wind, an appeal out of time from the order of July 20. The appeal is from the order of October 26, 1954, refusing to set aside the order of July 20; and the order which ought to have been made on October 26 was an order setting aside the order of July 20; thus, if the appeal is allowed, that will follow as a necessary consequence.

That is sufficient to dispose of this case; but, since the matter has been discussed before us, it would, I think, be right that I should say something about the jurisdiction of the registrar. The relevant provisions as to that are to be found, first, in section 102 of the Act, which provides as follows: "(1) The "registrars in bankruptcy of the High Court, and the registrars "of county courts having jurisdiction in bankruptcy, shall have "the powers and jurisdiction in this section mentioned, and any

" order made or act done by such registrars in the exercise of " the said powers and jurisdiction shall be deemed the order or " act of the court. (2) Subject to general rules limiting the " powers conferred by this section, a registrar shall have power " —then a number of matters are set out, beginning with " (*a*) To " hear bankruptcy petitions," and " (*b*) To hold the public " examination of debtors." There follows: " (*f*) To make any " order or exercise any jurisdiction which by any rule in that " behalf is prescribed as proper to be made or exercised in " chambers." Then, in the Bankruptcy Rules, 1952, r. 4 (1) provides: " ' The court ' includes a registrar when exercising the " powers of the court." By rule 8: " The following matters shall " be heard and determined in open court." A number of matters are then set out, of which the relevant one is " (*g*) Appeals " against the rejection of a proof, or applications to expunge or " reduce a proof, where the amount in dispute exceeds £200." Rule 8 (2) provides: " Any other matter or application may be " heard and determined in chambers." Rule 9, which is headed " Jurisdiction of Registrars " provides: " The registrar may, " under the general or special directions of the judge, hear and " determine any matter or application referred to in section 102 (2) " of the Act." So, by the joint effect of section 102 and rules 8 and 9, the registrar has jurisdiction to hear and determine the matters mentioned in section 102, including matters proper to be dealt with in chambers, but there is no express reference to the particular matter here in question, namely, applications for the extension of time within which to appeal from the rejection of a proof. On the other hand, the actual appeal from rejection of a proof is one of the matters which, according to the rules, are to be heard in open court. Mr. Muir Hunter, if I followed his argument correctly, says that by implication that means that an application to extend the time for appealing should be dealt with in the same way, inasmuch as the effect of rule 8 (1) (*g*) is to make the appeal itself a matter for the judge. That submission seems to me to be not without substance; and, so far as I am able to judge, it would probably be more convenient and more suitable if the judge who was going to hear an appeal from an order rejecting a proof should also deal with any question as to the extension of time within which to perfect and lodge an appeal of that kind; but, speaking for myself, I cannot find any sufficiently clear indication in the rules to enable me to hold that, as matters stand at present, applications for the extension of time are not proper to be dealt with by the registrars in bankruptcy. It seems that, according to the long-standing practice in bankruptcy, the registrars have consistently entertained these matters. Instances of their having dealt with them can be found extending over as long as 60 years. Accordingly, I wish to say nothing in this case to alter or cast doubt on a well-settled practice; but it might conceivably be worth consideration by the judges of the Chancery Division exercising the bankruptcy

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jurisdiction whether the practice in this respect might not advantageously be altered by a suitable direction, so that applications to extend the time for these appeals should be heard by the judge in bankruptcy, as are the appeals themselves.

There remains the third matter, namely, whether in any case good cause was here shown for an extension of time if the extension of time had been applied for in a regular manner. In view of the conclusion I have reached on Mr. Muir Hunter's first submission, this also is a point with which, strictly speaking, it is unnecessary for me to deal for the purposes of our actual decision, but I feel obliged to say that the affidavit in support of the ex parte application for extension of time seems to me to have fallen far short of showing any good cause at all for an extension of time. It was sworn by one Dawson, a managing clerk, who says by paragraph 1: "My firm act for Ethel Anne "Vanbergen who claims to be a creditor in the bankruptcy for "the sum of £20,245. A proof of debt of this amount was "lodged with the trustee who has given notice of rejection of the "same dated June 21, 1954. (2) The said Ethel Anne Vanbergen "is the wife of the above-named debtor who is now serving a "term of imprisonment. The claim of the said Ethel Anne "Vanbergen is in respect of various loans and other sums payable "to her by the above-named debtor over a period of approxi-"mately seven years and the total amount is made up of "numerous payments. (3) In the circumstances, my firm were "not able to obtain full instructions to enable the proceedings to "apply to reverse the trustee's decision to be commenced within "the time limited. The said debtor had been seriously ill in "prison hospital and owing to this illness it was some time "before he could be seen to obtain certain information which was "required so that details of the claim could be given. (4) It is "respectfully requested that in the circumstances the time for "applying to reverse the trustee's decision in rejecting the proof "of debt of the said Ethel Anne Vanbergen may be extended for "14 days." That affidavit is made, not by the creditor herself, but by a managing clerk. It gives no details; it condescends to no particulars. Although the creditor was able to lodge a proof, presumably a bona fide proof, for £20,245, it is here said in quite general terms that the information necessary for the purposes of lodging the appeal has not yet been obtained. There are no dates and no details whatsoever. The affidavit comes to no more than a mere statement that the creditor is not ready, with a submission that because the creditor is not ready the time ought to be extended. It is also not without significance that apparently this creditor, in order to make out her claim, found it necessary to consult her husband, the debtor. Why or for what purpose that should be necessary, if there is a bona fide claim, I find it difficult to see.

For these reasons I am of opinion that the trustee's appeal should here succeed on the first of the three grounds which I have

considered, and I would make an order accordingly, the effect of which will be to set aside the order of July 20, 1954, by allowing the appeal from the registrar's refusal to set it aside by the order of October 26, 1954.

HODSON L.J. I entirely agree with the judgment already delivered. On the question of jurisdiction, it appears from rule 8 that certain matters are to be heard and determined in open court. Those matters include, under rule 8 (1) (*g*), "Appeals against "the rejection of a proof, or applications to expunge or reduce a "proof, where the amount in dispute exceeds £200." That covers this case. Then, by rule 8 (2): "Any other matter or "application may be heard and determined in chambers"; and, looking at the Act, section 102 (*f*), the registrars in bankruptcy of the High Court have power "To make any order or exercise "any jurisdiction which by any rule in that behalf is prescribed "as proper to be made or exercised in chambers." It appears, therefore, on the face of it, as if an application for an extension of time can, by the combined effect of section 102 and rule 8 (2), be made to a registrar in bankruptcy; but I agree that there is force in the argument of Mr. Muir Hunter that, the judge alone having jurisdiction to hear and determine the appeal against rejection of proof, that would naturally carry with it the duty of considering applications for extension of time, and I would like to support the suggestion which has been made that in future, notwithstanding the long practice which has existed in the past, the judges of the Chancery Division might consider the making of a direction to the end that they should themselves hear applications for extension of time in these matters.

It seems to me an exceedingly important matter, because, as was pointed out to us in argument, after the time for appeal against rejection of proof has expired, the trustee in bankruptcy, on behalf of the general body of creditors, has acquired a vested right to the estate of the bankrupt which cannot be disturbed, as the rules show, without good cause.

I cannot forbear to add that it passes my understanding how the observations contained in the affidavit of Mr. Dawson could be regarded as good cause. I do not propose to add anything further to the criticisms on that affidavit which my Lord has made, which, in my opinion, are thoroughly well founded.

I agree that the appeal should be allowed and that the order which has been proposed should be made.

VAISEY J. I agree.

Appeal allowed.
Order for extension of time set aside.
Leave to appeal to the House of Lords refused.

Solicitors: *Ward, Bowie & Co.; S. Rutter & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1954
Dec. 17.

Lord Goddard C.J., Cassels and Devlin JJ.

* REGINA *v.* FRY.

PRACTICE NOTE.

Criminal Law — Sentence — Conditional discharge — Breach — Further offence committed — Sentence of Borstal training — No sentence imposed for previous offence—Desirability of nominal sentence.

APPLICATION for leave to appeal against sentence.

The applicant, George Thomas Fry, was convicted at Essex quarter sessions for office breaking, larceny, and attempted store breaking, and was sentenced to Borstal training. At the hearing it appeared that he had previously been found guilty of larceny by a court of summary jurisdiction and conditionally discharged. Quarter sessions imposed no sentence in respect of that offence.

The applicant applied for leave to appeal against the sentence of Borstal training.

The applicant did not appear and was not represented.

DEVLIN J. The court thinks that the sentence of Borstal training is perfectly proper and does not propose to interfere with it, but the matter for which the applicant was before quarter sessions was not only the fresh offence he had committed but also the breach of the conditional discharge, which meant that he could be sentenced for the offence for which he had been conditionally discharged. Quarter sessions took the view, however, that since they were passing a Borstal sentence for the substantive offence before them, it would not be proper to pass any sentence in respect of the previous offence. They were quite right in thinking that they could not pass a substantial sentence of imprisonment because that would have been inconsistent with the Borstal sentence, but it was suggested to them that they should pass a nominal sentence of one day's imprisonment. They decided, however, not to do so and in that respect this court thinks that they were wrong. Normally it is not desirable to impose nominal sentences of one day's imprisonment, but in this particular case it is the only way of surmounting the difficulty which would otherwise occur. If no sentence at all is passed in respect of the offence for which the applicant was conditionally discharged, it does not rank as a conviction. The result is that if hereafter he were to commit further offences and questions were to arise on which it was necessary to prove previous convictions, such as for corrective training, the offence for which he ought now to be sentenced since he has broken his conditional discharge would not rank for that purpose. The court does not feel that it can now interfere by imposing a sentence of one day's imprisonment in respect of that matter because the only sentence which the applicant has

appealed from is the sentence of Borstal training and the powers of this court are, therefore, restricted to dealing with that; but the court desires to draw attention to this matter so that in future it should be noted that this is one of the rare cases in which a nominal sentence should be imposed.

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REGINA v. FRY.

Application dismissed.

Solicitors: *Registrar, Court of Criminal Appeal.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* FINCHLEY BOROUGH COUNCIL.

1954
Dec. 14, 15.

Lord Goddard C.J., Cassels and Devlin JJ.

Highway—Street works—Expenses—Apportionment—Appeal—Power of Minister—Points of law—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 268.

Where a memorial under section 268 of the Public Health Act, 1875, has been addressed to the Minister by a person aggrieved by the decision of a local authority, the Minister has the widest powers to decide what, in the circumstances, is fair and reasonable, and to consider, if necessary, any points of law which may arise.

Reg. v. *Local Government Board* (1882) 10 Q.B.D. 309 applied.

Per Devlin J. The word "equitable" in section 268 is not, in my judgment, enough to require us to say as a matter of construction that points of law are excluded from the purview of the Minister.

A local authority demanded from the London Transport Executive the proportionate amount of expenses incurred by the authority in making up streets abutting on land owned by the Executive. The Executive appealed to the Minister under section 268, on the ground, inter alia, that they were not "owner" of the land within the meaning of the Act because it was extra commercium. The Minister allowed the appeal:—

Held, that an application by the authority for an order of certiorari quashing that decision must be refused.

APPLICATION for an order of certiorari.

On May 18, 1950, the applicants, the Finchley Borough Council, served notices under section 150 of the Public Health Act, 1875, on the London Transport Executive requiring the Executive to make up such parts of Heatherton Terrace, Squires Lane, Finchley, as fronted, adjoined or abutted on the land owned by the Executive. The works not having been carried out by the Executive, the council carried out the works themselves and demanded from the Executive the sums of £86 12s. and £906 10s. 7d. as the proportionate amount of the expenses incurred by the council in carrying out the work and alleged to be payable by the Executive in respect of that part of the

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Executive's railway track as abutted on the street and the embankment supporting an approach road to a bridge over the railway.

By a memorial under section 268 [1] of the Act of 1875 the Executive appealed to the Minister of Housing and Local Government against the decision of the council on the ground that the land in question was vacant land, had no commercial purpose, and could not be let at a rack-rent.

On March 10, 1954, the Minister ordered that the appeal of the Executive be allowed and that no amount should be payable in respect of the land. The council applied for an order of certiorari to quash the decision of the Minister.

G. D. Squibb for the applicants.
Rodger Winn for the Minister.
H. A. P. Fisher for the London Transport Executive.

The following cases were cited in argument: *Reg.* v. *Local Government Board* [2]; *Walthamstow Local Board* v. *Staines* [3]; *Great Eastern Railway Co.* v. *Hackney Board of Works* [4]; *Hampstead Corporation* v. *Midland Railway Co.* [5]; *Wake* v. *Sheffield Corporation* [6]; *In re West London Philanthropic Burial Society* [7]; *Eccles* v. *Wirral Rural Sanitary Authority.* [8]

LORD GODDARD C.J. stated the facts, read section 268 of the Public Health Act, 1875, and continued: I cannot find in section 268 any limitation on the right of appeal, or anything which indicates that, when an appeal is made by a person aggrieved, the Minister is not able to go in the widest way into everything put before him and come to a decision. Mr. Squibb has maintained that the only question in the case is whether the Transport Executive are to be considered as owners. He says that the question of whether they are or are not is a question of law which the Minister cannot decide because, he says, the local authority has no power to decide it and this appeal is only given against a decision of the local authority. That seems to me to be very subtle reasoning and I confess that I cannot follow it. It seems to me that the widest power is given to the Local

[1] Public Health Act, 1875, s. 268: "Where any person deems himself "aggrieved by the decision of the "local authority in any case in which "the local authority are empowered "to recover in a summary manner "any expenses incurred by them, or "to declare such expenses to be "private improvement expenses, he "may, within twenty-one days after "notice of such decision, address a "memorial to the Local Government "Board, stating the grounds of his "complaint, and shall deliver a copy "thereof to the local authority; the "Local Government Board may make "such order in the matter as to the "said Board may seem equitable, and "the order so made shall be binding "and conclusive on all parties."

[2] (1882) 10 Q.B.D. 309.

[3] [1891] 2 Ch. 606; 7 T.L.R. 446.

[4] (1883) 8 App.Cas. 687.

[5] [1904] 2 K.B. 802; [1905] 1 K.B. 538; 21 T.L.R. 272.

[6] (1883) 12 Q.B.D. 142.

[7] (1869) 20 L.T. 972.

[8] (1886) 17 Q.B.D. 107; 2 T.L.R. 416.

Government Board, now represented by the Ministry of Housing and Local Government,* to decide what is equitable, which I think means fair and reasonable. When section 268 was first read I confess that my mind went that way at once, but when I heard Mr. Squibb's argument my mind fluctuated. Having read two or three passages from the judgment in *Reg.* v. *Local Government Board*,[1] however, I came to the conclusion that my first impressions were right or at any rate had been so held to be by the Court of Appeal, and their decision is binding upon us. There are two passages in that case in the judgment of Brett L.J. which seem to me to be very important. He said[2]: "It is "assumed on the part of these appellants that the only question "which the Local Government Board can inquire into, is whether "the local board equitably ought to have made the owner pay "the sum which has been apportioned against him, or whether "they ought to make the whole expenses private improvement "expenses. Now what are the words which would oblige us to "come to that narrow conclusion? It would be most narrow "if after what I have said, there could be no appeal to the "Local Government Board upon the question whether the works "which are ordered to be done, ought as against an individual to "have been ordered." That seems to me to be clear enough. Later in his judgment, where he was dealing with the question whether the Local Government Board, as it then was, could consider a matter which had not been specifically set up by the owner in his memorial, he said[3]: "I should have been very "sorry to say because he has not mentioned that ground or any "other ground of complaint in the memorial, that therefore the "Local Government Board, if they think it right or equitable, "should not inquire into it, because he had not complained of "it. I think they ought to have the largest powers and the "largest discretion to inquire into everything, to examine every "fact which may lead them to a fair conclusion as between "the local authority and the individual who has presented the "memorial."

Those words seem to indicate that in the opinion of the Court of Appeal in 1882, the Minister, on a memorial being presented to him under section 268, has the widest possible powers; and I can find no words in the section which limit his powers as to what he may inquire into or limit the grounds on which he may allow or disallow an appeal. It seems to me that he is given a perfectly wide and general power so that if a person says: "Here are these private street works in respect of which "I have been asked to pay a sum of money and I say it is not "right, fair or equitable that I should have to pay," the Minister is given power to decide that point.

* See S.I. 1951, Nos. 142, 1900.

[1] (1882) 10 Q.B.D. 309.

[2] Ibid. 324.

[3] Ibid. 326.

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Lord Goddard C.J.

We are told, though I am not basing my decision on this ground, that ever since *Reg.* v. *Local Government Board*,[4] the Minister has regarded it as a most useful decision on the powers given to him by the section, because it enables him to decide many cases of small property owners who, instead of having to appeal to petty sessions, and then be taken to quarter sessions, and then very likely to this court by means of case stated, the case can be put before the Minister and he can be asked by the person aggrieved to intervene and say whether he is to pay or not. If the Minister decides against him, the person complaining has lost any other right of appeal and he will have to pay. If, on the other hand, the Minister says that he is not to pay, the local authority cannot enforce the order against him.

There is only one other matter which I think it is necessary to mention. The Minister, in deciding in favour of the Transport Executive, applied *Great Eastern Railway Co.* v. *Hackney Board of Works*.[5] I do not think that the facts are quite on all fours with the present case, but the decision of the court in that case was that where one had property considered to be extra commercium, that is to say, of no possible commercial value, it was not equitable or fair that this class of charge should be made upon it. The land in the present case no doubt is rather different from that in the *Great Eastern Railway Co.* case,[5] but both cases concerned property which the railway company were bound to maintain. The Minister applied the principle which was laid down there because it seemed to him that this embankment was extra commercium. In fact the only purpose for which it is suggested that the embankment could be used is as an advertising station. That was suggested in the *Great Eastern Railway Co.* case,[5] but here one has a site which has been in existence since the 1860's in a growing neighbourhood which so far has escaped the attention of Messrs. Pears and Guinness and no one has thought it a suitable place for advertising or anything at all. So I should think that the Minister was well justified in coming to the conclusion that there was really no value to be attached to this land.

It is enough to say that, in my opinion, the matter appears to fall exactly within section 268 as a fit subject for appeal, and as I can find no limitation on the Minister's powers which have been held in *Reg.* v. *Local Government Board*[6] to be of the widest possible nature, it follows that this application fails and must be dismissed with costs.

CASSELS J. I agree that this motion fails. The applicants, the Finchley Borough Council, come before this court and ask for relief on the ground that the decision of the Minister was not within his powers under section 268 of the Public Health

[4] 10 Q.B.D. 309.
[5] (1883) 8 App.Cas. 687.
[6] 10 Q.B.D. 309.

Act, 1875, and further, that the decision was bad in law. The question of the jurisdiction of the Minister was raised at first, but disappeared from the argument, and everything seems now to turn on section 268. I think it is important that that section should be read, at any rate the first paragraph. [He read it, concluding:] "... the Local Government Board may make such "order in the matter as to the said Board may seem equitable, "and the order so made shall be binding and conclusive on all "parties."

How useful those last words have turned out to be is indicated I suppose by the number of cases that have reached these courts on the discussion of the meaning of that section and by the fact that Mr. Squibb, on behalf of the Finchley Borough Council, is paying his first visit to this court and doubtless is on his way to other courts.

The position seems to me to be perfectly clear. The procedure as there devised is for the purposes of making a consideration by the Local Government Board, as it then was, easy to hold. The matter goes before the Minister by presentation of a memorial —not an appeal—on behalf of the person aggrieved. He is the person who is entitled to present his case. The Minister is the person who has power under section 268 to decide it and that decision is supposed to be final and conclusive upon all parties. As to the word "owner," section 4 of the Act provides: "'Owner' means the person for the time being receiving the "rack rent of the lands or premises in connexion with which the "word is used, whether on his own account or as agent or trustee "for any other person, or who would so receive the same if such "lands or premises were let at a rack rent:". These premises are not let at a rack-rent; no money is forthcoming for their use. The sole purpose to which this land is devoted is to hold up the road. It is then said on behalf of the applicants: "If you "could find advertisers ready and willing to pay money for the "purpose of putting up a hoarding on this land you would get "a rack-rent," to which the Railway Executive say: "That "would blind people coming up this road to traffic on the road "so that they would not be able to keep their eye upon the road "and, therefore, it is not available." The land never has been let. It has been there ever since the embankment was constructed in the sixties of the last century and nobody has thought fit to pay so much as a bean for the use of the land for advertising purposes. The Minister came to the conclusion under section 268 that it would be inequitable for the Railway Executive to be called upon to make the contribution demanded from them, and that being his decision there seems to me to be no reason why this motion should prevail or a writ of certiorari should be issued.

DEVLIN J. I agree. I would refer merely to section 150 of the Act to point out that the local authority, once it has executed the works, may recover the expenses in one of two ways: it

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may recover them in a lump sum in a summary manner "from "the owners in default, according to the frontage of their "respective premises," or it may "by order declare the expenses "so incurred to be private improvement expenses." The difference between the two is that, in the first case, the local authority may get the sum as a lump sum from the owners of the adjoining land, and, in the second case, it may by section 213 levy a rate on the occupiers of the adjoining land and thus recover the sum over a period of 30 years.

Having those two choices before it, the local authority in the present case decided that it would recover the sum from the owners of the adjoining land, that is, the Transport Executive, and the Transport Executive, while agreeing that they were the owners in one sense, said that they were not owners within the meaning of the Act because the land was extra commercium. Into the merits of that contention it is not necessary for the purposes of my judgment that I should go; I merely mention it to show that it was one of the matters in dispute.

That was the decision of the local authority and that brought into play section 268 of the Act and the only question, as it seems to me, is whether that is a decision within the meaning of that section. If it is, then that section comes into operation and the Minister has power to make such order in the matter as to him seems equitable. The opening words of the section are: "Where "any person deems himself aggrieved by the decision of the "local authority in any case in which the local authority are "empowered to recover in a summary manner any expenses "incurred by them, or to declare such expenses to be private "improvement expenses, he may" address a memorial. It has to be, therefore, a decision of the local authority in any case which comes within the words I have just read. That it is a decision of the local authority is beyond dispute. That it is made in a case which comes within the words which I have just read is also not disputed. But it must be observed that, to make it such a case, it does not matter whether the persons upon whom the sum is levied are owners or not. The case has to be one in which the local authority may exercise the choice either of levying the sum from the owners or imposing a rate on the occupiers, and it is, therefore, admitted that this is such a case. Then why is it not a case within the meaning of the Act? Mr. Squibb submits that it is not, because, he says, it must be a decision which the Minister is empowered to give. I can find no ground for reading such words of limitation into the section. It must be a case in which the local authority is empowered to do one thing or the other and there is nothing further in the section and nothing, in my judgment, which can be properly implied to mean that it is not a decision at which the local authority is empowered to arrive. It has to be—it obviously is or it would not be a matter about which anybody was aggrieved—an

appealable decision. But it may be an appealable decision because the local authority has acted outside its powers, or because it has not done something which it ought to have done under the Act, or because the decision is unfair or unjust. There is nothing, in my judgment, which limits the class of appealable decisions to one or the other or which excludes the Minister, once he has properly got seisin of the case, from reviewing any bad decision given in that case, no matter on what ground it was given.

The word "equitable" to which I have referred was relied upon by Mr. Squibb as showing that the Minister was not intended in these sort of proceedings to consider points of law, and here he was invited to and has in fact determined what is, if not a pure point of law, at any rate very largely a point of law, whether the Railway Executive were or were not owners within the meaning of this section. The word "equitable" might suggest that what was intended by the section was that the Minister should deal only with the just amount, whether the works had been properly done, whether the cost was reasonable, and so forth, and not to deal with questions of law. I do not think that by using the word "equitable" Parliament intended to allow the Minister to depart altogether from principles of law. Prima facie, principles of law are equitable and it would need much stronger words than the words which are used in the section to satisfy me that the Minister would be entitled to disregard any principles of law. But that does not mean that the word may not be appropriately used so as to signify that the Minister has powers wider than the application of principles of law might confer upon him. For example, if, as in this case, the local authority has chosen to make its decision to recover the sum from the owners in a lump sum, it might be said as a matter of law that all that the Minister could do would be to say whether that decision was good or bad. The words used are plainly—and this is conceded by Mr. Squibb—such as to give him wider powers than that. He might say: "I am not going "to say whether your decision is good or bad. I have complete "control of this matter and I am going to substitute for it an "order that you should get the sum by levying a rate on the "occupiers and not by a lump sum from the owners." That is the sort of power the language used by the section is wide enough to give and that is why I think the word "equitable" is used; but it does not mean that by using that word Parliament intended to exclude points of law from the purview of the Minister. I have no doubt that Parliament thought it unlikely that any points of law would arise. I have no doubt if Parliament thought legal points would be likely to play a great part in inquiries of this sort, it would not have entrusted it to the Minister; it may be so. Parliament perhaps did not foresee the complications to which questions of ownership might subsequently give rise; it probably thought it would be a simple matter to determine who

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was or was not the owner of any particular land. However that may be, the word "equitable" is not, in my judgment, enough to require us to say as a matter of construction that points of law are excluded from the purview of the Minister. The Minister has, therefore, dealt with the decision in a matter with which he is empowered to deal; he has given his decision upon it and I can see no grounds for setting it aside or quashing it and I agree, therefore, that the motion fails.

Application dismissed.

Solicitors: *Lees & Co.; Solicitor, Ministry of Health; M. H. B. Gilmour.*

J. D. P.

[CHANCERY DIVISION.]

1954

PRACTICE DIRECTIONS.

*PRACTICE DIRECTIONS.
(APPLICATIONS : AFFIDAVITS : MORTGAGES.)

Practice and Procedure—Chancery Division—Applications ex parte—Affidavits—Office copies—Mortgage—Redemption and foreclosure—Notice—Place of redemption.
Mortgage—Practice.

The judges of the Chancery Division have directed that the following Practice Directions shall be substituted for those issued under date November 3, 1954.[1]

1. EX PARTE APPLICATIONS.

Where, by any rule or practice, orders or directions may be sought in chambers ex parte supported by affidavit, it shall not be necessary to issue a summons for such purpose unless required by the rule under which the application is made or the judge shall otherwise direct.

Examples.

(1) Garnishee order nisi.
(2) Change of parties upon devolution of interest.
(3) Appointment of next friend or guardian ad litem of an infant or person under disability in the stead of such a person who has died.
(4) Substituted service of writ and other process.

2. OFFICE COPIES OF AFFIDAVITS.

Unless the court or a judge in any particular instance shall otherwise direct, it shall not be necessary to bespeak for the use of the court or judge office copies of affidavits intended to be filed in connexion with interlocutory or procedural matters, as distinct

[1] [1954] 1 W.L.R. 1389; [1954] 3 All E.R. 364.

from affidavits forming part of the evidence in a suit or dealing with the merits of the case; as to which latter the existing practice shall continue.

Examples where office copies will NOT usually be required.

(1) Of fitness to act as receiver, manager, next friend or guardian ad litem or guardian of an infant.

(2) Verifying the security of a surety or a receiver's, manager's or guardian's account.

(3) Proving service of process (including notices to prove a claim or the allowance thereof).

(4) In support of applications under R.S.C., Ord. 7, r. 4; Ord. 14; Ord. 18, r. 2; Ord. 31, r. 19A (3) and Ord. 57, etc.

Note. A more extensive list can be inspected in the Masters' Summons Rooms.

3. REDEMPTION AND FORECLOSURE OF MORTGAGED PROPERTY.

(1) In order to make it unnecessary to go to the expense of preparing deeds, powers of attorney and form of receipt to hand over in case a mortgagor should attend to redeem at the time and place appointed by the master's certificate for redemption; all orders for foreclosure or redemption unless the court otherwise directs will provide (i) that the mortgagor shall give seven days' notice of his intention to attend and redeem, and (ii) if no such notice is given but the mortgagor in fact attends at the appointed time and place then at the option of the mortgagee the time for redemption shall be extended for one week. This will give the mortgagee's solicitor time to prepare the necessary documents.

(2) The master's certificate pursuant to an order nisi (or the order itself if thereby a certificate is avoided) shall nominate as the place of redemption the office of the mortgagee's solicitors if it be within five miles of the Royal Courts of Justice, Strand, or such other place as may be agreed between the parties and recorded in the order or certificate. In all other cases the place for redemption shall be recorded as Room 138 of the Royal Courts of Justice, Strand, W.C.2.

M. G. WILLMOTT,
Chief Master.

December 21, 1954.

[COURT OF APPEAL.]

C. A.

1954
Dec. 13.

Evershed M.R., Birkett and Romer L.JJ.

*LEA *v.* MOORE.

County Court—Jurisdiction—Question of title to land—Lease—Assignment or guarantee—County Courts Act, 1934 (24 & 25 *Geo.* 5, *c.* 53), *ss.* 40, 43, 51.

By the County Courts Act, 1934, ss. 40 and 51, where the title to a hereditament is in question, the jurisdiction of a county court is limited to cases where neither the value nor the rent of the hereditament exceeds £100 per year.

The plaintiff brought proceedings in the county court to recover a sum of money alleged to have been paid by him on behalf of the defendant under the terms of an alleged assignment of a lease to the plaintiff himself, the defendant and one other jointly whereby each of the assignees covenanted to pay the rent of £300 a year. The defendant denied that he was an assignee and stated that if he had signed any assignment he had done so under the impression that he was signing a guarantee. On appeal against a decision in favour of the plaintiff:—

Held, that the defence brought into question the title to land the rent of which was admittedly above the statutory limits of the jurisdiction of the county court. Accordingly, the county court had had no jurisdiction to decide the question whether the defendant was or was not an assignee.

Reg. v. *Harden* (1853) 2 E. & B. 188 applied.

APPEAL from Judge Forbes sitting at Birmingham County Court.

The defendant Moore was the headmaster of a school carried on in premises known as "Wick House," held under a term of 21 years granted in April, 1947, to one Simpson at a rent of £300 per annum. In 1948 it was proposed to form a limited company to take over the school, but the landlord was unwilling to allow the lease to be assigned to a limited company. An assignment was, therefore, taken by the chairman of the parents' committee (the plaintiff Lea), one Winders and the defendant Moore. By the terms of the assignment, which was dated March 9, 1948, each of the assignees covenanted with the lessor to pay the rent charged. The company was later formed but did not prosper and the premises became vacant.

As a result of certain proceedings the plaintiff paid a sum of money to the landlord and he then claimed to recover about £75 as being the defendant's share of the amount which he had been called upon to pay. The defendant, who appeared in person in the county court, disputed the plaintiff's claim on the following grounds, as stated on a document put in by him: "(1) I never "signed a deed of assignment of a lease; (2) if I did it was "because of fraudulent misrepresentation on the part of the "plaintiff; (3) if I did the lease is no longer binding on me," and he counterclaimed for damages for fraudulent misrepresentation. The county court judge gave judgment for the plaintiff and the defendant appealed.

The defendant Moore appeared in person.
J. Malcolm Milne for the plaintiff.

No case other than the case referred to in the judgment was cited in argument.

EVERSHED M.R., having stated the facts: The substance of the defendant's case was that what he had been asked to do, and what he thought he had done, was to sign, merely, a guarantee. The judge was troubled on the issue of fact raised before him, and from his notes and from his careful judgment it is to me apparent that he applied himself most fully and thoroughly to it. I say that because I am sorry to see that the first ground of the appeal is that the judge interrupted the defendant too much and, therefore, embarrassed him in conducting the case. The question of fact was that the defendant said: "I was asked merely to sign a guarantee; if I did sign the document," and eventually he admitted that he did sign this document or another which was entirely the same, "I signed it in ignorance of its true nature, "having been misled into supposing that it was a mere guaran-"tee." Judging from the judge's notes, there was obviously something to be said for that point of view. But on that question of fact, the judge decided against the defendant. It is right that I should say so, because the charge of fraudulent misrepresentation was a charge of a very grave character and the judge, having heard the witnesses, acquitted the plaintiff of it. The defendant, however, took another point. He said: "You, the county court, "have no jurisdiction to go into this matter, for this is a case in "which the title to land is in question, and the value of land is "above the limit which alone is within the competence of the "county court to debate upon." That argument rests upon certain sections of the County Courts Act, 1934. Section 40 provides: "(1) A county court shall have jurisdiction to hear and "determine any action founded on contract or on tort where the "debt, demand or damage claimed is not more than £100, "whether on balance of account or otherwise: Provided that a "county court shall not, except as in this Act provided, have "jurisdiction to hear and determine . . . (*b*) any action in which "the title to any hereditament or to any toll, fair, market or "franchise is in question."

The exceptions referred to are to be found in certain other sections. By section 43: "If, with respect to any action assigned "for the time being to the King's Bench Division of the High "Court, the parties to the action agree, by a memorandum signed "by them or by their respective solicitors, that a county court "specified in the memorandum shall have jurisdiction in the "action, that court shall have jurisdiction to hear and determine "the action accordingly."

It will be convenient if I deal at this stage with one point raised by Mr. Milne. He said that, by the form of the pleadings

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including the counterclaim, the defendant had, in effect, together with the plaintiff, "signed a memorandum" so as to confer jurisdiction on this county court. I am quite unable to accept that submission. In my judgment, section 43 applies only where an action has in fact been instituted and has been "assigned" to, and so is proceeding in, the Queen's Bench Division of the High Court. The section only relates to those cases where the parties to that existing action sign a memorandum of the kind indicated. I am clear that not only was there no action of the relevant kind on foot, but that no memorandum, as contemplated by that section, was ever signed.

By section 48: "A county court shall have jurisdiction to hear "and determine any action for the recovery of land where neither "the value of the land in question nor the rent payable in respect "thereof exceeds the sum of £100 by the year."

Finally, in section 51 it is provided that: "A county court "shall have jurisdiction to hear and determine any action in "which the title to any hereditament comes in question, being an "action which would otherwise be within the jurisdiction of the "court— . . . (*a*) . . . if neither the value nor the rent of the "hereditament in respect of which the easement or licence is "claimed, or on, through, over or under which the easement or "licence is claimed, exceeds the sum of £100 by the year."

The question is whether, having regard to the nature of these proceedings, the title to a hereditament is in question. It is not in dispute that the leasehold term, the outstanding 14 years of the term comprehended in the original lease of April, 1947, is a hereditament within the meaning of the relevant sections. For that proposition some authorities are quoted in Halsbury's Laws of England, vol. 9, pp. 148, 149, and Mr. Milne has not suggested the contrary. But it is true that this is not at first sight the kind of case which would be described as litigation about the title to land. On the other hand, I have come to the clear conclusion, with all respect to the county court judge, that since the whole of the plaintiff's claim depended on the essential assertion that the defendant, together with the plaintiff and one other, had vested in them a particular term of years, and since the first line of defence put in by the defendant was that he was not such an assignee of the term of years, it seems to me inevitable that the title to this land is in question.

Sections 48 and 51, which I have read, point to the distinction between cases relating to the recovery of land and cases where the title to the land is in question. The short note in the English and Empire Digest of *Reg.* v. *Harden*,[1] seems clearly to support the view that the title to land will properly be said to be in question when the liability with which the defendant is charged depends upon the alleged circumstance that he is the

[1] (1853) 2 E. & B. 188.

proprietor of a particular landed interest. I, therefore, have come to the conclusion that this appeal must succeed.

The county court judge dealt at length with the defence of non est factum and also of fraudulent misrepresentation, and decided adversely to the defendant. If that decision was right, then, of course, the title was no longer in question; but it is, I think, clear that if, on the face of the proceedings, the title was in question, the judge could not go into the matter at all, not even to the extent of determining the matter of fact, which was essentially involved in the question of the title to the land. I have said, and my brethren have said also, that the result may be something of a Pyrrhic victory for the defendant. But it is not for us to animadvert upon that matter, save, perhaps, to repeat my hope that in this very unfortunate state of affairs the persons who now appear to be, on the face of the document at any rate, liable for a substantial sum of rent for a substantial number of years might take whatever steps they can to put an end at the earliest possible moment to this recurring risk without prejudice to whatever their rights one against the other might be. Subject, however, to that possibly irrelevant observation, I conclude in this case that the appeal must be allowed.

BIRKETT L.J. I am of the same opinion.

ROMER L.J. I agree fully with both the judgments which have just been delivered, and on the legal question which has been argued I merely desire to say that it appears to me that the view is inescapable that this case raises a question of the title to a hereditament, because the whole case depends on whether the defendant is, or is not, an assignee of these premises, Wick House. If he is an assignee of the premises, then the legal interest in the premises for the term granted by the original lease of April 9, 1947, became vested by the assignment jointly in the plaintiff, the defendant and Mr. Winders. If that assignment is not binding on the defendant, as he says it is not, then the legal interest in that term of years is either vested in the plaintiff and Mr. Winders, or if they could escape from the liability under the assignment on the ground that it was intended to be a joint assignment, and that if it is not binding on the defendant, then it is not binding upon them either then, presumably, the legal interest in the term of years remains vested in the assignor, Mr. Simpson, who was the original lessee. Accordingly, the whole question concerns the legal interest in the premises, and that is essentially a question of title and is, therefore, within section 40 of the Act. I agree, therefore, that the appeal must succeed.

Appeal allowed.

Solicitors: *Glaisyer, Porter & Mason, Birmingham.*

E. D.

[CHANCERY DIVISION.]

1954
Dec. 1.

Roxburgh J.

*LONDON PAROCHIAL CHARITIES TRUSTEES *v.* ATTORNEY-GENERAL AND OTHERS.

[1953 L. 132.]

Charity — Scheme — Modification — Scheme for administration made under statute and approved by Order in Council—Article of scheme enabling Charity Commissioners to modify it "by schemes made "in the exercise of their ordinary jurisdiction"—Application to court to modify scheme—Jurisdiction of court—Charitable Trusts Act, 1860 (23 *&* 24 *Vict. c.* 136), *ss.* 2, 3, 4, 5—*City of London Parochial Charities Act,* 1883 (46 *&* 47 *Vict. c.* 36), *s.* 34.

Section 33 of the City of London Parochial Charities Act, 1883, provided that the Charity Commissioners might formulate in relation to the City of London Parochial Charities schemes requiring the approval of Her Majesty in Council. Section 34 provided: "No scheme shall of itself have any operation, but the "same, when and as approved by Her Majesty in Council, shall ". . . have full operation and effect in the same manner as if it "had been enacted in this Act."

In 1891, the scheme known as the Central Scheme was formulated under the Act and was approved by Her Majesty in Council. Article 58 of the scheme provided: "The commissioners [i.e., the "Charity Commissioners] may from time to time by schemes made "in the exercise of their ordinary jurisdiction modify the provisions "of this scheme." In 1953 the plaintiffs, the London Parochial Charities Trustees, took out this summons asking, inter alia, that the scheme might be modified as in the summons indicated:—

Held, that article 58 by implication cast on the commissioners a statutory duty to consider whether the scheme ought or ought not to be modified, and that, as the scheme had statutory force, the court had no jurisdiction to modify it.

In re Berkhamsted Grammar School [1908] 2 Ch. 25; 24 T.L.R. 514 considered and applied.

ADJOURNED SUMMONS.

By Order in Council dated February 23, 1891, a scheme was approved which was known as the Central Scheme and was made by the Charity Commissioners for England and Wales, under the City of London Parochial Charities Act, 1883, for the administration of the funds vested under that Act in the City of London Parochial Charities Trustees (hereinafter called the plaintiffs). By this summons, which was taken out on January 15, 1953, the plaintiffs asked, inter alia, that the scheme might be modified as in the summons indicated, and that any necessary consequential alterations might be made in the scheme. There were thirteen defendants to the summons.

The relevant statutory provisions and articles of the scheme are set out in the judgment of Roxburgh J.

Geoffrey Cross Q.C. and *G. H. Newsom* for the plaintiffs.

Denys B. Buckley for the Attorney-General.

The second defendants, the London County Council, did not appear.

Andrew Blackett-Ord for the Working Men's College Corporation.

Charles Russell Q.C. and *R. O. Wilberforce Q.C.* for the chairmen of Regent Street Polytechnic, Battersea Polytechnic Institute and Borough Polytechnic Institute, the governor of Chelsea Polytechnic, the chairmen of the City of London College, Northampton Polytechnic Institute and Northern Polytechnic Institute, the governor of the North-Western Polytechnic and the chairman of the Morley College.

J. A. Plowman Q.C. and *D. Gidley Scott* for a trustee of the Bishopsgate Foundation.

ROXBURGH J. This is an application to modify a scheme for the administration of certain charities, which was approved by Her Majesty in Council on February 23, 1891, and was made under the City of London Parochial Charities Act, 1883.

At the threshold of the hearing the question arises whether the court has jurisdiction to modify the scheme, and it is on that point alone that I am now giving judgment.

Section 2 of the City of London Parochial Charities Act, 1883, provided: "The Charity Commissioners for England and Wales "(hereinafter called the Commissioners) shall be Commissioners "under this Act and have the following powers for the purposes "thereof." I call attention to that provision because it shows that the Charity Commissioners, in addition to their ordinary duties under what I may call the general Acts relating to charitable trusts, have special duties and powers for the purposes of this Act of 1883.

The Act provided by section 33—I need not go into detail about this—for the formulation of schemes by the Charity Commissioners in relation to the City of London Parochial Charities which require the approval of Her Majesty in Council. Section 34 provided: "No scheme shall of itself have any operation, but the "same, when and as approved by Her Majesty in Council, shall ". . . have full operation and effect in the same manner as if it "had been enacted in this Act." Therefore, the scheme is given statutory validity.

Section 36 provided: "The Order in Council approving a "scheme shall be conclusive evidence that such scheme was "within the scope of and made in conformity with this Act, and "the validity of such scheme and order shall not be questioned in "any legal proceedings whatever." Therefore, I am not concerned here with any question of ultra vires. That is not unimportant because when I come to deal with one particular provision in this scheme there might well have been some argument as to whether it was ultra vires or not, but for that provision which makes it quite plain that any such point cannot be taken.

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I will now turn to the scheme, which, as I have said, has statutory validity, and no question of ultra vires can arise in relation to it. Article 57 provides: "Any question as to the "construction of this scheme, or as to the regularity or validity "of any acts or proceedings done or taken or about to be done "or taken under this scheme, shall be determined conclusively "by the commissioners, upon such applications made to them for "the purpose as they think sufficient." Pausing there, that means the Charity Commissioners. I am not concerned today with the question whether the functions which are under the scheme assigned to the Charity Commissioners ought or ought not now to be exercised by the Minister of Education. I want to make that quite plain. I shall continue to refer to the Charity Commissioners, but that is without prejudice to the question whether now their functions ought or ought not to be exercised by the Minister of Education. I make that reservation because I understand that there is some doubt on that point which has not been argued before me. I am therefore leaving it.

Article 57 creates a difficulty. If on other grounds I had felt that I had jurisdiction, I should have had to reach a final conclusion on the meaning of article 57, but as I think that there are sufficient grounds to be found elsewhere on which to base my judgment that I have no jurisdiction, I desire to leave open the question what article 57 means. As a mere matter of grammar, it appears to me to lay on the commissioners an imperative duty to determine any of the questions embraced in article 57, and to provide that when they have determined them their determination is conclusive. I realize, however, that such a construction might give rise to far-reaching difficulties, and therefore I wish to say that I also think it possible that any court that was really faced with construing article 57 might find a way of giving to those words a construction which I do not think they prima facie bear. It must at least be said, however, that on no view are they inconsistent with the decision which I am about to reach.

Article 58 provides: "The commissioners may from time to "time by schemes made in the exercise of their ordinary juris-"diction modify the provisions of this scheme."

Before I turn to the Charitable Trusts Act, 1860, in order to discover what is meant by the words "in the exercise of their "ordinary jurisdiction," I will summarize the position up to this point, which is as follows: the scheme has the effect of a statute, and therefore the court has no inherent jurisdiction to modify it. Any power to modify it must be found in the scheme itself, though I agree that it is possible that power to modify might be implied from words in the statute itself if the words properly lead to an implication of that character. Mr. Cross, I think, said as much; but whether he did so or not, it is really clearly decided by Warrington J. in *In re Berkhamsted Grammar School*.[1] The

[1] [1908] 2 Ch. 25; 24 T.L.R. 514.

Act there in question was not the same, but it had sufficient similarity to make the words which Warrington J. used about the scheme before him applicable to the scheme now before me—not all of his words, but those which I am going to quote. He said [2]: "It is said, and said with truth, that by virtue of the "operation of section 45 of the Act of 1869"—that Act, namely, the Endowed Schools Act, 1869, for these purposes may be treated as indistinguishable from the Act of 1883—"the scheme of 1877" —which for these purposes may be treated as indistinguishable from the scheme of 1891—"is as much an Act of Parliament as "if it had been enacted by that Act. Then it is said, and said "also with truth, that the Board of Education"—that is the Board of Education as successors in this regard to the functions of the Charity Commissioners—"have no greater powers than "those which the court had always exercised prior to the original "Charitable Trusts Act, 1853, and that the powers exercised by "the court did not extend to enable it to alter the provisions of a "statute." As I have said, in my view, those words are directly applicable here.

Later, Warrington J. says [3]: "It is exactly the same as if the "scheme of 1877 had been originally a statute and that statute "had provided that the Board"—meaning the Board of Education as successors to the Charity Commissioners—"may from "time to time frame schemes altering this scheme." Therefore, first and foremost, I have to decide whether article 58 confers any jurisdiction on the court to alter this scheme. Admittedly, it does not expressly do so; but it is argued that it does so by implication.

In order to explain the argument, I must now refer to the general powers of the Charity Commissioners, which are to be found for this purpose in sections 2, 3, 4 and 5 of the Charitable Trusts Act, 1860. Section 2 provides: "The Board of Charity Commissioners for England and Wales, subject to the restrictions "and rights of appeal hereinafter provided, shall have power from "time to time, upon the application" of certain persons ". . . to "make such effectual orders as may now be made by any judge "of the Court of Chancery sitting at chambers" or by certain other bodies ". . . for the appointment or removal of trustees "of any charity" or for a number of other purposes which I need not read, "or"—and this is the important one—"for "the establishment of any scheme for the administration of any "such charity."

Section 3 provides: "The said Board, previously to making "any order under the jurisdiction vested in them by this Act, "shall notify to the trustees or administrators (if any) of the "charity to be affected thereby their intention of exercising such "jurisdiction, by notice in writing. . . ." Pausing there, in my view that is one of the restrictions referred to in section 2. Section 4 provides: "The said Board shall not make any order,

[2] [1908] 2 Ch. 25, 43.

[3] [1908] 2 Ch. 25, 44.

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" under the jurisdiction vested in them by this Act, with respect " to any charity of which the gross annual income, exclusively of " the yearly value of any buildings or land used wholly for the " purposes thereof, and not yielding any pecuniary income, shall " amount to fifty pounds or upwards, except upon the application " of the trustees or persons acting in the administration of the " charity, or a majority of them. . . ." That is another of the restrictions referred to in section 2.

Section 5 provides: " The said Board also shall not exercise " the jurisdiction hereby vested in them in any case which, by " reason of its contentious character, or of any special questions " of law or of fact which it may involve, or for other reasons, " they may consider more fit to be adjudicated on by any of the " judicial courts." With regard to the charitable trusts to which the Act of 1860 normally applies, the court, of course, has concurrent jurisdiction, and I certainly do not think it possible to construe section 5 as authorizing the board to confer on the court jurisdiction which it does not otherwise possess. There is no difficulty about the scheme of the general Act. The difficulty is about the special scheme with which I am today concerned. The court normally has concurrent jurisdiction, and this merely means that the Charity Commissioners need not exercise their jurisdiction in a case within the scope of section 5. If they do not, then the court has jurisdiction because all the time it has concurrent jurisdiction; but when one comes to apply that sort of legislation to a case in which the court has not concurrent jurisdiction—and this is admittedly such a case—then, as so often happens with referential legislation, the sort of difficulty arises which has arisen in the present case.

The argument was very ably put before me by Mr. Cross, who contended that the words " in the exercise of their ordinary " jurisdiction " must import the whole system of administration of charities envisaged by sections 2 to 5 inclusive of the Act of 1860. Those sections envisage a concurrent jurisdiction of the court. Therefore, it was argued, article 58 must also envisage a concurrent jurisdiction of the court, and therefore the court, taking an extremely heavy penful of ink, must expand article 58 to provide as follows: " The commissioners may from time to " time by schemes made in the exercise of their ordinary juris- " diction, or the court, if, under section 5 of the Act of 1860, " the commissioners do not desire to exercise their jurisdiction, " may modify the provisions of this scheme." One cannot apply to the construction of a statute the principle of falsa demonstratio, but one must, I think, give effect to the language of the statute if it is reasonably plain.

In my judgment, there is really no ambiguity about article 58. It provides quite definitely that the modifications are to be by schemes made by the commissioners. That appears to me to exclude schemes made by the court. As I say, there is no concurrent jurisdiction. Therefore, I have to get out of these words

something conferring jurisdiction on the court. How can I get that out of words which say that the schemes are to be made by the commissioners? It is the very negation of what the words say. The argument is that if I take that view I am giving no meaning to the words " in the exercise of their ordinary jurisdic- " tion." I cannot take that view. Two alternative explanations can be offered for those words. I think that in a way they are cumulative. One is that the contrast is between the special jurisdiction conferred on the commissioners ad hoc for the purposes of the Act of 1883, which was of limited duration, and the ordinary jurisdiction conferred on them by the Act of 1860, which is of unlimited duration. Again, the words " in the exercise of their " ordinary jurisdiction " may be a restriction on the enabling power conferred by article 58. If those words were struck out, the commissioners would presumably be able to make their own rules of procedure with a view to modifying the provisions of the scheme, whereas article 58 seems to me plainly to incorporate the restrictions, if and so far as they are relevant, imposed by sections 3 and 4.

It is contended that it would be ridiculous if the commissioners could disclaim jurisdiction under section 5 of the Act of 1860 and leave the court powerless. In my judgment, however, the commissioners have no power to disclaim jurisdiction under section 5 of the Act of 1860 because I can see no reason to import that section into article 58. It seems to me that the provision in the scheme that " The commissioners may . . . in the exercise " of their ordinary jurisdiction modify the provisions of this " scheme," necessarily implies that the commissioners should consider whether they ought to modify the provisions of the scheme. In other words, it seems to me that by implication a statutory duty is cast upon them to consider whether or not this particular scheme ought to be modified.

Therefore, in the result, I am of opinion that by virtue of the fact that this is a scheme having the force of a statute, no jurisdiction exists in this court to modify it.

Declaration accordingly.

Solicitors: *J. W. French; Treasury Solicitor; Coward, Chance & Co.; Bartlett & Gluckstein; Ernest G. Scott & Co.*

K. R. A. H.

[QUEEN'S BENCH DIVISION.]

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Dec. 13, 14.

Lord Goddard C.J., Cassels and Devlin JJ.

* PETHERICK *v.* BUCKLAND.

Road Traffic — Disqualification — Limitation of disqualification to vehicles of a particular description—"Class or description"—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 6.

The defendant, having committed offences under the Road Traffic Act, 1930, was disqualified for "holding or obtaining a licence for "driving 5 hundredweight vehicles for 12 months." On appeal by the prosecutor the question for the opinion of the court was whether "5 hundredweight vehicles" was a "class or description" of vehicles within the meaning of section 6 of the Act, which provided that a court might limit a disqualification "to the driving of a "motor vehicle of the same class or description as the vehicle in "relation to which the offence was committed":—

Held, that although section 2 of the Act of 1930 divided motor vehicles into classes the Minister when making regulations under the Act divided vehicles into different descriptions; accordingly, if the Minister could divide vehicles into "descriptions" there was no reason in law why the justices could not limit a disqualification to vehicles of a particular description.

Per curiam. In future, when justices wish to limit a disqualification under section 6 they must limit it to vehicles referred to under a particular class in the Act or under a particular description in the regulations.

Quaere, whether the Minister had power to prescribe different descriptions when making regulations.

CASE STATED by Essex justices.

The prosecutor preferred an information against Peter James Buckland charging him with permitting, on March 10, 1954, John Albert Southgate, who at the material time was under 17 years, to drive a goods van contrary to section 9 of the Road Traffic Act, 1930, and with permitting Southgate to use the van without a third party insurance policy being in force with regard to its use contrary to section 35 of the Act. At the hearing of the information the justices found, inter alia, that on March 10, Southgate drove a Morris van which was "a "delivery van of a size or capacity sometimes known as a '5-"'hundredweight',"' when he was under the age of 17, while the defendant walked beside the van. At the end of the prosecution's case the defendant changed his plea to one of guilty to the offence under section 35. Having heard the defence to the charge under section 9, the justices found the information proved. After hearing the defendant's solicitor on the question of disqualification, the justices were of the opinion that there were no special reasons for not ordering disqualification, but decided that, having regard to the fact that the defendant earned his livelihood by driving motor vehicles and having regard to the

provisions of section 6 * of the Act, the disqualification could properly be limited to the driving of vans of a size and capacity of 5 hundredweight. The justices therefore ordered that the defendant should pay a fine of £2 for the offence under section 35 and be disqualified for holding or obtaining a licence for driving 5 hundredweight vehicles for 12 months.

The question for the opinion of the High Court was whether "5 hundredweight vehicles" was a "class or description" of vehicles within the meaning of section 6 of the Act.

F. H. Lawton for the prosecutor.

The defendant did not appear and was not represented.

Rodger Winn for the Minister of Transport and Civil Aviation as amicus curiae.

The following cases were cited in argument: *Whittall* v. *Kirby* †; *Burrows* v. *Hall* ‡; and *Dennis* v. *Tame*.§

LORD GODDARD C.J. This is a case stated by justices for the County of Essex before whom the defendant was charged with certain offences in connexion with a motor vehicle. It is not necessary to go into the particular offences because the matter we have to decide is entirely a matter of the provisions as to disqualification of a person who has committed an offence which carries with it the penalty of disqualification.

The vehicle with which the justices were concerned was said by them to be "a delivery van of a size or capacity sometimes "known as a '5-hundredweight'." The case might not be so difficult if they had said it was a vehicle well known in the motor trade or something of that sort. They decided that there was no special ground for not disqualifying the defendant, and said "that having regard to the fact that the [defendant] "earned his livelihood by driving motor vehicles"—which we have tried to point out ever since *Whittall* v. *Kirby* [1] is an immaterial matter—"and having regard to the provisions of "section 6 of the Road Traffic Act, 1930, the disqualification "could properly be limited to the driving of vans of a size and "capacity of 5 hundredweight."

Mr. Lawton on behalf of the Chief Constable of Essex says that there is no such description or class of vehicle as a 5-hundredweight vehicle. It is curious that this point which

* Road Traffic Act, 1930, s. 6 (1): "Any court before which a person is "convicted of any criminal offence in "connection with the driving of a "motor vehicle . . . (*a*) may in any "case, . . . and shall where so "required by this Part of this Act, "order him to be disqualified for "holding or obtaining a licence . . . "Provided that, if the court thinks "fit, any disqualification imposed "under this section may be limited "to the driving of a motor vehicle "of the same class or description as "the vehicle in relation to which the "offence was committed."

† [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552.

‡ [1950] 2 K.B. 476; 66 T.L.R. (Pt. 1) 1102; [1950] 2 All E.R. 156.

§ [1954] 1 W.L.R. 1338n.

[1] [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552.

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might have arisen ever since the Road Traffic Act, 1930, came into force has never arisen until the case was before us the last time this court was sitting, when we thought the case raised such a difficult and novel point that we should ask for the assistance of the Minister of Transport as the defendant was not represented, and Mr. Rodger Winn has attended on his behalf to assist the court as amicus curiae. It is not Mr. Winn's fault if I say, with all due respect to him, that his argument has left the matter as difficult as it was before. It is an extraordinarily difficult position and it is one which I do not hesitate to say the Minister ought, as there is a Road Traffic Bill which has already been introduced into Parliament —it had its first reading recently in the House of Lords and the second reading is next week—to have cleared up.

The position is this: the Road Traffic Act, 1930, Part I, which deals with the regulation of motor vehicles, commences with the sub-heading "Classification of Motor Vehicles," and section 2 provides: "Motor vehicles shall, for the purposes of "this Act and the regulations, be divided into the following "classes." I pause there to point out that the classification is not for the purposes of Part I of the Act alone; it is for the purposes of the whole Act and of the regulations. The section then proceeds to give the classes—heavy locomotives, light locomotives, motor tractors, heavy motor cars, motor cars—quite a long description of those—motor cycles and invalid carriages. In almost every other part of the Act one finds, instead of the word "class" being used, the words "class or description," and section 6, with which we are concerned, and which deals with disqualification, provides "Provided that, if the court "thinks fit, any disqualification imposed under this section may "be limited to the driving of a motor vehicle of the same class "or description as the vehicle in relation to which the offence "was committed." If it was of the same class, no difficulty would arise, but here one gets for the first time "class or "description" and there is nothing in the Act which states what "description" means or who is to prescribe any particular descriptions or how vehicles of a class are to be divided so far as descriptions are concerned; the Act is entirely silent about it. It uses the words "class or description" in a great many sections, but the curious thing is that when one turns to the First Schedule to the Act, which of course is part of the Act, which deals with limits of speed, one finds there that the limits of speed vary according to the class of vehicle. Then one finds that there are vehicles which do not fall exactly within any of the classes laid down in section 2 but may be said to be, I suppose, classes or descriptions. Section 10 provides: "It "shall not be lawful for any person to drive a motor vehicle "of any class or description on a road at a speed greater than "the speed specified in the First Schedule to this Act . . ."

Then, when one turns to the First Schedule one does not find class or description of vehicle, one finds class of vehicle.

At one time, it seemed to some members of the court, that the words " class or description " might be merely tautologous. Mr. Winn told us that such a construction terrified the Minister, because he said that if that was so a great many of the regulations would be ultra vires. They may be, I do not know; some day we may have to decide that, because the regulations deal with descriptions of vehicle and there is nothing in the Act which apparently enables the Minister to prescribe the different descriptions. Section 2, as I have already said, deals with classes; that is the only division of motor vehicles, but the Minister has throughout apparently divided up motor cars into different descriptions and then one keeps on finding in the Act the expression " class or description." Somebody must be able to say whether a vehicle is of a particular description or not and if the Minister can do it, I cannot see any reason why the justices cannot do it. The Minister apparently makes his own descriptions. He has to do certain things to carry out the sections which refer to class or description; so have the justices and if the justices, therefore, like to say that a man shall not drive a car of this particular description, we cannot say in law that they cannot do it. But it is inconvenient they should do it in this way.

While the court thinks that in this particular case they cannot interfere with the disqualification which the justices have imposed, they direct that in future where the justices are limiting the disqualification under the terms of the proviso to section 6, they should limit it to vehicles which can be found under a particular class in the Act or under a particular description in the regulations. One finds in the Act and the Schedules goods vehicles, passenger vehicles, heavy vehicles, light vehicles and so forth and the only way in which this limited disqualification can work satisfactorily is if the justices will take one of the descriptions which is to be found either in the Schedules of the Act or in the regulations and say " We apply the disqualifi- " cation to that vehicle or class of vehicle and to no other." We are not blaming the justices in any way for what they did because this case has given the court very great difficulty. We uphold the disqualification, and dismiss the appeal.

CASSELS J. I agree.

DEVLIN J. I agree. The reason for the direction which my Lord has indicated and the justification for it seems to me to be this: if justices compose their own description, as we have held under the words of the Act they are entitled to do, they would obviously have to be descriptions which are most carefully defined because any person driving a vehicle of that character while disqualified commits an offence as a result of which he must be

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sent to prison unless there are special circumstances. Therefore, by far the most convenient course is for the justices to take one of those descriptions—and there are plenty of them—in the Act or regulations because those descriptions contain their own definitions: then there can be no difficulty about the enforcement of their order.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co. for D. E. Morgan, Chelmsford; Treasury Solicitor.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

1954
Dec. 13.

Lord Goddard C.J., Cassels and Devlin JJ.

* REGINA *v.* CHELSEA JUVENILE COURT. *In re* AN INFANT.

Adoption—Adoption order—Alleged error—Court's power to correct particulars—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 21.

Section 21 (1) of the Adoption Act, 1950, which provides, "The court by which an adoption order has been made . . . may, "on the application of the adopter . . . amend the order by the "correction of any error in the particulars contained therein," gives the court power to correct particulars incorrectly stated in the adoption order and is not merely a slip rule.

The adopter applied to the juvenile court under section 21 to amend an adoption order on the ground that it appeared from certain evidence that the adopted child was younger than the age attributed to him in the order. The court held that they had no jurisdiction. On an application for an order of mandamus directing the court to hear and determine the application:—

Held, granting the application for mandamus, that the court had power, if they came to the conclusion after hearing the evidence that there had been an error, to amend the order with regard to the child's date of birth and to make any necessary consequential amendments.

APPLICATION for order of mandamus.

On June 20, 1951, the Chelsea Juvenile Court granted the applicant an adoption order in respect of a child, with whom she had become acquainted in June, 1946, when the child was in the care and custody of the London County Council, and who had been boarded out with her since June, 1949. In the adoption order the child was described as a foundling and was said to be a child identical with an entry made on July 16, 1942, in the Register of Births for a registration district in London (the birth certificate there referred to showed that the child was found at a railway station on September 21, 1938) and that the child's probable date of birth appeared to be August 1, 1938. On September 29, 1954, the applicant applied to the Chelsea Juvenile

Court under section 21 of the Adoption Act, 1950,[1] to amend the particulars in the adoption order relating to the child's date of birth on the ground that it appeared from certain medical and other evidence that the probable date of the child's birth was about the beginning of 1941. The applicant applied to the juvenile court to delete the words " a foundling " and the recital of the child's identity in the adoption order and to substitute January 1, 1941, for August 1, 1938, as the probable date of the child's birth. The court, without hearing the applicant's witnesses, refused to amend the particulars in the order on the ground that they had no jurisdiction to do so.

H. E. Francis for the applicant.
F. H. Lawton for the juvenile court.
Paul Wrightson for the London County Council.

No cases were cited in argument.

LORD GODDARD C.J. stated the facts and continued: Section 21, under which the application was made, provides: " (1) The court by which an adoption order has been made under " this Act or the Adoption of Children Act, 1926, or the Adoption " of Children (Scotland) Act, 1930, may, on the application of " the adopter or of the adopted person, amend the order by the " correction of any error in the particulars contained therein. . . ." Section 21 (1) is in the widest possible terms and it has been suggested to us that that is only what is called a slip rule. Those words are not appropriate to a slip rule at all. A slip rule applies where the court makes an order and by a slip the order drawn up does not represent what the court has said. That is the true function of a slip rule. Power is obviously being given in this section to correct particulars which in the case of these children from unknown parentage may be very easy to get wrong in an order.

Subsection (2) of the section provides: " Where the adoption " order was made before the first day of January, nineteen " hundred and fifty, the power of the court under the foregoing " subsection shall include power to amend the order—(*a*) by the " insertion of the country of the adopted person's birth; (*b*) (where " the order does not specify a precise date as the date of the

[1] Adoption Act, 1950, s. 21: " (1) The court by which an adoption " order has been made under this Act " or the Adoption of Children Act, " 1926, or the Adoption of Children " (Scotland) Act, 1930, may, on the " application of the adopter or of the " adopted person, amend the order by " the correction of any error in the " particulars contained therein . . . (2) " Where the adoption order was made " before the first day of January, " 1950, the power of the court under " the foregoing subsection shall in- " clude power to amend the order— " (*a*) by the insertion of the country " of the adopted person's birth; (*b*) " (where the order does not specify " a precise date as the date of the " adopted person's birth) by the inser- " tion of the date which appears to " the court to be the date or probable " date of his birth. . . ."

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"adopted person's birth) by the insertion of the date which "appears to the court to be the date or probable date of his "birth. . . ." We have not explored very fully what the position was before the first day of January, 1950, but if the court is expressly given power to make that alteration, it seems to me that it is because there may have been some doubt about the power to do that under the old order and it is recognized under this section that orders made since then can be amended. There is no doubt, in our opinion, that the justices have power to amend the order and, although it may be, if they do amend the order with regard to the date of birth, they may have to make some consequential amendments, there is no confusion as to the child that was adopted. There may be some confusion as to the date of birth of the adopted child or where it came from, but the child adopted was the child that this lady who made the application had in her custody and whom the justices could see and no doubt did see.

In my opinion the justices were wrong in refusing jurisdiction. We are not attempting to dictate how they are to decide it when the matter comes before them. No doubt there will be strong evidence on the one side and on the other, and it will be for the justices to come to a conclusion when they have heard the evidence as to the particulars. If they come to the conclusion that there was no error, then of course they will refuse the amendment. Therefore, in my opinion, the order for mandamus must go.

CASSELS J. I agree.

DEVLIN J. I also agree.

Order of mandamus.

Solicitors: *T. D. Jones & Co.; Samuel Coleman; J. G. Barr, The Solicitor, London County Council.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

1954
Dec. 14, 17.

* MAYNARD *v.* WILLIAMS AND OTHERS.

Lord Goddard C.J., Cassels and Devlin JJ.

Gaming—Lottery—"Private lottery"—Supporters' Club of Football Club—Money raised by various means including a weekly lottery—Whether club "conducted for purposes not connected with . . . "lotteries"—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 24 (1).

The respondents, members of the Torquay United Supporters' Club, were convicted of offences under the Betting and Lotteries Act, 1934, in connexion with weekly lotteries run by the club. On appeal, quarter sessions found that the aims and objects of the supporters' club were the welfare of the Torquay United

Football Club and to obtain funds for that purpose. The supporters' club's activities included numerous social activities all primarily aimed at raising money, providing voluntary services for the football club, improving the amenities of the football ground, organizing and making arrangements for running the football club's "A" team, providing transport for "away" matches, maintaining and repairing playing kit and raising money by means of lotteries. For eleven weeks the supporters' club ran a weekly lottery, tickets for which could only be obtained by members of the supporters' club on payment of 1s. About 5,000 tickets were sold each week. After deducting expenses, 60 per cent. of the receipts from the lottery were devoted to the provision of prizes and 40 per cent. used by the supporters' club for the benefit of the football club, the latter amounting to an average of £90 a week. Quarter sessions, allowing the respondents' appeal, held that the running of the lottery was only incidental and ancillary to the other methods and enterprises used by the supporters' club to carry out its declared purpose of helping the football club and that no offences were committed. The question for the court was whether the club "was established and conducted for purposes not connected with "... lotteries" so that the lottery was a "private lottery" within the meaning of section 24 (1), which exempted private lotteries from the provision in section 21 of the Act that all lotteries were unlawful:—

Held (Devlin J. dissenting) that on the facts as found by quarter sessions, the supporters' club was conducted for a purpose connected with lotteries; the club, although it raised money by other means, was, as part of its business, raising money by means of lotteries; accordingly the lottery was unlawful and offences had been committed.

Held also, that there was nothing in the Act which provided that if the running of the lottery was ancillary or incidental to the other business of the club, it was a lawful lottery.

Per Cassels J. A society might be established for one purpose and conducted for another. The supporters' club was established to help the football club financially, but conducted for a purpose connected with lotteries. The frequency of the lotteries was an important feature in deciding whether the club was conducted for a purpose connected with lotteries.

Per Devlin J. The test was not whether the club conducted lotteries, but whether its affairs were so conducted that the untainted purposes for which it was established had been overthrown or joined by a tainted purpose. What had to be considered was not the immediate act of running the lottery, but the purpose of the association of the people forming the club. The conduct of the club was only material if it affected a change in the purposes for which the club was established.

CASE STATED by Devon Quarter Sessions.

The respondents, Leslie Walter Williams, Frederick Gordon Down, Frederick Maurice Wolff and James Leonard Burgoyne were convicted on informations preferred by the appellant, Harold Samuel Maynard, of unlawfully using the club room of the Torquay United Supporters' Club for purposes connected with the promotion or conduct of a lottery contrary to section 22 (1) (*f*) of the Betting and Lotteries Act, 1934, and other connected offences.

At the hearing before quarter sessions the following facts were proved or admitted. The Torquay United Football Club

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was a professional club with a ground at Plainmoor, Torquay. The Torquay United Supporters' Club was formed over 30 years ago. Its aim and objects in the terms of its own rules were the welfare of the football club and for that purpose to obtain funds and to use them in such manner and for such purposes as its executive committee might direct. Membership of the supporters' club was open to all persons without distinction and the annual subscription was 1s. The membership exceeded 7,000. The management of the supporters' club was vested in the executive committee of which the respondents were members. The activities of the supporters' club in furtherance of its aims and objects were numerous and varied. They comprised, inter alia: (i) social activities frequently throughout the year such as dances, whist drives, jumble sales, darts and skittle matches, all primarily aimed at raising money; (ii) providing gatemen, stewards and other voluntary services at home matches and the entertaining of visiting supporters; (ii') improving the amenities of the Plainmoor ground by means of voluntary labour on the part of members of the supporters' club. A notable instance was the construction of a terraced bank along the whole of one side of the ground which made it possible to accomodate approximately 5,000 additional spectators; (iv) organizing and making all necessary arrangements for the running of the football club "A" team; (v) organizing transport arrangements for supporters wishing to attend "away" matches; (vi) maintaining and repairing playing kit; (vii) raising money by means of lotteries. The football club incurred an annual deficit of about £5,000 and the unpaid services and financial support provided by the supporters' club had been essential to its continued existence. The gross income of the supporters' club from all sources excluding lotteries had been about £4,000 to £4,500 per annum and that had enabled the supporters' club to pay to the football club a yearly total of about £2,000. In the course of the last five years, the supporters' club had at times, in addition to its other activities, conducted lotteries for the express purpose of raising funds. In October, 1953, a lottery on football results was conducted by the supporters' club for two to three weeks and again between November, 1953, and March, 1954, a weekly lottery was organized. They were discontinued due to objections by the police.

On March 24, 1954, the executive committee of the supporters club appointed by resolution a sub-committee in order to organize the promotion of a fresh lottery on such conditions as would comply with the requirements of the law. The respondents were the effective members of the sub-committee. The sub-committee organized a weekly lottery on football results which was called "The Torquay United Supporters' Club Private Lottery Com-"petition" and which ran for 11 weeks from March 27 to June 7, 1954, when the institution of proceedings against the respondents caused a cessation of that effort to raise funds. The

respondents individually participated in the conduct of the lottery in such a manner as justified their conviction on the several charges preferred against them unless the lottery was a "private "lottery" within the meaning of section 24 of the Betting and Lotteries Act, 1934.[1] Tickets in the lottery could only be obtained by members of the supporters' club through duly authorized members on payment of 1s. for each ticket. The number of tickets sold each week amounted to an average of approximately 5,000, some members buying more than one ticket. The conditions prescribed by the Betting and Lotteries Act, section 24 (2) were strictly observed. After deducting the cost of printing and stationery, 60 per cent. of the net receipts was devoted to the provision of prizes and the other 40 per cent. used by the supporters' club for the benefit of the football club. The accountants' fee for auditing the accounts of the lottery was paid out of the general funds. The money retained by the supporters' club averaged about £90 a week and that sum was forthwith remitted to the football club. The lottery was capable of considerable expansion if the demand so warranted and the club desired to extend it. The tickets printed were, however, limited to the number of 5,000 because of the large amount of clerical work involved and because a lottery of that size was sufficient to yield such a profit to the supporters' club which, together with the proceeds from its other activities, would cover the normal annual deficit of the football club. The supporters' club room at Plainmoor was used, among other things, for carrying out the administrative and clerical work involved in keeping the records of the lottery. The sub-committee met weekly at the club room to check returns, sort the results and to work out the prize money. Tickets were also prepared for printing for the succeeding week and it was estimated that of the 7,187 members of the supporters' club about one third purchased tickets in the lottery.

It was contended on behalf of the respondents that the supporters' club was a society established and conducted for purposes not connected with gaming, wagering or lotteries and that accordingly the lottery was a "private lottery" within the meaning of section 24 of the Act.

It was contended on behalf of the appellant that the supporters' club was neither established nor conducted for purposes not connected with gaming, wagering or lotteries and that the exemption provided under section 24 did not apply.

[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of "this Part of this Act, all lotteries "are unlawful."

S. 24 (1): "In this section, the "expression 'private lottery' means "a lottery in Great Britain which is "promoted for, and in which the sale "of tickets or chances by the promoters is confined to, either—(*a*) "members of one society established "and conducted for purposes not connected with gaming, wagering or "lotteries; or (*b*) persons all of whom "work on the same premises; or (*c*) "persons all of whom reside on the "same premises. . . ."

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Quarter sessions were of the opinion that the running of the lottery was only incidental and ancillary to the other methods and enterprises used by the supporters' club to carry out its declared purpose of helping the football club, the contention of the respondents was correct and the appeals were allowed. They were satisfied that the conditions laid down in subsection (2) of section 24 had been fully and conscientiously complied with.

Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn and *J. T. Molony* for the appellant.

Dingle Foot Q.C. and *T. O. Kellock* for the respondents.

The following cases were cited in argument: *Stacey* v. *Wilkins* [2] and *Hudson* v. *Chamberlin*.[3]

Cur. adv. vult.

December 14. LORD GODDARD C.J. This is a case stated by the Appeal Committee of the Devon Quarter Sessions, who allowed an appeal by the respondents against convictions for offences against the Betting and Lotteries Act, 1934.

It is not disputed that unless the lottery is protected by section 24 of the Act the offences have been committed, and the only question for this court is whether or not the appeal committee were right in holding, on the facts which they found, that the lottery was a private lottery within the meaning of section 24 of the Act. It is to be observed that in the Act of 1934 all lotteries are declared to be illegal subject to the provisions of the Act, that is to say, subject to the exceptions which are found in sections 23 and 24.

[His Lordship read the material words of section 24 and continued:] The case arises out of the practice which has been going on all over the country whereby supporters of local football clubs, I think mostly professional clubs, form themselves into a club for the purpose of assisting financially the local professional football club. They raise money in a variety of ways. [His Lordship stated the facts found by the appeal committee and continued:] So far as the matter is a question of fact, we are bound by the findings of quarter sessions but, taking the facts, this court has to consider whether quarter sessions have directed themselves properly and have applied the law to the facts. The first comment I make on the findings of quarter sessions that they are of opinion "that the running of the lottery was only inci- "dental and ancillary to the other methods and enterprises used "by the supporters' club," is that I find nothing in the Act which says that if the running of the lottery is ancillary or incidental to the business or other part of the business carried on by the club, it becomes a lawful lottery. The words of the Act, I repeat, are: "members of one society established and

[2] [1946] K.B. 271; 62 T.L.R. 243; [1946] 1 All E.R. 293.

[3] [1949] W.N. 501.

" conducted for purposes not connected with gaming, wagering or " lotteries."

What is the object here of the promoters of this lottery? It is to raise money. That is their business, or part of their business, to raise money for the purpose of handing that money over to the football club. If that is part of their business, as it clearly is, and is so found by quarter sessions, the fact that they are raising money by means of lotteries seems to me to show that this society is conducted for purposes connected with a lottery. I cannot for myself see any material difference between this case and *Pearse* v. *Hart*,[1] the case of the Gloucester Football Club, except that there were certain differences in the facts there. It may be said that it was easier in the Gloucester case to find that the business was nothing but the business of running a lottery. But here, although the supporters' club raised money by other means, they undoubtedly raised money by means of lotteries, and the declared object of the club is to raise money in order that they may hand over that money to the football club and so assist the football club to keep going. For myself, I can see no material difference between this case and *Pearse* v. *Hart* [1] and I do not think it is a question whether the lottery is incidental or ancillary to the declared business of the club.

One has first of all to see what is the business of the supporters' club and then see if it is conducted in a way connected with lotteries. If, for the purpose of raising income to enable them to maintain the football club, they conduct lotteries I confess it seems to me that the words come exactly within the words I have read. It is true that the provision is put in a negative form: it must be for purposes not connected with lotteries, but if the business is connected with lotteries, it follows that an offence has been committed. In fact, I have asked myself this question: If, on these facts, it is to be held that there is no offence, I am wondering whether it would be possible to say that no offence would be committed if the directors of a commercial company conducted a lottery which was confined to shareholders in the company for the purpose of raising money to enable the company to continue or to enable the company to extend its operations. These are weekly lotteries held to provide a weekly sum of money, and if that is not conducting a business in connexion with lotteries, I find great difficulty in understanding what would be. In my opinion, the decision of the justices was right, the decision of quarter sessions must be set aside and the convictions upheld, and I would allow the appeal accordingly.

CASSELS J. I agree with the judgment which Lord Goddard C.J. has just delivered. As the court is not unanimous on this particular case I desire to indicate my reasons. [His Lordship referred to the facts and continued:] Quarter sessions were of

[1] Post, p. 67.

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the opinion that the running of the lottery was only incidental and ancillary to the other methods, like dances, whist drives, jumble sales, darts and skittle matches, to carry out the declared purpose of the supporters' club to help the football club. I do not understand the use in this connexion of these words "incidental" and "ancillary"; I think "additional" would have been a better word.

Section 21 of the Betting and Lotteries Act, 1934, declares all lotteries to be unlawful, and section 24 exempts private lotteries, which means a lottery "promoted for, and in which the "sale of tickets or chances by the promoters is confined to, "either—(*a*) members of one society established and conducted "for purposes not connected with gaming, wagering or lotteries; "or (*b*) persons all of whom work on the same premises; or "(*c*) persons all of whom reside on the same premises." I need not trouble about (*b*) and (*c*). On the facts shown by the case this was a society conducted for purposes connected with lotteries. Where Parliament uses two words, as here, "established" and "conducted," I think Parliament intended to convey two separate meanings. A society may be established for one purpose and conducted for another. This society was established to help the football club financially. It was conducted for a purpose connected with lotteries. I think frequency is an important feature. Here there was a weekly lottery. If frequency is not to be regarded there would seem to be nothing to prevent a society established for other purposes adding to and probably vastly increasing its funds by daily lotteries on the results of racing events or other chances. If scale is not to be regarded, there would seem to be nothing to prevent a society established for other purposes adding to and probably vastly increasing its funds by attracting many thousands of people who, on a nominal payment, could belong to the society and would then indulge in participation in a lottery which had a prize fund amounting to 60 per cent. of the net receipts.

In the present case, the respondents formed a sub-committee which conducted these lotteries. Such sub-committee, having organized the printing and sale of the tickets, checked the returns, sorted the results and worked out and distributed the prize moneys. The supporters' club was being conducted for purposes connected with a lottery. It is not, in my opinion, necessary that it should be the sole purpose of the supporters' club. I think it was at the material times its main purpose, and indeed the result was to pay over to the football club a sum of money which was larger than the sum of money which came from all the other efforts combined; it was whist drives and the other activities which were incidental and ancillary to the lotteries, if those words are to be used.

I think on the facts found in the case stated, quarter sessions arrived at a wrong conclusion in law, and they should have upheld the convictions by the justices. There is no magic about

this being a supporters' club or a football club or any other club engaged in sport or games. If the respondents are within the law then a society formed for any purpose, political, social or otherwise, provided it is not an illegal purpose, can have a supporters' club to collect funds for it, and that supporters' club can conduct weekly lotteries along with some dances and whist drives, and make those lotteries its main method of collecting these funds and attract an enormous membership on a merely nominal subscription, and the lucky members who have bought one or two tickets can share a big percentage of the net money return on the sale of tickets in the lotteries and a smaller percentage can be given to the society and yet it would have to be held that the supporters' club was conducted for purposes not connected with lotteries. If that be so, then there is nothing to prevent such a club from running a gaming or wagering establishment as well as handing over the proceeds of the society, and section 24 (1) becomes a nullity. I do not believe that that was the intention of the legislature. I do not believe that that is the construction that has to be put on the Act.

I agree that this appeal succeeds, and I agree with what my Lord has said about these convictions having to be restored.

DEVLIN J. The Torquay United Supporters' Club has existed for over 30 years and its object, as its name indicates, is to support the Torquay United Football Club. The football club could not carry on if it had to rely simply on gate-money. The supporters' club helps it in two ways, first by giving unpaid labour for the maintenance of the ground, by the provision of gatemen and stewards and by discharging other similar duties; and secondly, by raising money. Money is raised by a number of social activities, such as dances, whist drives and so forth, and recently the supporters' club has taken to raising additional money by means of weekly lotteries. By activities other than lotteries the supporters' club had previously succeeded in raising enough money to hand over to the football club about £2,000 per annum. This left an annual deficit of more than twice that amount, and by means of the weekly lotteries the club has raised enough money to hand over to the football club about £90 a week to cover this deficit. The club has over 7,000 members but only 5,000 tickets are issued for each lottery, as these produce enough to raise the amount required for the deficit. A member may take more than one ticket, and in fact only about one-third of the members participate in each lottery.

The question to be determined is whether in these circumstances the supporters' club is "conducted for purposes not "connected with gaming, wagering or lotteries" within the meaning of section 24 (1) (*a*) of the Betting and Lotteries Act, 1934. The Torquay magistrates thought that it was not so conducted and they convicted the respondents. The Appeal

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Committee of the Devon Quarter Sessions allowed the appeal and stated a case for the opinion of this court.

There is no doubt that the supporters' club now raises a large proportion of its funds, about two-thirds, by holding regular lotteries. Does this mean that one of the purposes for which the society is conducted is the holding of lotteries? Very few societies exist merely for the purpose of raising funds; the raising of funds is done in pursuance of one or more of the society's objects. On the other hand, very few societies exist for purposes, the furtherance of which does not require the provision of funds. Mr. Foot argues that the raising of funds is not by itself one of the purposes of this club, and that because it raises funds so as to further its true purposes, the raising of the fund is not in itself to be described as a purpose. He concedes, however, that a society might adopt a particular means of raising funds, such as a lottery, on such a scale that the means dwarfed the ends, with the result that the holding of the lottery became one of the purposes for which the society was conducted.

The Solicitor-General does not accept this distinction between means and purposes. He does not submit that the mere fact that some part of the funds is raised by means of a lottery is of itself enough to constitute "a purpose," but he says that it becomes a purpose if it is done on a sufficient scale to form part of the society's business. It is, he says, a matter of degree and in determining the question one must look at all the circumstances. In this case he relies on the regularity and frequency with which lotteries are now held and the large amount of money which they now raise. Questions of degree are, he concedes, primarily questions of fact for the Appeal Committee to determine, but he submits that in this case the raising of funds by means of lotteries is so considerable that no magistrates who directed their minds to the proper question could rightly come to any other conclusion than that it is one of the purposes for which the society is now being conducted.

Part II of the Betting and Lotteries Act, 1934, begins with section 21 which, subject to the provisions thereafter set out in Part II, makes all lotteries unlawful. The exemptions from this general provision are contained in sections 23 and 24 and from their nature it is apparent that, while Parliament intended to prohibit entirely any large lotteries open to the public generally, it did not intend to prohibit small lotteries restricted to groups of people, provided they were conducted in accordance with a number of specified conditions. Section 23 exempts small lotteries which are promoted as an incident of certain entertainments such as bazaars, sales of work, etc. Section 24 exempts private lotteries, and the question in this case is whether the lottery falls within the definition of a private lottery in subsection (1). This subsection defines three classes of private lottery, and there is a common element in each definition, that

common element being the limitation of the sale of tickets to a limited group of persons. Two of these groups are very simply described and are easily identifiable because the nexus is physical in character. The former consists of persons who work on the same premises, and the latter of persons who reside on the same premises. A common place of employment or a common residence are the factors which respectively unite these groups. The remaining group—the first to be specified—is " members of one " society." Here the nexus is mental and not physical. People do not belong to one society unless the society is formed for a common purpose or purposes. The common purpose is thus the factor which unites the members of this group.

But the terms of the definition are not restricted to " members " of one society." If they were, there would be an easy means of evasion. Societies would be formed for the common purpose of holding lotteries. That would produce an absurd result and the Act uses words to exclude it; the words are wide. If an expressed purpose of the society were to hold lotteries, naturally it would stand condemned; but if the objects are tainted by any such purpose, likewise it is condemned. So the respondents are required to show that their purposes are " not connected with " gaming, wagering or lotteries."

Another possible evasion that Parliament has foreseen is that a society might be formed for one purpose and conducted for another. The original purpose might be lost sight of or become a façade for some other purpose. The society's affairs might be so conducted that a new purpose not contained in its original objects grows up and becomes one of the purposes of the society. Therefore the Act uses the phrase " established and conducted." The respondents must show that their society is neither established nor conducted for a tainted purpose.

This reference to the conduct of the society naturally leads to an inquiry into what it is doing. Its objects are to be judged not merely by the aims which it declares upon establishment but also by its deeds. But its deeds are to be scrutinised only in order to see what light they throw upon the purpose of the association. One must not lose sight of the fact that the object of this definition is not to forbid a course of conduct but to define a group. If the group comes within the subsection it may hold as many lotteries as it likes. If the lottery is a private lottery—the word " private " is I think used to show that the distinction to be emphasised is concerned primarily with character and not with size—the Act imposes no limitation on the amount of money which the lottery raises or on the frequency with which it is held. This is clearly shown by reference to the other groups within the subsection whose definition is beyond doubt. Thus there may be a large number of people working on the same premises, I suppose many hundreds work in this building where we are now sitting. Such people may form a committee to

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organize lotteries and may hold lotteries as often as they like, raise any amount of money they like and do what they like with the money. The conduct of their affairs is unrestricted. It is indeed irrelevant to inquire how they conduct themselves, so long as they observe the special conditions. It is worth noting that under section 24 the condition which forbids the sending of tickets through the post must of itself be restrictive of size. But the inquiry into "conduct" under section 24 is relevant only if it throws light on the bond of purpose which unites the members.

The Solicitor-General does not contend that this society was established for a tainted purpose. He submits that it is now conducted for such a purpose. I think that a misconstruction of the word "conducted" in the section leads to a fallacy underlying the Solicitor-General's argument. The question is not whether the society conducts lotteries, nor even whether it conducts a business consisting largely of lotteries, but whether its affairs are so conducted that the untainted purposes for which it was established have either been overthrown or joined by a tainted purpose. Of course, in one sense every time the club holds a lottery it might be said to be conducting itself for the purpose of holding a lottery. If this were the right test of purpose, it would make nonsense of the definition, for it would be impossible to hold a lottery and remain within it. What the subsection refers to is not these smaller purposes which govern the doing of the individual act but the larger purposes which unite the members of the society. No doubt each activity of the society, whether it be a lottery, a whist drive or cutting the grass, is done with the immediate purpose of doing the act itself. In that sense you may say that the society has as many purposes as it has activities. But if a measurement of its activities had been intended as the test, it would have been a simple matter to have phrased the definition as one which covered any society which held enough lotteries to amount to a substantial part of its activities, and exempted only those which held occasional lotteries. That sort of test is contemplated by section 23, where one of the conditions (subsection (2) (*d*)) provides that "the "facilities for participating in lotteries shall not be the only, or "the only substantial, inducement to persons to attend the "entertainment." No doubt the word "conducted" in section 24, if taken by itself, might suggest that what one has to look at is what the society is doing, and not what the society is aiming at. But on the true construction of the section, I think that the word "conducted" is used in order to broaden the word "established." What has to be considered is not the immediate purpose of the act but the purpose of the association. The conduct of the society is material only if it effects a change in the purposes for which the society was established.

If this construction is right, then the matter which the magistrates have to inquire into is whether the holding of lotteries

has joined the proclaimed objects of the society as one of its purposes. That such a thing may happen is illustrated by *Pearse* v. *Hart* [2] which this court decided earlier this week. In that case a supporters' club, similar to the one we are now considering, started holding lotteries in January, 1953. It had then 1,400 members. Within six months its membership rose to 12,500. It is only reasonable to suppose that the vast majority of these new members were attracted solely by the idea of joining in the lotteries. If the magistrates thought that 80 or 90 per cent. of the members had joined the society without any particular sympathy for its proclaimed objects, but with the object of having a flutter, they would manifestly be entitled to find that the holding of lotteries had become one of the common purposes which held the members together. Whether or not it had become one of the society's purposes is a question of fact; and there was certainly in that case ample evidence on which the magistrates could so hold.

In the present case the appeal committee have, I think, applied their mind to the right question. It would perhaps have been better if they had expressed their finding in the terms which the Act uses and had found specifically that none of the purposes for which the club was established or conducted was connected with gaming, wagering or lotteries. I have noted before that justices seem reluctant to express their findings of fact in the express terms which the Act specifies, perhaps because they fear that they may be thought to be deciding the point of law which is being submitted to the court. They might consider employing the formula much used in commercial arbitrations: "In so far as it is a question of fact we find, and in so far as it "is a question of law we hold, etc." That leaves it to the superior court to decide what is fact and what is law, but also leaves the superior court in no doubt, if it turns out to be a question of fact, about the conclusion of the justices on it. Here the appeal committee has expressed the opinion "that the "running of the lottery was only incidental and ancillary to "the other methods and enterprises used by the supporters' "club to carry out its declared purpose of helping the "football club." I think this finding shows that they have applied what I believe to be the right test. They have distinguished between purposes and the means adopted for the carrying out of such purposes, and they have held in effect that the raising of money by lottery is only one of the means and has not changed the purposes for which the club was established. I think that this is a conclusion which they could reasonably reach on the evidence, and it is a question of fact for them. The holding of lotteries now forms a substantial part of the club's activities, but I am unable to say that as a matter of law it had grown to such

[2] p. 67, post.

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overwhelming proportions that the appeal committee could only hold that it had become one of the purposes of the association.

A failure to distinguish between purposes and means leads to difficulties which are inherent in the Solicitor-General's argument. Is the raising of funds per se one of the purposes of the club? I can understand an argument that it is. I can follow an argument that if a club has a number of objects and those objects require the raising of money, then the raising of money for those objects must itself become one of the purposes of the club. But then if the raising of funds is one of the purposes of the society, and the raising of funds is "connected with . . . "lotteries," the society is outside the subsection. The raising of funds would be connected with lotteries (the words are extremely wide) if any part of the funds was raised by lotteries. This would mean that a single lottery held for the purpose of raising funds would take the society outside the subsection. The Solicitor-General shrinks from this conclusion. But if this conclusion is not accepted, it can only be because for the purposes of this subsection the raising of funds for the society's objects is not to be regarded as one of the purposes of the society but only as a means for achieving its purpose. Of course the means may grow so great as to swamp the ends: the holding of the lotteries may be indulged in on such a scale as to be no longer a means of raising money but an end in itself. But that is simply to express in other words the test I have already applied.

I can see no warranty in the Act for any half-way house or for saying that it is all right to hold an annual or quarterly or maybe a monthly lottery, but not to hold a weekly one; or that it is all right to raise, say, 10 per cent. of the society's funds by means of a lottery but not to raise 50 per cent. or more. The definition is not in my view, as I have already said, concerned with limiting the frequency or size of lotteries, but simply with ascertaining the nature of the common bond defining the group within which the sale of tickets is to be confined.

For these reasons, I think that the decision of quarter sessions was right and I would uphold it.

Appeals allowed.
Convictions restored.

Solicitors: *The Director of Public Prosecutions; Arthur & Co.*

C. J. E.

NOTE.

[QUEEN'S BENCH DIVISION.]

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Lord Goddard C.J., Cassels and Devlin JJ.

Gaming — Lottery — "Private lottery" — Supporters' club of football club—Money raised by various means including weekly lotteries— Whether club "conducted for purposes not connected with . . . "lotteries"—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 24 (1).

CASE STATED by Gloucester justices.

Informations were preferred by the respondent, William Hart, against the first and second appellants, Norman Sidney Pearse and Albert Francis Gerald Leach, charging them with unlawfully selling on April 10 and 17, 1954, a ticket in a lottery known as the Gloucester City Association Football Club Supporters' Club Private Lottery Competition contrary to section 22 (1) (*b*) of the Betting and Lotteries Act, 1934, and against the third appellants, Hempsted Press (Gloucester) Ld., charging them with unlawfully printing tickets for use in the lottery contrary to section 22 (1) (*a*).

At the hearing of the informations the justices found the following facts. The first and second appellants had each sold to persons who were members of the Gloucester City Association Football Club Supporters' Club tickets in a lottery promoted by certain members of the supporters' club, which had been printed by the third appellants. The supporters' club was established in 1936 for purposes not connected with gaming, wagering or lotteries. Its members assisted at the ground of the Gloucester City Association Football Club, supported the matches of the football club and organized social activities. In 1939 the membership was between 400 and 500 members and during the war the supporters' club continued its activities on a reduced scale. In 1948 the supporters' club had 1,000 members. Members assisted at the football club's ground. They organized dances, whist drives, variety shows, dinners, social evenings and a pantomime, and the proceeds were donated to the football club and other local bodies connected with sport. In April, 1954, the supporters' club had over 16,000 members. Each member paid an annual subscription of 1s. to the supporters' club. The objects of the club were set out in rule 2 of the rules of the club and were: (*a*) to promote among the citizens of Gloucester and the neighbouring district the furtherance of association football and to foster a common interest in and support for it and to further the interest, existence and future of the Gloucester football club; (*b*) to encourage athleticism particularly among the young people and make grants for that purpose; (*c*) to provide funds to support the football club; (*d*) to provide funds to support the football club for various particularized purposes and any object which would, in the opinion of the football club, promote its activities and welfare; (*e*) to provide facilities to enable members of the club to attend away matches; (*f*) to promote social activities among members of the club; (*g*) to acquire premises for the use of the supporters' club.

The governing body of the supporters' club was the executive committee and there were a number of sub-committees to organize various activities including the competition committee which was wholly and solely concerned with running the lottery competition. The members of the supporters' club assisted at the football club ground in various ways and provided transport for away matches. In February, 1954, the

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supporters' club acquired certain premises where they organized various social activities and where the club's committees met each week. In January, 1953, the supporters' club commenced a lottery called the Gloucester City Association Football Club Supporters' Club Private Lottery Competition in which the sale of tickets was confined to members of the supporters' club. The annual membership fee for the lottery competition was 1s. At the end of 1952 the membership of the supporters' club was about 1,400 but by June, 1953, the membership had risen to 12,500. After deducting expenses incurred for printing and stationery, 75 per cent. of the proceeds of the lottery was devoted to the provision of prizes in the lottery and 25 per cent. to the purposes of the supporters' club set out in the rules of the club. On April 10, 1954, 14,784 chances were sold and on April 17, 14,726 were sold. Without taking into account the results of the lottery the provisional accounts for the supporters' club for the current year showed an estimated income of £2,920. For 1953 the proceeds of the lottery amounted to about £34,000, of which 25 per cent. was £8,600. None of the conditions required by section 24 (2) to be observed in connexion with promotion and conduct of a "private lottery" had been broken.

It was contended by the appellants that the lottery was one which by virtue of the provisions of section 24 was deemed not to be unlawful since the supporters' club was a society established and conducted for purposes not connected with gaming, wagering and lotteries. The promotion of the lottery was not a purpose of the supporters' club within the meaning of section 24 (1). Alternatively, if it were held that the club was conducted for a purpose connected with a lottery, it was contended that as the club was a society established and conducted also for purposes not connected with gaming, wagering or lotteries, it was entitled to the exemption under section 24.

It was contended by the respondent that section 24 contemplated small and occasional and not substantial and regular lotteries. The lottery competition, because of its regularity, substance and the disproportionately large income derived from it compared with other sources, had become one of the purposes for which the club was conducted and accordingly the club was not entitled to the exemption claimed under section 24 and therefore the lottery was unlawful.

The justices were of the opinion that the lottery competition was not a lottery within section 24 (1) (*a*) and found the appellants Guilty.

Harold Heathcote-Williams Q.C. and *Christopher Priday* for the appellants.

Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn and *Paul Wrightson* for the respondent.

LORD GODDARD C.J. In 1934, Parliament passed the Betting and Lotteries Act and by section 21 Parliament declared "Subject to the "provisions of this Part of this Act, all lotteries are unlawful."

On all these matters people differ profoundly in their views whether or not the restrictions put by law on these things are justified or unjustified, whether the objects of lotteries and so forth are good or bad, but we have nothing to do with that. We have only to apply the law as Parliament has laid it down and Parliament made two exceptions with regard to lotteries. One exception provided for in section 23 with which we are not directly concerned today, is with regard to what were called small lotteries and which, it is quite obvious from the wording of the Act, were intended to deal with what I may call the ordinary bazaar raffle. The other section, section 24, is no doubt more difficult. [His Lordship read section 24 (1) and continued:] We have to see whether the lottery is confined to "members of one

"society established and conducted for purposes not connected with "gaming, wagering or lotteries," and I find nothing in this section—I say this, although this will be more material to the other case in which we have reserved judgment [1]—about the lottery being incidental or ancillary.

The lottery in question in the present case was connected with a football club at Gloucester. It would be idle for any member of this court to pretend that he does not know that great numbers of clubs are running lotteries in connexion with football clubs or other clubs. Apparently the way that the matter begins is that there is an organization called "Supporters of the Football Club" which is so far as Gloucester is concerned—the case does not tell us but I imagine this is so—a professional club; but whether it is a professional club or an amateur club I think makes no difference. I have no doubt that the supporters or I believe the technical expression in football circles is "fans," who go to the matches of the club and watch the twenty-two gladiators on the field are very anxious that the club should be supported because otherwise their Saturday afternoon amusement would suffer. So the football club supporters' club—almost a club within a club—is formed and the one at Gloucester goes in for looking after the ground, organising social activities which consist of dances, whist drives, variety shows, dinners, social evenings and a pantomime, so it is a very active club. But to get money it seems that they have to rely very largely on running lotteries because it is found that you pay one shilling to become a member of the supporters' club and then if you like to pay another shilling you qualify for entering lottery competitions. The lottery competitions seem very popular with the people of Gloucester because the numbers of the supporters' club, at first 1,400, very quickly rose to 12,500; and after deducting the expenses incurred for printing and stationery "the proceeds of the lottery are devoted as to seventy-five per cent. "to the provision of prizes in the lottery and as to twenty-five per cent. "to the purposes of the supporters' club set out in rule 2 of the rules "of the club." In April there were 14,784 chances sold the first week and the next following week, 14,726 chances were sold. So the matter went on and the police who considered it to be their duty to prosecute—and of course it is the duty of the police to prosecute whether they sympathize with the objects or not and no one suggests that this lottery was otherwise than honestly held—brought the matter before the justices. The justices came to the conclusion that it was an unlawful lottery because the defendants had not shown that it was a private lottery.

The reason why the justices were justified in coming to that conclusion was because on the facts they found that it was quite impossible to say, although it was only members of one society who could take tickets, that the club was not conducted for a purpose connected with lotteries; it was their way of raising money because, as I have said, there was first of all a club and then a separate club within a club, at any rate a department of it because one paid an extra shilling for membership of the lottery competition.

I do not propose to go all through the facts in this case because it is very largely a question of fact. It is a question of fact provided a proper reading is given to the section and the justices apply their minds and direct themselves correctly as to what the section means. I do not think that because the club no doubt supports other activities that affects the matter at all. It is not a question whether the club has one purpose and one purpose only. The club may have a variety of purposes. I have no doubt that the supporters' club had, but if

[1] *Maynard* v. *Williams* (p. 54, ante).

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one of their purposes is connected with lotteries, it seems to me that it ceases to be a private lottery and is, therefore, not exempted from section 21 of the Act which says that all lotteries are unlawful. I repeat that there is no suggestion here that the lottery was run for improper purposes, still less that it was not properly run, but that is not a matter with which this court is concerned any more than the justices were concerned. The simple question is whether the defendants who were the promoters of the lottery can manage to bring themselves within the exemption contained in section 24 because it gives a defence. It takes a certain class of lottery outside the Act. It is for them to prove that and they have not proved it. The justices were amply justified in coming to the conclusion they did and in the present case I do not think that they could have come to any other decision.

For these reasons the appeal is dismissed.

CASSELS J. I agree. It was in 1936 that this supporters' club was founded. It had a few hundred members. It struggled through the war period. It had reached a membership of 1,400 by the end of 1942. In January of 1953 the supporters' club commenced a lottery called "the Gloucester City Association Football Club Supporters' Club "Private Lottery Competition" and as soon as that was started the membership jumped from 1,400 to 12,500 and that was what it was by the month of June of 1953. The amount of money which passed, through the lottery competition part of the supporters' club's activities, was considerable and the benefit to the football club was also considerable.

The question which the justices had to decide in this case was whether section 24 (1) of the Betting and Lotteries Act, 1934, exempted this body from the offence of running a lottery and coming within section 21 of the Act which declares all lotteries to be unlawful. The justices came to the conclusion that this was a society conducted for purposes connected with gaming, wagering or lotteries. There was ample evidence to support their finding to that effect. I think this is quite clearly a case in which this particular supporters' club with a very long name has for one of its purposes the running of a lottery and, therefore, they come within the mischief of the Act, they were properly convicted and I think this appeal must be dismissed.

DEVLIN J. The meaning and effect of section 24 of the Betting and Lotteries Act, 1934, is one of the matters which the court will consider in the case in which it has reserved judgment [2] and, therefore, all that I think it is necessary to say in the present case is this: that even if the construction most favourable to the appellants were adopted, there would still be ample evidence to justify the conclusion of the justices that one of the purposes for which this society was conducted is connected with gaming, wagering or lotteries. Accordingly I agree that the question stated in the case should be answered in the affirmative and that the convictions should be upheld.

Appeal dismissed.
Convictions upheld.

Solicitors: *Devonshire & Co. for Bretherton & Sons, Gloucester; Director of Public Prosecutions.*

C. J. E.

[2] *Maynard* v. *Williams* (p. 54, ante).

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[1951 J. 6218.]

Evershed M.R., Birkett and Romer L.JJ.

Detinue—Plaintiff's property in goods—Immediate right to possession—Contractual right—Goods sold and delivered—In possession of third party—Agreement between buyer and seller for return—Whether seller entitled to sue third party in detinue.

In January, 1948, J. delivered bathroom fittings to W. at P.'s request. P. did not pay for them and in September, 1949, it was agreed, between J. and P., that J. should take back the goods, collecting them from W. at P.'s expense. W., however, refused to deliver up the goods to J. J. claimed in detinue against W. for the return of the goods:—

Held, that J. could not maintain an action in detinue against W. since the property in the goods, which had passed to P. on delivery to W. at P.'s request, had remained vested in P., notwithstanding the agreement that J. should recover the goods.

APPEAL from Judge Glazebrook sitting at Tonbridge County Court.

In 1947, one Paterson ordered from the plaintiff, Jarvis, bathroom fittings at a price of £72 15s. and in January, 1948, he requested the plaintiff to deliver them to the defendant, Williams of Tottingworth Park, Heathfield, Sussex. In May, 1949, the goods had not been paid for and were still lying at the defendant's premises. The plaintiff wrote to Paterson saying that he would be prepared to take the goods back if Paterson was prepared to pay the cost of collection. Paterson did not reply and the plaintiff wrote a second letter to which Paterson replied on September 14, 1949, saying "I had the impression "that you had collected long ago, but as you evidently have not "will you kindly do so, and I agree to pay the cost of collection." On receipt of the letter the plaintiff sent his lorryman, one Sands, with the letter to the defendant to collect the goods, but he was informed that he could not take the fittings away. Two years later, in 1951, the plaintiff commenced proceedings in the High Court against Paterson claiming £72 15s. for goods sold and delivered. He joined Williams as defendant claiming against him in detinue for the return of the goods and further or alternatively damages for detention of the goods. He then discontinued the proceedings against Paterson and brought the present proceedings against the defendant in the county court. The county court judge held that the plaintiff was entitled to recover against the defendant. The defendant appealed.

The facts are more fully stated in the judgment of Evershed M.R.

G. B. M. Reed for the defendant.
J. H. S. Elliott for the plaintiff.

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In addition to the case referred to in the judgments the following cases were cited in argument: *Emanuel* v. *Dane* [1]; *Gordon* v. *Harper*.[2]

EVERSHED M.R. The action which now comes before us on appeal appears originally to have been an action brought in the Queen's Bench Division of the High Court by the plaintiff Jarvis against one Paterson, and was for the sum of £72 15s. for goods sold and delivered. The items are set out in the special indorsement on the writ, and I will refer to them hereafter as bathroom fittings. That writ was issued in October, 1951, some four years or more after the date of the original alleged sale, so that it is not surprising if some of the facts are a little obscure. However that may be, the later history of the proceedings was that the plaintiff joined as a defendant one Williams, the present defendant, and as against him claimed in detinue for the return of the goods with, further or alternatively, damages for detention of the same goods. At or about the time that Williams was joined, I understand that the plaintiff discontinued the proceedings against Paterson.

The only question which arises here is whether the plaintiff has a good cause of action in detinue against the defendant in respect of these goods. The judgment of the county court judge makes most of the matter plain; thus, as he points out in his judgment, the bathroom fittings in question which had been ordered by Paterson from the plaintiff, were delivered at Paterson's request not to his house, but to the premises of the defendant and there they remained for a considerable time.

In May, 1949, a question arose between the plaintiff and Paterson whether or not the plaintiff would take these goods back, and the plaintiff appears to have written to Paterson in May, 1949. That letter is not before us, and all we know of it is that, according to the plaintiff's affidavit when he sought to obtain summary judgment against Paterson on the original claim, he said: "I wrote to the defendant Paterson as to whether he "wished to retain the fittings, and, if not, I would, under the "circumstances, be prepared to take them back if he was pre-"pared to pay me for collection." It appears that that letter was unacknowledged, and that the plaintiff wrote again at the beginning of September in the same year. The second letter brought forth the reply which is set out in the county court judge's judgment. It was from Paterson to the plaintiff, dated September 14, 1949, and ran thus: "I am obliged for your "letter of September 9, and please accept my apologies for not "replying to yours of May 6, 1949. I had the impression that "you had collected long ago, but as you evidently have not will "you kindly do so, and I agree to pay the cost of collection."

[1] (1812) 3 Camp. 299.

[2] (1796) 7 T.R. 9.

On receipt of that letter the plaintiff sent his foreman or lorryman, one Sands, armed with the letter to the premises of the defendant. He, Sands, asked that the bathroom fittings should be delivered to him, but he was told by someone, who may, or may not, have been Mrs. Williams, that he could not take the bathroom fittings away, and so he left empty-handed. It was after that episode that the present proceedings started; though the plaintiff, for some reason or another, allowed a period of some two years to elapse before he began the proceedings, and it was another three years before eventually they were tried in the county court.

The first question is, what was the effect of the arrangement made as a result of the letter of September 14, 1949? The two letters therein referred to are not before the court but the judge said that he had some evidence from the plaintiff which explained the terms of the letter, and he concluded first (and Mr. Elliott for the plaintiff relied strongly on this) that the effect of the arrangement was: "I, the plaintiff, agree to take the fittings "back; he (that is Paterson) to pay the carriage." After stating the subsequent narrative which I have stated, the judge said: "It is clear to me that the arrangement of 1949 to take the "goods back never transferred the property back to the plaintiff. "It remained in Paterson because the plaintiff in fact never got "the goods back, and never intended the property to revert "until he got them back. This is confirmed by the writ for the "price of goods sold and delivered." I think that the county court judge was quite right in that conclusion.

Mr. Elliott submitted that the question was really one of fact, and was determined in his favour by the brief statement by the judge of the effect of the arrangement. The question, in my view, which is one of mixed fact and law, if not, indeed, really of law, is what was the effect of this arrangement as regards the vesting or revesting of the property in these fittings? There is no doubt (at least I so assume as we have heard no argument to the contrary), that when these fittings were first delivered at Paterson's request to the defendant's house, the property in them, as on an ordinary sale of specific goods, passed to Paterson, and he became liable to pay their price accordingly. The question is whether this vague arrangement of 1949 revested the property in the plaintiff? Mr. Elliott referred to section 18 of the Sale of Goods Act, 1893. I am not satisfied that the transaction of 1949 could properly be described in any circumstances as a sale of goods. But even if the rules in that section were applicable, they are expressed to be subject to the formula "unless a different intention appears." If Mr. Elliott is right it seems to me, that it would follow from the revesting of the property in the plaintiff, eo instanti, on the receipt of the letter of September 14, that Paterson ceased to be liable for the price of those goods. The most that he would be liable for, on this view, would be for a breach of the contract or bargain for putting

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an end to the original sale when his agent the defendant refused to permit the plaintiff to re-collect the goods. In my judgment, that argument cannot be sustained, nor can I attach any significance to the statement made by the plaintiff in the course of his evidence: "I say the goods are mine because of this letter "from Paterson accepting my offer" (meaning the letter of September 14, 1949). The plaintiff was answering questions in cross-examination, and no doubt stated in answer to counsel's suggestion what his case was. I observe, indeed, that in answer to the judge he said later: "When the arrangement with Pater-"son that I should collect the goods came to nothing, I suppose "the goods still remained goods sold to him which he had not "paid for"; so there he is stating an opposite view of the legal consequences of the arrangement. However I am of opinion that the county court judge rightly interpreted the arrangement made and its essential character.

That, however, leaves the question, which the judge decided in favour of the plaintiff, whether at the date of the demand, which I take to be the demand by Sands when he called at the defendant's house, the plaintiff was entitled to sustain an action for detinue in respect of these goods against the defendant. The relevant part of the county court judge's judgment is to this effect: "But the plaintiff says that detinue can be brought by "anyone entitled to possession. Counsel for the defendant put "up a number of defences to that. It is clear that under the "agreement the plaintiff was entitled to these goods. True, it "was all done very informally." After referring to the call of Sands at the defendant's house the county court judge proceeded: "Therefore the villain of this piece is Paterson who owes both "the plaintiff and the defendant money: there are some merits "in the plaintiff, but it is not a question of merits at all, but a "legal question. The plaintiff is entitled to recover the goods "or their value, and if they have deteriorated, damages for their "detention."

I take that to mean that the contractual right which the plaintiff had vis-à-vis Paterson to go and collect these goods from Paterson's agent was a right of a sufficient character to enable the plaintiff to bring an action in detinue against the agent of the owner of the property in these goods. But, with all respect to the county court judge, I am unable to accept that as a good proposition of law. Certain classes of persons, as for example bailees, have, no doubt, a special right to sustain actions in trover and detinue, but the general rule is, I think, correctly stated in the text of Halsbury's Laws of England, 2nd ed., vol. 33 at p. 62, para. 98. "In order to maintain an action of trover or detinue, "a person must have the right of possession and a right of "property in the goods at the time of the conversion or detention; "and he cannot sue if he has parted with the property in the "goods at the time of the alleged conversion, or if at the time of

" the alleged conversion his title to the goods has been divested " by a disposition which is valid under the Factors Act, 1889."

The point arose in this court in *Rosenthal* v. *Alderton & Sons Ld.*[1] The question there was, whether the value of goods, which had disappeared, ought to be ascertained, for the purpose of giving to the successful plaintiff damages for their wrongful detention, as at the date of the detention or as at the date of the judgment. No such question, of course, arises here. But in the course of the judgment of the court in that case, it is stated[2]: " It is further to " be noted that the action of detinue was essentially a proprietary " action implying property in the plaintiff in the goods claimed," and then a reference is made to Viner's Abridgment vol. 8, p. 23 and Holdsworth, History of English Law, vol. 7, pp. 438 and 439. " It was, and still is, of the essence of an action of detinue " that the plaintiff maintains and asserts his property in the goods " claimed. . . ."

Although it is, no doubt, true in a sense, and certainly in its original medieval conception, that when speaking of property in chattels there is in mind the right to their immediate possession, nevertheless the sense of property in chattels is now well understood. It is involved in the Sale of Goods Act, 1893, itself. Even though, by contract between himself and Paterson, the plaintiff may have had a right which, if infringed, could form the subject-matter of an action for breach of contract, and though he had a right to go and possess himself of these goods, nevertheless, until he has done so, there was in him according to my contruction of the arrangement, no proprietary interest in the goods, in the sense in which that term is now, as I think, commonly understood. It seems to me therefore, that he had not, on the authorities which I have mentioned, the necessary foundation on which to sustain an action for detinue against the defendant. He, no doubt, could sue Paterson either for the price of the goods or for damages or for damages for breach of this arrangement for the return of the goods when the defendant refused to deliver them over. But I think that the rights of the plaintiff as regards these goods were not such as entitled him to bring an action in detinue against the defendant, in whose possession they were, as agent, at the time, of the person in whom the property in the goods was then vested.

For these reasons I think that this appeal must be allowed and that the action against the defendant should have been dismissed.

BIRKETT L.J. I am of the same opinion. My Lord has dealt with both points fully. One was the construction of the letter of September 14, 1949—whether or not that letter revested the goods in the plaintiff, and the second question, if it did not, did

[1] [1946] K.B. 374; 62 T.L.R. 236; [1946] 1 All E.R. 583.

[2] [1946] K.B. 374, 377.

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that letter, or the arrangement then made, give to the plaintiff a contractual right to collect the goods or a sufficient proprietary interest for him to maintain or to sustain an action in detinue? I agree with the judgment of my Lord on both points.

ROMER L.J. I also agree and I propose to add nothing, notwithstanding that we are differing from the county court judge.

Appeal allowed with costs.
Action dismissed with costs on scale 3.

Solicitors: *Powell, Skues & Graham Smith for J. E. Rodgers & Pembroke, Bexhill-on-Sea. Simmons and Simmons for Sprott and Sons, Tunbridge Wells.*

E. D.

[COURT OF APPEAL.]

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Denning, Morris and Parker L.JJ.

*DANIELS *v.* FORD MOTOR CO. LD.

[1953 D. No. 1158.]

Factory—Eyes—Protection—Provision of goggles or effective screens—"Suitable"—Fettling process involving special risk of eye injury—Misting of goggles—Duty of employers—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 49—*Protection of Eyes Regulations,* 1938 (*S.R. & O.* 1938, *No.* 654), *Sch.*

The plaintiff, while engaged in the defendants' factory in fettling—a process specified by regulations as involving special risk to the eyes and therefore one for which section 49 of the Factories Act, 1937, required that suitable goggles should be provided to protect the eyes of persons employed on it—was wearing goggles provided by the defendants. The lenses having misted over he pulled the goggles away from his nose sufficiently to insert his finger and thumb to cleanse the lenses, and while he was so doing a bit of metal entered his right eye and caused injury. He claimed damages from the defendants, alleging a breach by them of their statutory duty:—

Held, that section 49 [1] did not impose on employers an absolute duty to provide goggles which would ensure full protection for the eyes, and that the defendants, having provided goggles which while in use were suitable to protect the eyes, were not in breach of the section.

Decision of Finnemore J. reversed.

APPEAL from Finnemore J.

The plaintiff Daniels was at the time in question employed

[1] Factories Act, 1937, s. 49: "Protection of eyes in certain processes. In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

in the "knockout" department of the defendants' factory at Dagenham. He, with others, was engaged in fettling, a process in which there is admittedly considerable risk of injury to the eyes and accordingly section 49 of the Factories Act, 1937, applied and the defendant employers were under a duty to provide the plaintiff with "suitable goggles . . . to protect the eyes." The defendants had in fact provided several types of goggles and the plaintiff was wearing goggles which, though said to be favoured by the workmen, had the defect of misting over. When this happened the plaintiff pulled the goggles an inch or two away from his nose for the purpose of cleaning the lenses with his finger and thumb, and unfortunately a bit of metal, presumably knocked off by a fellow-workman, entered his right eye, causing injury, for which he claimed damages from the defendants.

Finnemore J. held in effect that section 49 imposed an absolute duty and that the defendants were in breach of that statutory duty, because although, as he found, they had given very careful consideration to the problem, they had not provided a perfect set of goggles which afforded full protection to the eyes. He awarded the plaintiff damages.

The defendants appealed.

F. W. Beney Q.C. and *Bernard Caulfield* for the defendants.

R. Marven Everett Q.C. and *D. P. Croom-Johnson* for the plaintiff.

DENNING L.J. I will ask Parker L.J. to give the first judgment.

PARKER L.J. This is an appeal by the Ford Motor Co. Ld. from a judgment of Finnemore J., given on October 28, 1954, awarding the plaintiff, who was an employee of theirs, damages for an eye injury which he suffered while at work. He was working at the time in what is called the "knockout" department at the defendants' factory at Dagenham, where castings are apparently brought along conveyor belts and have to be knocked out. Admittedly the plaintiff and the others working in that department were engaged in the process of fettling—a process in which there is a well-known risk of injury to the eye, not merely from sand and dust but from fragments of metal flying. It is one of the processes to which section 49 of the Factories Act, 1937, applies, and accordingly it became the duty of the defendants to provide the plaintiff (to use the words of the statute) with "suitable goggles . . . to protect the eyes."

On the day on which he met his accident the plaintiff was wearing goggles of a type which were referred to throughout the evidence as the "red" goggles. They were, however, apt (as indeed all goggles are, to some greater or less extent) to mist over, either from perspiration from the wearer or from condensation of the outside atmosphere, or, indeed, as one of the witnesses

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said, by the wearer's breath. While at work on this day the goggles misted over and the plaintiff then pulled them an inch or two away from the nose (they being attached by an elastic to the back of the head) sufficiently to insert a finger and thumb and clean the lenses. Most unfortunately, on this occasion, although the goggles at the time they were pulled away must still have afforded some 90 per cent. protection, and although the man had his hands up there holding the goggles and cleaning the lenses, a bit of metal, knocked off by a fellow worker presumably, hit his right eye, causing injury, which happily turned out not to be serious.

The position with regard to these goggles is stated by the trial judge in the following way, which is abundantly borne out by the evidence: "I think the fair result of the evidence, first of all, is "this—and I think it ought to be said—that there is no doubt "at all that the Ford Motor Company have given very careful "consideration to this problem. They have considered all kinds "of goggles. They have had various kinds on display. They "offer to their workmen different sorts, so that each man, within "reasonable limits, can make his own choice. Everybody knows "that men can be extremely fussy about goggles. Not only have "the men had a measure of choice, but obviously from the "evidence of Mr. Thomas—nobody challenged it, or wished to "challenge it—inquiries have been made and tests have been "made and a considerable amount of attention and experiment "has been given to this matter by the defendant company, to "try to produce a perfect set of goggles. The result of it all is "that so far nobody has produced, so far as I can see, a perfect "set of goggles."

Mr. Thomas, who had been the safety officer of the Ford Motor Company for some 11 years, was quite clearly a witness who impressed the judge, who later in his judgment said: "Mr. "Thomas summarized admirably all the points which had to be "considered, whether you should use triplex safety glass or "whether you should use perspex, whether the sides should be "opaque, such as aluminium with holes in it, or gauze, or "perspex again, and points for and against these goggles were "paraded before me. I think the result is that whatever pair "of goggles in fact you adopt there are advantages and there "are disadvantages. It may well be that, in the result, the red "pair of goggles, which the Ford Motor Company say, in spite "of the other models they have had produced, are still preferred "by the great majority of their men who work in the foundry, "are as good and as useful a pair as has been produced."

Unfortunately, as I have said, one of the disadvantages of these red goggles is that apparently they are apt to mist over to some degree more than other goggles. On the other hand, they certainly have marked advantages for fettling over other goggles which can be obtained. One of the matters, apparently, that weighed with the defendants was that if one had merely

gauze at the sides or openings which would allow considerable ventilation, there would be the grave disadvantage in that it would not afford adequate protection from flying metal. The judge, however, while at pains to point out that no sort of blame attached to the defendants, held that they were in breach of their statutory duty in that these goggles had to be rubbed clean from time to time and when this was being done they did not (as, indeed, this accident shows) afford full protection to the eyes. In other words, he has decided this case quite irrespective of any negligence or blame on the part of the defendants, but merely on the basis that the duty imposed by section 49 is an absolute duty.

It would indeed be a surprising result if employers who provided the most well-adapted goggles which the wit of man has so far produced should be guilty not only of a criminal offence but of a breach of a statutory duty. However, Mr. Everett, quite rightly, does not shrink from that and he points out that in many cases that result follows when considering other sections of the Act. He instances in particular *Galashiels Gas Co.* v. *O'Donnell.*[1] Speaking for myself, I do not think, however, that the words of section 49 drive one to such a drastic conclusion. Going by stages, "suitable" there, as Mr. Beney has pointed out, cannot mean "perfect." The word "suitable" is not apt to mean any such thing. It is a matter that can be comparative; something may be more suitable than something else. I think that in its context it must mean well-adapted for the process under consideration (because there are a number of different processes, involving different risks, albeit all to the eyes) and well adapted for the wearer in that they must fit him.

I think that the argument, if one stops there, would be quite untenable; but the words that follow must be read: the goggles are to be "suitable to protect the eyes"; and it has been urged —and I think that this influenced the trial judge—that that phrase is equivalent to and should be read as "suitable goggles "to ensure the protection of the eyes," or "suitable goggles that "will protect the eyes." Again I see no reason to read the phrase as a whole in any such sense. It seems to me that the words "to protect the eyes" are merely describing the end which is sought to be achieved by the provision of the goggles, and are not to be read as equivalent to ensuring protection. In other words, while the obligation to provide suitable goggles is quite clearly an absolute obligation, there is no absolute obligation that the goggles so provided shall ensure protection. In that respect the words are quite different from the words used in other sections of the Act which have been used to impose an absolute obligation —words such as "shall be securely fenced" in section 14.

Mr. Everett raised before this court a second point. He said that if he is wrong and that the section should be read as meaning that the duty is complied with if goggles are provided which are

[1] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

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well adapted for the process in question, yet even so the defendants failed to provide such goggles in this case. It seems to me that the difficulty in his way there is the finding of the judge, to which I have referred, which can be abundantly supported by the evidence, that in this case no blame at all attached to the defendants. The argument was really to this effect, that the fettling process on which the plaintiff was engaged was, in this case, of such a nature that the work was particularly strenuous and that in those circumstances goggles should be provided, whatever other disadvantages they had, which were properly ventilated.

It seems to me that the judge has in fact found in this case that the defendants were in no way to blame, and I see no reason for interfering with that finding. In those circumstances I would allow this appeal.

MORRIS L.J. I have reached the same conclusion. There is very little that I would desire to add to what my Lord has said, but as I have formed a view different from that entertained by the judge I would just state my reasons in a few sentences.

The question involves a consideration of the words that have been used in section 49 of the Act, and in particular the words "suitable goggles . . . shall . . . be provided to protect the eyes "of the persons employed in the process." That is the only wording which we have to consider and not any alternative wording that might possibly have been used, such as that "goggles shall be provided which will protect the eyes of the "persons employed in the process." It seems clear from the evidence that it does on occasion happen that there is either condensation caused by the atmosphere, or that, as a result of the perspiration of the wearer of goggles, there may be misting of the goggles. To that extent there may be a criticism of the goggles which the defendants provided, but a criticism only in this limited sense that, as the defendants themselves acknowledge, the goggles are not perfect goggles for the reason that such misting does at times occur.

The judge summarized the way in which the matter was put by the defendants in these sentences of his judgment: "On the "other side it is said 'Well, in the sense that suitable goggles "'mean perfect goggles, then these goggles are not perfect, "'because there are times when the wearer has to do this "'cleaning. It is a very short time indeed. If he does it "'carefully with a piece of rag and uses his hands sensibly he "'can still protect his eyes, because at that moment, of course, "'he has got two hands and he has not got to look at his work "'or carry out any operation, and you ought to construe the "'word "suitable" in a reasonable sense as meaning goggles "'which are suited to this kind of work, which are suited to the "'man who wears them, and the mere fact that from time to "'time he removes them altogether is something which does not

" ' prevent them being still described as " suitable." ' " In that passage various points are indicated. It has been said by the defendants that the occurrence that gave rise to this litigation was an extraordinary mischance. It has further been said that when somebody finds occasion to wipe goggles because of misting, it could be done by merely withdrawing the goggles a short distance from the brow, by pulling the elastic, and that the clearing could be done while protecting the eyes completely with the two hands which are then free for that operation.

In a later part of his judgment the judge said: " Now, it can " be said—this is the whole point—that if goggles are provided, " however excellently they are designed (and I say not a word " against them) owing to the particular kind of work which was " being done by the plaintiff, and they had to be removed some- " times, thereby leaving the eyes unprotected, could those " goggles, within the meaning of section 49, be said to be suit- " able goggles to protect the eyes of the person, in this case the " plaintiff, employed in the process to which the section of the " regulations has been applied?" I quote that sentence because the judge is saying that he has not a word against the design of these goggles. He uses the words " however excellently they " are designed (and I say not a word against them)." It seems to me that when the goggles became misty, on the judge's finding if they had remained on they were still goggles that would protect the eyes of the wearer though he could not continue to do his work as he would wish to do it while that misting remained. Because of the layout and planning of the work there might in this case have been some difficulties in withdrawing far from the work in order to clear the goggles some distance away; but the goggles as such, according to the judge's finding, remained goggles that would protect the eyes. The judge really held that the goggles supplied to the plaintiff were goggles that fitted him; they were goggles that were suitable when worn to protect the eyes; and subject only to the question of misting, they were goggles which were suited to the kind of work.

It seems to me that the question becomes ultimately one of fact whether the goggles supplied to the plaintiff were goggles that were suitable to protect the eyes in the process upon which he was employed; and, on the judge's findings, notwithstanding that some misting could and did occur, I do not think it was shown that there was a breach of this section. I would allow the appeal.

DENNING L.J. I agree with both the judgments of my Lords and have nothing to add. The result is that the appeal will be allowed.

Appeal allowed.

Solicitors: *A. E. Wyeth & Co.; Pattinson & Brewer.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

Jan. 14. 1955

Lord Goddard C.J., Cassels and Lynskey JJ.

*BURSTED PROPERTIES LD. *v.* DENTON URBAN DISTRICT COUNCIL.

Public Health—Drainage—Garden path—Leading to front and back doors of dwelling-house—Whether "passage giving access to a "house"—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 56 (1).

By section 56 (1) of the Public Health Act, 1936, "If any court "or yard appurtenant to, or any passage giving access to, a house "is not so . . . flagged, asphalted, or paved . . ." as to allow of satisfactory drainage the local authority may by notice require the owner of the house to remedy the defect.

A local authority served a notice under section 56 (1) on the owners of a dwelling-house requiring them to flag, asphalt or pave a path leading from the street to the front and back doors of the house. Part of the path crossed the front garden and part of it was bounded on one side by the house and on the other by a grass verge leading to the boundary fence. A court of summary jurisdiction dismissed the house-owners' appeal against the notice, but quarter sessions allowed their appeal, holding that the notice was not justified by the section, as in their opinion the path was not "a passage giving access to a house" within the meaning of section 56 (1). On appeal by the local authority:—

Held, that the words "any passage giving access to a house" in section 56 (1) were intended to refer to a passage in the nature of a court and that the word "passage" was not apt to describe the path concerned in the present case. Accordingly, quarter sessions had come to a correct decision on the facts found and the appeal must be dismissed.

CASE STATED by the Appeal Committee of Lancashire quarter sessions.

On January 22, 1954, Bursted Properties Ld., owners of dwelling-houses at Denton, Lancashire, appealed, pursuant to section 290 of the Public Health Act, 1936, to a court of summary jurisdiction against a notice served on them by the Denton Urban District Council under section 56 (1) [1] of the Act requiring them to execute certain works, namely, to flag, asphalt or pave the path leading from the street to the front and back doors of a dwelling-house at Fairbourne Road, Denton. The company contended that the notice was not justified by the terms of the subsection. The court of summary jurisdiction dismissed their appeal and against that decision the company appealed to quarter sessions.

[1] S. 56 (1) of the Public Health Act, 1936, provides: "If any court or "yard appurtenant to, or any passage "giving access to, a house is not so "formed, flagged, asphalted, or paved, "or is not provided with such works "... as to allow of the satisfactory "drainage of its surface or subsoil to "a proper outfall, the local authority "may by notice require the owner of "the house to execute all such works "as may be necessary to remedy the "defect."

The appeal committee found the following facts. The path leading from the street to the front and back doors of the house was made of asphalt, but was not formed, flagged, asphalted or paved or provided with such works as to allow of the satisfactory drainage of its surface or subsoil to a proper outfall. The part of the path lying between the front gate and front door crossed a garden some 30 feet wide and was flanked on each side by flower beds while the part which ran from the front to the back door of the house was bounded on one side by the house and on the other by grass and flower beds reaching to the boundary fence. The path, to which access from the street was gained through a gate, provided the only means of access from the street to the front and back doors of the house. Paths similar to the path in the question were normally described as "paths" and not as "passages."

The appeal committee, being of opinion on the facts found that the path was not "a passage giving access to a house" within the meaning of section 56 (1), held that the notice served by the district council was not justified, and allowed the appeal. The district council appealed to the Divisional Court.

W. D. T. Hodgson for the urban district council.
L. J. Solley for the property company.

The following cases were cited in argument: *Oakley* v. *Merthyr Tydfil Corporation* [2]; *Reg.* v. *Goole Local Board* [3]; *Chatterton* v. *Glanford Rural District Council.* [4]

LORD GODDARD C.J. read section 56 (1) of the Public Health Act, 1936, and continued: If a notice is served on the owner of a house and he desires to dispute it, he can appeal to the court of summary jurisdiction and from that court there is an appeal to quarter sessions. If quarter sessions state a case it comes to this court. That is rather a long chain of court proceedings to decide a comparatively small point, but no doubt the point is of some importance because it would appear that the Denton Urban District Council is serving notices on several owners of small property in front of which there is what is commonly called a front garden—a little enclosure between the public highway and the front door.

In the present case the council has regarded the way by which a person goes through his front garden to his front door as a passage and have called on the company which owns several of these houses to flag, asphalt or pave those passages. The justices held that they were passages. On appeal, quarter sessions set out all the facts and said that in their opinion they were not passages. Among other things they say: "Paths similar to "the said path are normally described as 'paths' and not as

[2] [1922] 1 K.B. 409; 38 T.L.R. 60.
[3] [1891] 2 Q.B. 212.
[4] [1915] 3 K.B. 707.

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" ' passages.' " In fact, this is a path over the front garden of the house. Section 56 (1) provides: " If any court or yard " appurtenant to, or any passage giving access to, a house is " not so formed. . . ." Of course, if there is a court or yard appurtenant to a house, it is within the curtilage; it would pass with the grant of a house and its appurtenances.

It has not been suggested here, and Mr. Hodgson does not feel inclined to argue, that a court or a yard would include a garden and there is no reason why it should. If there is a court or yard appurtenant to a house where, for example, cars may be washed, no doubt it is desirable that the water should be made to drain away, especially if the court or yard is flagged or made hard in some form or another. Different conclusions might apply to a mere path, but the words are not: " . . . any court or yard " or passage appurtenant to a house "; they are " any passage " giving access to a house." I think the section aims at a passage in the nature of a court. One knows perfectly well that in towns there are passages down which people go to reach houses. I do not think the word " passage " is apt to describe what the council wish to have paved here, which is merely the way a man may walk from his front gate to his door and round the side of the house to the back door. At any rate I am not prepared to differ from the conclusion to which quarter sessions came and, therefore, I would dismiss this appeal.

CASSELS J. I agree.

LYNSKEY J. I agree.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for James Smith (Clerk of Denton Urban District Council); Capel Cure & Clarke.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

1955
Jan. 18.

Lord Goddard C.J., Cassels and Streatfeild JJ.

* BAXTER *v.* KELDON.

Gaming—Betting—Ready-money betting—Receiving money in street on behalf of bookmaker—Defendant charged with assisting in conducting a betting business contrary to section 3 of the Betting Act, 1853—Defendant guilty of offence under section 4—No offence committed under section 3—Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3, 4.

Sections 3 and 4 of the Betting Act, 1853, are quite distinct, for section 3 imposes a maximum penalty of £100 or a sentence of six months' imprisonment upon the person who opens a betting house, keeps it, or permits it to be kept and assists in conducting the business there, while section 4 imposes a less severe penalty of £50 or three months' imprisonment upon a person acting for or on

behalf of the owner or occupier of a betting house, or in any manner assisting in conducting the business there " who shall receive directly " or indirectly any money " in respect of betting.

Where, therefore, a bookmaker's runner acting on behalf of a person who conducted the business of a betting house received money and betting slips in the street and took them to the office to be sorted and recorded, was charged with assisting in conducting the business contrary to section 3 of the Act:—

Held, that since section 4 created a substantive offence upon a person doing the very acts which the defendant had done, he had committed an offence under that section and not under section 3, and he should not, therefore, have been rendered liable to the more severe penalty by being charged with assisting in the commission of an offence under the latter section.

Observations of Lord Maugham L.C. in *Milne* v. *Commissioner of Police for the City of London* [1940] A.C. 1, 13; 55 T.L.R. 898; [1939] 3 All E.R. 399 applied.

CASE STATED by the metropolitan magistrate sitting at Lambeth.

An information was preferred against the defendant that he on divers days between and including October 14 and 29, 1953, did assist in conducting the business of a certain place situate at 354 Kennington Road, S.E.11, which was then being used by one Thomas Brindle for the purpose of money being received on his behalf as the consideration for an undertaking to pay thereafter money on events and contingencies relating to horse or dog races, contrary to section 3 [1] of the Betting Act, 1853.

The following facts were found by the magistrate: During the whole of the relevant period one Thomas Brindle, a brother-in-law

[1] Betting Act, 1853, s. 1: " No " house, office, room, or other place " shall be . . . used for the purpose " of . . . betting . . . or for the pur- " pose of any money or valuable thing " being received by or on behalf of " such owner, occupier, keeper, or " person . . . as or for the considera- " tion for any . . . undertaking . . . " to pay . . . thereafter any money " . . . on any event or contingency " of or relating to any horse race. " . . ."

S. 3: " Any person who being the " owner or occupier of any house, " office, room, or other place, or a " person using the same, shall open, " keep or use the same for the pur- " poses hereinbefore mentioned, . . . " and any person who being the " owner or occupier of any house, " room, office, or other place, shall " knowingly and wilfully permit the " same to be opened, kept, or used by " any other person for the purposes " aforesaid . . . and any person " having the care or management of " or in any manner assisting in con- " ducting the business of any house, " office, room, or place opened, kept, " or used for the purposes aforesaid " . . . shall, on summary conviction " . . . be liable to forfeit . . . £100 " . . . or . . . may be committed to " . . . gaol . . . for . . . six calendar " months."

S. 4: " . . . any person acting for " or on behalf of any such owner or " occupier, or any person having the " care or management or in any " manner assisting in conducting the " business . . . who shall receive, " directly, or indirectly, any money or " valuable thing as a deposit on any " bet on condition of paying any sum " of money . . . on the happening of " any event or contingency of or " relating to a horse race or any " other race . . . or as or for the con- " sideration for any . . . undertaking " . . . to pay or give thereafter any " money . . . on any such event or " contingency, . . . shall, upon sum- " mary conviction . . . forfeit . . . " £50 . . . or . . . may be committed " to . . . gaol . . . for . . . three " calendar months."

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of the defendant, was conducting a betting business at 354 Kennington Road, S.E.11, and in the course thereof was using that place for the purpose of money being received on his behalf as the consideration for an undertaking to pay thereafter money on events and contingencies relating to horse and dog races. The office of the business was at 354 Kennington Road. Money and betting slips were accepted on Brindle's behalf by his agents at a number of different sites (known as " pitches ") in the streets, brought to the office and there sorted and recorded in a set of books. On October 14, 15, 16 and 17, 1953, the defendant was at one of the pitches, with two other men, for between 1½ and 2 hours, leaving on each occasion a few minutes after 2 p.m. At the pitch on each occasion the defendant received from men money and betting slips. At other times when he was not present one of the other men would and did accept money and betting slips. In accepting the money and betting slips the defendant was acting on behalf of Brindle and in the course of the latter's business. On leaving the pitch the defendant drove on each occasion in his van to the office for the purpose of delivering the money and betting slips to Brindle. He went inside the office and remained there for periods of 15 minutes and upwards. Besides those occasions the defendant was at the office on October 28 and 29, 1953, arriving in his van a few minutes after 2 p.m. The defendant never took any part in the work done inside the office.

It was contended by the prosecution that by assisting in the carrying on of Brindle's business in that manner the defendant was assisting in conducting it.

It was contended by the defendant that in accepting money and betting slips on behalf of Brindle he had offended against section 4 of the Betting Act, 1853, and not against section 3 of the Act.

The magistrate was of the opinion that the contention of the defendant was right and accordingly he dismissed the information.

The prosecutor appealed.

H. F. Cassel and *E. J. P. Cussen* for the prosecutor.

Mervyn Griffith-Jones for the defendant.

The following cases were referred to in argument: *Milne* v. *Commissioner of Police for the City of London* [2]; *Jenks* v. *Turpin* [3] and *Stoddart* v. *Hawke*.[4]

LORD GODDARD C.J. referred to the facts and continued: On those facts the magistrate held, on the submission being made to him, that the information failed because the defendant should have been charged with an offence against section 4 and not against section 3.

[2] [1940] A.C. 1; 55 T.L.R. 898; [1939] 3 All E.R. 399.

[3] (1884) 13 Q.B.D. 505.

[4] [1902] 1 K.B. 353; 18 T.L.R. 23.

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This case is a striking instance of the curiously unsatisfactory state the betting laws are in. No blame attaches to the police for having brought this prosecution under section 3, but, in my opinion, the point taken by the defendant, who has really no merits, is perfectly good. If he has committed an offence, it is under section 4 and not under section 3.

The point arises in this way: Under the Betting Act, 1853, it is an offence to keep a house for, to put it concisely, ready-money betting, and section 3 imposes a maximum penalty of £100 or six months on the owner or occupier of a betting house. [His Lordship read section 3 and continued:] That is with reference to the person who opens the betting house, keeps it, or permits it to be kept and assists in conducting the business there.

What the defendant did was to act as the bookmaker's runner in the streets; he took money from people who wanted to bet with the betting house keeper, that is, ready-money betting. But section 4 of the Act provides: "Any person . . . acting for or on "behalf of any such owner or occupier . . ."—and it is found that the defendant was acting on behalf of the owner or occupier—"or in any manner assisting in conducting the business thereof, "who shall receive, directly, or indirectly, any money . . . as a "deposit on any bet . . ." shall be liable to a penalty, not of £100 or six months' imprisonment, as under section 4, but £50 or three months. Where an Act creates a substantive offence upon a person doing a certain thing, and the evidence shows that a defendant did that very thing, it seems to me that by all the canons of construction he must be prosecuted for that offence, and the prosecution must not, by inference, try to get him made liable to a more severe penalty by saying that, in so doing that thing he in some way aided and abetted—because that is what the argument comes to—the commission of an offence under the previous section.

The matter is put beyond doubt by the speech of Lord Maugham L.C. in *Milne* v. *Commissioner of Police for the City of London*,[1] who analysed the two sections with great care, specifying the categories of persons who could commit an offence under section 3. Then he dealt with section 4 and said[2]: "Some points on these somewhat artificial provisions are worth "noting. Section 1 deals with the user of the place for one of "two defined purposes, and the user is made a common nuisance "and illegal. The sanctions are in sections 3 and 4 and they "both refer to the user of the place for one or other of the "purposes mentioned; but the sanctions are more severe under "section 3 than under section 4. It may be noted in passing that "under section 3 the persons mentioned in six of the categories "above mentioned (the owner, occupier, keeper, the person using, "the person managing, and the person conducting the business)

[1] [1940] A.C. 1, 8; 55 T.L.R. 898; [1939] 3 All E.R. 399.

[2] [1940] A.C. 13.

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" are made liable, but it omits the persons procured, and the " persons employed on behalf of the owner, etc., and the agent " of the manager. Section 4 inflicts the lower penalty on all the " nine classes or categories who receive money, etc., as a deposit " or on a promise to pay, or who give an acknowledgment or " receipt."

That seems to me to show that the two sections are quite distinct. If the acts which are relied on in the present case as a breach of the statute, the acts of receiving money on behalf of the owner of the house, are proved, then the defendant has committed an offence under section 4 and not under section 3. For these reasons I think that the magistrate was right in the decision to which he came and this appeal is dismissed.

CASSELS J. I agree.

STREATFEILD J. I agree.

Appeal dismissed.

Solicitors: *Solicitor for the Metropolitan Police; Henry I. Sydney & Co.*

J. F. L.

[CHANCERY DIVISION.]

1954
Nov. 12, 16.

Harman J.

* *In re* EAST YORKSHIRE GRAVEL CO. LD.'S APPLICATION.

[1952 E. 569.]

Mines and Minerals—Working facilities—Lease—Notice to quit at termination of lease—Lease of beds of gravel and sand under two fields—Application to Ministry for right to work made several days before expiration of lease—Matter later referred to High Court—"Without the concurrence of two or more persons"—"Having an "interest in them"—Mines (Working Facilities and Support) Act, 1923 (13 & 14 *Geo.* 5, *c.* 20), *s.* 1 (1).

By a mining lease, dated February 15, 1932, certain quarries and beds of gravel and sand under two fields, which formed part of a farm, were demised to tenants for a period of 20 years.

On July 24, 1951, notice to quit and deliver up possession on February 15, 1952, the date of the expiration of the lease, was given by the landlords to the tenants.

Several days before the expiration of the term the tenants (a limited company to whom the lease had been assigned) applied to the Ministry of Fuel and Power for a grant of the right to continue to work the minerals, and the Ministry referred the matter to the High Court.

An originating summons was taken out on March 21, 1952, by the company, in which the court was asked to confer on the applicants a right to work the minerals.

On July 9, 1954, an application was made by summons for the determination of the following preliminary questions of law:

(1) Whether on the true construction of section 1 (1) of the Mines (Working Facilities and Support) Act, 1923, and on certain agreed facts (a) the minerals were not capable of being worked "without "the concurrence of two or more persons" within the meaning of subsection (1) (*a*) of section 1 of the Act, and (b) the applicants were a person "having an interest" in the said minerals within the meaning of that section:—

Held, that (1) there had been no time when the minerals were not capable of being worked without the concurrence of two persons; as before the lease ended they could be worked without interference by the applicants, and on the termination of the lease they could be so worked by the landlords; (2) the "interest" which by section 1 (1) an applicant must possess must be a proprietary interest, vested at the time when the order granting the right to work is to be made in the applicant as owner in fee simple, or as lessee of the minerals, or as the holder of a licence not presently revocable to work the minerals and carry them away; whereas the applicants' lease had determined before the hearing of the summons.

In re West of England Road Metal Co. Ld. [1936] 2 All E.R. 1607 discussed.

ADJOURNED SUMMONS.

By a lease dated February 15, 1932, there was demised to the lessees for a period of 20 years from February 15, 1932, "all the quarries strata seams and beds of gravel and sand which "may be got by quarrying and excavations from the surface and "open to the daylight and not by underground workings within "or under the lands . . . forming part of the High Stonehills "Farm situate in the Parish of Bawnston in the County of "York and comprising fields 99 and 100 on the Ordnance Sheet "for the said parish."

Pursuant to the lease the lessees entered on the said fields and carried out the operations of winning and working the gravel and sand in accordance with the terms of the lease.

On March 21, 1934, the lease was taken over by the applicant company by arrangement with the lessors but without formal assignment, and the company continued to carry on the business and operations of winning and working the minerals.

In November, 1947, the company purchased freehold a portion of the field No. 100 amounting to one acre in extent.

On July 24, 1951, the Glendon Estates of Harrogate (who had recently become the owners of the High Stonehills Farm) served on the company what purported to be a notice to quit the land comprised in the lease (less the one acre above referred to) on February 15, 1952.

On February 7, 1952, an application was made to the Ministry of Fuel and Power, under the Mines (Working Facilities and Support) Act, 1923, on behalf of the company for a grant of the right to work the minerals, and on March 14 the Ministry gave notice under R.S.C., Ord. 54, r. 4, that the matter was to be referred to the High Court.

On March 21, 1952, a summons was taken out by the company in which it was stated that "whereas there is a danger

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" of the said minerals being left permanently unworked by reason " of them being comprised in and/or lying under land which is " subject to a lease and/or which said minerals are not capable " of being worked without the concurrence of two or more persons, " a right to work the said minerals may be conferred on [the " company] being persons having an interest in them, together " with such ancillary right, or rights, as may be reasonably " necessary for this said purpose, pursuant to the provisions of " the above mentioned Mines (Working Facilities and Support) " Act, 1923, and that an order shall be made giving directions " as to the procedure to be followed before the summons is set " down for hearing in court. This application is made under the " Mines (Working Facilities and Support) Act, 1923, ss. 1, 3, 4 " and 5."

On July 9, 1954, an application was made by the company by summons for an order under R.S.C., Ord. 34, r. 2, for the preliminary argument of points of law, and on July 15, 1954, an order was made for the preliminary argument of the points of law, namely, " whether on the true construction of sections 1 [1] " and 3 of the Mines (Working Facilities and Support) Act, 1923, " and on the agreed facts set forth in the schedule hereto— " (a) the minerals the subject-matter of the application herein " are not capable of being worked without the concurrence of " two or more persons within the meaning of subsection (1) (*a*) " of section 1 of the said Act; (b) the applicants are a person " having an interest in the said minerals within the meaning of " section 1 of the said Act."

H. Edmund Davies Q.C., Raymond Walton and *Desmond Neligan* for the applicant company.

John W. Mills for the landlords.

Cases referred to in argument: *In re West of England Road Metal Co. Ld.*[2]; *In re Nunnery Colliery Co.'s Application*[3]; *Campbeltown Coal Co.* v. *Duke of Argyll*[4]; *Job* v. *Potton.*[5]

HARMAN J. stated the facts and continued: Before the court would be able to determine whether the order asked for by the

[1] Mines (Working Facilities and Support) Act, 1923, s. 1 (1): " Where " there is danger of minerals being " left permanently unworked—(*a*) by " reason of the minerals being com- " prised in or lying under land which " is or has been copyhold land, or " land subject to a lease exception " reservation restriction covenant or " condition, or otherwise not being " capable of being worked without the " concurrence of two or more persons; " (*b*) by reason of the minerals being " owned in such small parcels that " they cannot be properly or con- " veniently worked by themselves; a " right to work the minerals may be " conferred in the manner and sub- " ject to the provisions hereinafter " appearing on any person having an " interest in them, or, in the case of " minerals owned in small parcels, in " minerals adjacent to them, who is " desirous of working them either by " himself or through his lessees."

[2] [1936] 2 All E.R. 1607.

[3] [1924] W.N. 257.

[4] 1926 S.C. 126.

[5] (1875) L.R. 20 Eq. 84.

originating summons should be granted, a large body of evidence would have to be considered, including expert testimony about the state of the sand and gravel trade, and whether it would be in the national interests that the working should be continued; and it appears to have occurred to the parties that a short cut could be taken, because it was the respondents' contention that, even assuming that the applicants proved that the other requirements of the Mines (Working Facilities and Support) Act, 1923, were satisfied, nevertheless the applicants were not persons to whom any grant could be made, because they were not qualified as grantees. The broad grounds of the objections on the part of the respondents were, first, that the applicants had no such interest in the quarries or the ground as would support an application, and, secondly, that this was not a case where the concurrence of two or more persons was required for the working of the quarries, and, consequently, a condition precedent had not been fulfilled. The parties, therefore, agreed the questions which I am asked to answer today under R.S.C., Ord. 34, r. 2, which empowers the court, if it be of the opinion that there is a question of law convenient to be decided before evidence is given, to refer that question of law for trial as a kind of preliminary point. It is much the same as a proceeding by way of demurrer. I have never seen this kind of procedure applied to proceedings by originating summons before, but I see no reason, ex facie, why that should not be done, because an originating summons is a "cause or matter" within R.S.C., Ord. 34, r. 2, as much as is an action by writ. I think, therefore, although preliminary points of this kind often lead to trouble, that the procedure is justified on this occasion.

[His Lordship stated the questions which were to be determined, read section 1 (1), and continued:] Therefore, before a grant can be conferred under section 1, an applicant has, first, to prove that there is a danger of minerals being left permanently unworked. For the purposes of the present proceedings I must assume that this first requirement can be satisfied. An applicant then has to show that the danger exists for one of the reasons set out in section 1 (1). The first two grounds stated in paragraph (a) do not apply in the present case, and, so far as I know, paragraph (b) does not arise, but it is of interest in connexion with a case to which I shall refer later. The applicants in the present case have, therefore, to rely on the last part of paragraph (a): "... or otherwise not being capable of being worked "without the concurrence of two or more persons."

The first point which I have to consider is the meaning of the words "without the concurrence of two or more persons," and the second point is the meaning of the words "having an interest "in them," in the latter part of section 1 (1).

Section 3 of the Act empowers what are called ancillary rights to be granted to a person already having some rights to work minerals which are hampered. Section 4 (1) lays down

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limitations, and reads: "Neither the right to work minerals nor "an ancillary right shall be granted under this Act unless it is "shown that it is not reasonably practicable to obtain the right "in question by private arrangement for any of the following "reasons: . . . (*d*) that the person with power to grant the right "unreasonably refuses to grant it or demands terms which, "having regard to the circumstances, are unreasonable."

For the present purpose I shall assume, without deciding the point, that section 4 (1) (*d*) applies. Section 5 shows the way in which an application under the Act is to be made. Section 5 (1) reads: "Any person having an interest in any minerals "who is desirous of working, either by himself or through a "lessee, those minerals, or any adjacent minerals, and who "considers that the circumstances are such that a right to work "the minerals can be granted under this part of this Act, may "send to the Board of Trade an application for the grant of such "a right." For "Board of Trade" we now read "Minister of "Fuel and Power." An application was made to the minister under that subsection. Section 5 (4) reads: "The Board [now "the Minister] shall consider the application, and shall, unless "after communication with such other parties interested (if any) "as they may think fit they are of opinion that a prima facie "case is not made out, refer the matter to the Railway and Canal "Commission."

By the Railway and Canal Commission (Abolition) Act, 1949, section 1, the matter is to be referred to the High Court. Under a proviso to section 5 (4) of the Act of 1923 it was essential for the Ministry to communicate with the respondents, who had refused to grant the right, before referring the application to the court. As, apparently, the Minister referred the matter to the court, I must assume that he did not think that no prima facie case was made out, and that he did communicate with the respondents.

Section 6 (1) of the Act of 1923 reads: "Where a matter is "so referred to the Commission, the Commission, if satisfied "that the requirements of this Part of this Act are complied "with in the case of the applicant, and that it is expedient in "the national interest that the right applied for should be granted "to him, may, by order, grant the right on such terms and "subject to such conditions, and for such period, as the Com-"mission may think fit. . . ."

Section 6 (2) provides for compensation to the owner. Section 6 (3) provides: "In determining the duration of any right to be "granted the Commission shall have regard to the time reason-"ably necessary to enable the minerals to be fully worked, and "where the applicant's interest in any minerals in virtue of "which he is entitled to make the application is an interest as "lessee, shall have regard to the duration of such interests."

In 1926 the position was altered so far as concerned coal mining, and, by the Mining Industry Act, 1926, s. 13, a person

who wished to search for coal could have rights granted to him by the Commission without proving that he had any interest in the subject-matter. That is only of interest as showing that in the case of minerals such as sand and gravel, the applicant must have an interest in the minerals, while, in the case of certain other minerals he does not have to have an interest. Precisely what kind of interest the applicant is required to have is not stated.

The first point is about concurrence. The applicants have to show, under section 1 (1) (*a*) of the Act of 1923, that the minerals are "not capable of being worked without the concurrence of "two or more persons." I do not think that I need to decide whether "not . . . capable of being worked" means that physically the minerals cannot be worked, or that lawfully they may not be worked. The words "not . . . capable of being "worked without the concurrence of two or more persons" mean that there must be someone able and willing to work, and someone else who is able to prevent the working, and who is not willing to give his assent or to concur. Not more than two persons are needed, because the words in section 1 (1) (*a*) are "two or more "persons," but there must be, at least, two persons, and each must, vis-à-vis the other, be in a position to work the coal only with the concurrence of that other. That is illustrated by *Campbeltown Coal Co.* v. *Duke of Argyll*,[1] a decision of the Railway and Canal Commissioners in Scotland, cited in a note to section 1 (1) of the "Act of 1923" in Halsbury's Statutes of England (first ed.), vol. 12, p. 182. The note begins with these words: "The section applies as between a landlord and a tenant "of minerals." I think that it is now conceded in the present case, although it was not conceded when the hearing began, that that statement is right, subject to the limitation that there must be something in the demise to the tenant which prevents him from working the minerals without the assent or the concurrence of the landlord, who is the other person concerned. In *Campbeltown Coal Co.* v. *Duke of Argyll*[1] that was exactly the position. The lessee had a lease of certain mines, but the lessor had obtained an interdict from the Scottish courts restraining him from working the minerals under a farmhouse, and the lessee applied for permission to work them under section 1 of the Act of 1923. That was, obviously, a case in which the concurrence of two persons was required. The tenant could not work without the landlord's leave because of the interdict, and the landlord could not work because he had demised the subject-matter to the tenant and, therefore, was not in possession of the mines. In the present case it is contended on behalf of the applicants that the tenants (the applicants) were not in a position to work the minerals without the concurrence of the landlords (the respondents), because when the lease ran out the tenants could not

[1] 1926 S.C. 126.

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continue to work unless the landlords would allow them to do so, and that, therefore, section 1 (1) of the Act of 1923 applied.

The respondents, in answer to that contention, submitted that, while it was true that the applicants could not work the minerals without the concurrence of the respondents after the lease had expired, the respondents could do so without the concurrence of the applicants; that, until the lease expired, the applicants could work the minerals without the concurrence of the respondents; and that, therefore, there never was a time when the applicants and the respondents had to concur in order that the minerals should be capable of being worked. That seems to me to be a good point, and the answer to this case. I do not think that there was, in the circumstances stated in the schedule to the order of July 15, 1954, a time when the minerals were incapable of being worked without the concurrence of two persons. Before the lease ended the applicants could work them, and were working them, and after the lease ended the respondents could work them and the applicants had no right to interfere.

The second question which I have to determine is whether the applicants were a "person having an interest" in the minerals, within the meaning of section 1 (1) of the Act of 1923. Under section 5 (1) the only persons who may apply for rights are "persons having an interest in any minerals." When the application was made to the Minister in this case the applicants, undoubtedly, had an interest in these minerals. It is true that they were only interested in them for another week, but they had an interest, and it seems to me, therefore, that they were qualified to make the application. When one turns back to section 1, however, to look for the persons on whom the right to work may be conferred, one finds that they are persons "having "an interest in them." In them? In what? In the minerals. Consequently the court, when considering possible grantees of this right, is confined to persons having an interest in the minerals. It is quite obvious that, after the application under section 5 (1) was made, at least a week would have to elapse before the matter could be adjudicated on by the court, and the court would come to the conclusion, when considering who was the person on whom to confer the rights, that the applicants had no proprietary rights in the minerals and, therefore, were not eligible for a grant of rights if, as is contended by the respondents, "interest," in section 1 (1) (*a*), must mean a proprietary interest of some sort.

A proprietary interest, in my judgment, may be of, at least, three kinds, that is to say, one may be the owner of the minerals in fee simple, or the lessee of the minerals, or a person having a licence not presently revocable to work the minerals and carry them away. It is clear that one of the people having an interest is the lessee, because section 6 (3) reads: ". . . where the "applicant's interest in any minerals in virtue of which he is "entitled to make the application is an interest as lessee . . ."

It was submitted by the respondents that that, or some similar interest, was necessary before a person could show that he was qualified to have a right granted to him under Part I of the Act of 1923. The answer of the applicants was that it was enough to have had an interest at the date when the original application was made. That contention, as I have already said, seems to me to be incorrect. Secondly, they contended that an interest might be a commercial interest, namely, to have a true business reason for working, and they went on to say that they had a commercial interest in the quarries, because they had their machinery installed on the land and they had been working the minerals and carrying on their established business.

Is that enough? I should have thought not. I should have thought that "an interest," within the meaning of section 1 (1) (*a*), must mean such an interest as the law will recognize. In *In re West of England Road Metal Co. Ld.*,[2] a case before the Railway and Canal Commission in 1936, such an interest, however, was not shown. In that case the applicants were a quarrying company, who wished to acquire the right to extend their quarry over certain adjacent fields. They had no proprietary interest in the adjacent fields or in the minerals under them, and so they were not qualified in that way, but they could have qualified by being interested in adjacent minerals if it were true that the minerals which were the subject of the application were "owned "in such small parcels that they [could] not be properly or "conveniently worked by themselves." That, however, was not proved in the case. The point was never taken, I do not know why. Counsel of the greatest eminence in matters of this sort were employed, and one would have expected every point to be taken that could be taken. That seems to me to be very far from a decision that a proprietary interest is not necessary. The decision may have been made per incuriam, or there may have been circumstances which the reporter failed to notice, which made such a point untenable, or not worth taking in that particular case, and I cannot regard *In re West of England Road Metal Co. Ld.*[2] as a case which indicates to me that I should take a view of the nature of the interest different from that which I should have gathered from the Act itself.

There are some expressions of opinion in textbooks that these interests must be proprietary interests. There is such a statement in Bowen on the Coal Act, 1938, p. 287, in a note to section 1 of the Mines (Working Facilities and Support) Act, 1923. See also Bamber on the Mines (Working Facilities and Support) Act, 1923, p. 8. There is, however, no authority on the matter which has been brought to my attention. As a matter of construction, however, that is what seems to me to be the true view, more especially as the Mining Industry Act, 1926, s. 13, so far as coal is concerned, and the Mines (Working Facilities) Act, 1934, so

[2] [1936] 2 All E.R. 1607.

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far as certain other minerals are concerned, deliberately cut out the necessity of an applicant having an interest for the purposes of those minerals.

The minerals with which we are concerned in the present case are not in either of those categories, and I think that counsel for the respondents is, therefore, right in saying that it is still necessary to satisfy the conditions in section 1 (1) of the Act of 1923, and one of those conditions is that an applicant must have a proprietary interest in the minerals, or, in a small parcels case, in the adjacent minerals. In the present case the applicants, in my judgment, have neither of those interests, because by the time when the application comes before the court the applicants' estate and interest have ended and they are trespassers if they enter on the land. For those reasons it seems to me that both the preliminary points should be answered in the way that the respondents suggest.

Declaration accordingly.

Solicitors: *Smith & Hudson for Mainprize, Rignall & Whitworth, Hull; Stafford Clark & Co. for Armitage, Speight & Ashworth, Leeds.*

J. L. D.

[CHANCERY DIVISION.]

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Nov. 2.

Wynn-Parry J.

*PORTMAN BUILDING SOCIETY *v.* GALLWEY AND ANOTHER.

[1953 P. 873.]

Mortgage—Receiver—Corporate body—Limitation of action—Acknowledgment — Action against sureties 13 *years after original default of mortgagor company—Appointment of bodies corporate as successive receivers—Periodical sums paid by receivers to mortgagees —Limitation Act pleaded by sureties—Appointment of receivers a nullity—Receivers not agents of mortgagor—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 109 (2)—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 306 (1)—*Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 366.

Limitation of Action.

In 1936 premises were mortgaged by a company to the plaintiffs, and in 1939 the company defaulted with the result that sureties (party to the mortgage deed) became liable to pay moneys due. Thereafter the rents and profits were paid to corporate bodies appointed (by other mortgagees) as receiver.

In 1953 the plaintiffs brought an action against the sureties to recover sums due under their covenants as sureties. The defendants pleaded, inter alia, the Limitation Act, 1939; they contended that periodical payments made to the plaintiffs from time to time on behalf of the receivers were not acknowledgments within the Act, as an appointment of a corporate body as receiver was a nullity by virtue of section 306 (1) of the Companies Act, 1929 (now section 366 of the Companies Act, 1948), so that the ostensible

receivers were not the agents of the mortgagors under section 109 (2) of the Law of Property Act, 1925:—

Held, dismissing the action, that the effect of section 306 (1) of the Companies Act, 1929, was to prevent a body corporate from being the receiver of the property of a company; so that any attempt to appoint a body corporate as such was a nullity, and failed to create any contractual relations between the body corporate in question and the company over whose property it purported to be appointed receiver.

ACTION.

By a mortgage deed dated September 28, 1936, a company mortgaged certain premises to the plaintiffs, the first defendant and a person of whom the second defendant was personal representative being joined as sureties. There was in existence a prior mortgage of the premises in favour of other mortgagees dated February 25, 1936, which provided for the immediate appointment of a receiver, and a firm of solicitors had been appointed to act as such.

By a deed executed simultaneously with the mortgage of September 28, to which the prior mortgagees, the mortgagors and the plaintiffs were parties, the prior mortgage was postponed to the plaintiffs' mortgage. In 1939 the mortgagees defaulted in their payments under the plaintiffs' mortgage, so that in February, 1940, the sureties became liable to pay the moneys due. The mortgagor company was dissolved on February 15, 1949.

In 1938 the prior mortgagees appointed a corporate body to act as receiver, and in 1941 another corporate body was appointed as receiver in their place. Throughout the relevant period, until some date after the dissolution of the mortgagor company, the actual collection of the rents and profits of the mortgaged premises continued to be carried out by the solicitors as agents for the receivers, and such rents and profits were from time to time paid to the plaintiffs.

In 1953 the plaintiffs brought an action against the defendants to recover sums due under their covenants as sureties. The defendants pleaded, inter alia, the Limitation Act, 1939; they contended that the periodical payments made to the plaintiffs from time to time on behalf of the receivers were not acknowledgments within the Act, as an appointment of a corporate body as receiver was a nullity by virtue of section 306 (1) of the Companies Act, 1929 [1] (see now section 366 of the Companies Act, 1948), so that the ostensible receivers were not the agents of the mortgagors under section 109 (2) of the Law of Property Act, 1925.

Denys Buckley for the plaintiffs.

J. G. Monroe for the first defendant.

R. B. S. Instone for the second defendant.

[1] Companies Act, 1929, s. 306 (1): "A body corporate shall not be qualified for appointment as receiver of the property of a company."

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Cases referred to in argument: *Heath* v. *Pugh* [2]; *Markwick* v. *Hardingham* [3]; *Whitley* v. *Lowe*.[4]

WYNN-PARRY J. In this action the plaintiffs, as mortgagees under a mortgage dated September 28, 1936, sue the two defendants as sureties, or, in the case of the second defendant, as representing the estate of a deceased surety, they having guaranteed the payment of moneys due under the mortgage by the mortgagor company, S. G. Properties Ld.

At the date of that mortgage there was in existence a prior mortgage on the same property dated February 25, 1936, in favour of a company called Tudor Investment Trust Ld. Under that document provision was made for the immediate appointment of a receiver, and in fact a firm of solicitors, Messrs. Shirley Woolmer & Co., as they then were, were appointed and acted as receivers. The evidence shows that it was part of the bargain represented by the mortgage of September 28, 1936, that the prior mortgage should be postponed and, indeed, by a document of even date with the mortgage, the prior mortgage was postponed so as to rank after the mortgage in favour of the plaintiffs. Messrs. Shirley Woolmer & Co. acted as receivers under the mortgage of February 25, 1936, until July 27, 1938, when, by a deed of that date made between the Tudor Investment Trust Ld., Messrs. Shirley Woolmer & Co. and the Temple General Investment Co. Ld., which recited that Messrs. Shirley Woolmer & Co. were desirous of being discharged and the mortgagees were desirous of appointing the Temple General Investment Co. Ld. as receivers in their place, it was provided by clause 1: "The "mortgagees" [Tudor Investment Trust Ld.] "in exercise of "the powers conferred on them by the principal deed" [of February 25, 1936] "or by statute or otherwise hereby appoint "the receiver to be receiver of the rents and profits and income "of the premises comprised in the principal deed in the place of "the solicitors." By clause 3 the mortgagees released the solicitors from the provisions of the principal deed, which included their appointment as receivers, and from all moneys received or which ought to have been received pursuant to the provisions therein contained. By clause 4 they gave to the solicitors a complete and full indemnity.

The new receivers, Temple General Investment Co. Ld., continued to act until August 11, 1941, when, by a deed of that date, they were removed and a company called Hallingbury Trust Ld. were appointed receivers in their place. Throughout the whole of the material period the actual collection of money continued to be made by Messrs. Shirley Woolmer & Co., and a partner in that firm, Mr. Storrs, gave evidence before me to the effect that in each case his firm collected the rents as solicitors and agents for the limited company in question.

[2] (1881) 6 Q.B.D. 345.
[3] (1880) 15 Ch.D. 339.
[4] (1858) 25 Beav. 421.

This procedure continued down to and, indeed, subsequent to, February 15, 1949, when the mortgagors, S.G. Properties Ltd., were dissolved pursuant to section 353 of the Companies Act, 1948. I ought then to add that the mortgagors made default in payment of the monthly sums reserved and made payable by the mortgage of September 28, 1936, in November, 1939, and accordingly under the provisions of that mortgage the mortgagees' power of sale became exercisable and the moneys owing to the plaintiffs from the two defendants as sureties became due and payable in February, 1940.

The two defendants plead the Limitation Act, 1939, and prima facie that is a good plea. It is met by the reply delivered by the plaintiffs to the two defences which is to the effect that, as a result of the relevant documents to which I have referred, Hallingbury Trust Ld. became and remained until February 15, 1949—that is the date of the dissolution of the company—the agents of the mortgagors. The reply shows, and the evidence confirms, that payments were made to the plaintiffs by Messrs. Shirley Woolmer & Co. or their successors almost down to the present time, and it is pleaded that Hallingbury Trust Ld., as agents for the mortgagors, paid or procured to be paid to the plaintiffs those moneys.

Now, two points are taken by Mr. Instone for the second defendant. The first is that the deed of September 28, 1936, postponing the prior mortgage, is not pleaded and that, therefore, the plaintiffs are not entitled to rely on the fact of postponement and, accordingly, that the payments which the receivers made must be taken not to have been in accordance with the Law of Property Act, 1925, s. 109 (8), which applied as they were receivers of the income under that Act and required them to make payments in accordance with the document [i.e., the mortgage of February 25, 1936] in right of which they were appointed. Counsel says that those wrongful payments cannot be attributed to the mortgagors. To that, counsel for the plaintiffs replies, and in my view with force, that the receivers must be taken to have directed the payments by Messrs. Shirley Woolmer & Co., and as the receivers were, by virtue of section 109 (2) of the Act of 1925, throughout the agents of the mortgagors, it does not lie either in the mouth of the mortgagors or the sureties to question what they did. Therefore, whether or not the court is apprised of the deed postponing the prior mortgage is immaterial. I think that the point is well taken, and, therefore, I do not accept the first submission of counsel for the second defendant. But he has another and, to my mind, much more formidable submission.

He draws attention to the fact that under the Companies Act, 1929, s. 306, re-enacted substantially by section 366 of the Companies Act, 1948, a body corporate shall not be qualified for appointment as receiver of the property of a company. In 1936, section 306 of the Act of 1929 applied and that section was

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slightly different in form from section 366 of the Act of 1948, because it was necessary to make an exception in 1929 as regards bodies corporate which had been appointed receivers prior to August 3, 1928. Section 306 is divided into two subsections, subsection (1) containing the disqualification and subsection (2) dealing with the exception. At the end of subsection (2) it is provided that "Subject as aforesaid any body corporate which "acts as receiver as aforesaid shall be liable to a fine not "exceeding £100." On the basis of that section it is submitted that the appointment, first, of the Temple General Investment Co. Ld. and, secondly, of the second company, Hallingbury Trust Ld., was a nullity, and that therefore it must follow that the plea on which the plaintiffs rely, that Hallingbury Trust Ld. became and remained until February 15, 1949, the agent of the mortgagors is not sustained.

It was urged on me by Mr. Buckley that I should recognize that in fact the parties proceeded all through on the basis that whatever defect in law there might be in the appointment of the Temple General Investment Trust Ld. and Hallingbury Trust Ld., they were receivers and they should therefore be treated as agents of the mortgagors for whom Messrs. Shirley Woolmer & Co. acted as agents.

I must, I think, proceed strictly on the basis of the pleadings. The point is purely a point of law, which is taken by counsel for the second defendant, and, therefore, if I come to the conclusion in his favour that the effect of his point is to destroy the plea that Hallingbury Trust Ld. became and remained the agent of the mortgagors, then the plaintiffs ought not to succeed.

The point is a very short one. The language of section 306 is: "A body corporate shall not be qualified for appointment as "receiver of the property of a company." In my view, the language is perfectly clear and it is intended to prevent, and has the effect of preventing, a body corporate from being the receiver of the property of a company. It has, in my view, the effect of making it ultra vires any body corporate to act as receiver, and it follows, in my judgment, that any attempt to appoint a body corporate as receiver of the property of a company must be a nullity and must fail to create any contractual relations between the body corporate in question and the company over whose property it is purported to be appointed receiver.

Now, the evidence of Mr. Storrs is that, from the time when his firm ceased to act as receivers his firm acted as solicitors and agents, first for the Temple General Investment Trust Ld. and, secondly, for the Hallingbury Trust Ld., but I cannot conclude from that, as Mr. Buckley would have me conclude, that they went on acting as agents for the mortgagors to collect and hand over the money to the plaintiffs. It may be that on differently drafted pleadings the point might be taken, and I say nothing as to what might have been the outcome; but, on the case as it is presented, I do not see that that point is open.

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The sole point put forward in the reply is that the Hallingbury Trust Ld. were throughout the material period of the dissolution the agents of the mortgagors as receivers, and, in my view, I am forced, for the reasons which I have given, by the language of section 306 (1) of the Companies Act, 1929, to hold to the contrary.

For these short reasons, therefore, I come to the conclusion, not without the reluctance which the court usually feels on a successful plea of the Limitation Act, 1939, that the plea in this case is successfully taken by each of the defendants, and that therefore I must dismiss the action with costs.

Judgment for the defendants.

Solicitors: *Hewlett & Co.; Lewis Lloyd & Co.; Edwin E. Clark & Son.*

J. L. D

[QUEEN'S BENCH DIVISION.]

*COWLISHAW *v.* CHALKLEY.

1955
Jan. 20.

Lord Goddard C.J., Cassels and Streatfeild JJ.

[PRACTICE NOTE.]

Justices—Case stated—Drafting of case—Desirability of submitting case to both sides—No contentions in fact—Contentions stated in case—Remission to different justices.

CASE STATED.

Justices dismissed an information preferred by the police against Donald Edward Chalkley made under the Road Traffic Act, 1930, s. 12, for alleged dangerous driving. They stated a case in which they set out certain facts (which are not relevant to this report) and also set out contentions alleged to have been made by the prosecutor and the defendant.

At the hearing of the appeal by the prosecutor, counsel for the prosecutor and counsel for the defendant informed the court that no contentions were in fact made on either side, as after the witnesses for the prosecution had been called and cross-examined by a solicitor acting on behalf of the defendant, the latter went into the witness-box and took the oath, whereupon the justices said that they wished to hear no more of the case, that no case had been made out, and that they would accordingly dismiss the information.

Paul Wrightson for the prosecutor.
C. G. L. Du Cann for the defendant.

LORD GODDARD C.J., having set out the facts, continued: I imagine that in stating that certain contentions were made on

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Cowlishaw v. Chalkley.

behalf of the defendant the justices are really stating their recollections of the line his solicitor took in cross-examination, because obviously he was cross-examining on those lines. But we are assured by both counsel that no submissions were made, and it is said on behalf of the defendant that while he is not disputing that the evidence set out in the case was given he wanted to give his own evidence because he wished to put a different complexion upon it. Whether he could have done it or not, I do not know, nor is it material at this stage. As Mr. Wrightson agrees that that was the course taken at the hearing—and the court is bound to say that the course was an improper one, and that the case is improperly stated—we have decided to send the case back to the justices with a direction that it is to be reheard before other justices than those who stated the case.

We also desire to say that as a rule it is by far the better practice, though it cannot be insisted upon, that where justices agree to state a case, if they state it themselves or cause their clerk to state it, it should be submitted to both sides, and in case of any complication it should be left to the parties themselves to draft the case and submit it to the justices for their consideration. A point like this would not then arise.

Case remitted.

Solicitors: *Solicitors for the Metropolitan Police; Pierron & Morley.*

E. M. W.

[Queen's Bench Division.]

1955
Jan. 19.

*McINNES v. CLARKE.

Lord Goddard C.J., Cassels and Streatfeild JJ.

Agency—Estate agent—Accommodation agency—Deposit required on supplying list of addresses—Balance of fee paid on client obtaining accommodation—Deposit returned to unsatisfied clients—Accommodation Agencies Act, 1953 (1 & 2 *Eliz.* 2, *c.* 23), *s.* 1 (1) (*b*).

An estate agent carried on a business of finding for persons requiring it furnished accommodation. On a person making an inquiry for accommodation he would be told that the fee payable by him, if accommodated, was a sum equal to one week's rent of the premises and that a deposit of approximately half of the weekly rental which he was willing to pay would be asked for. If the client was willing to pay the deposit an agreement was entered into between the client and the estate agent. Either before or after the agreement was signed a list of addresses would be given to the client. After a client had obtained accommodation, he would return and pay the balance of the fee due. Unsatisfied clients received their deposits back in full:—

Held that, on the facts, the estate agent was demanding or accepting payment in consideration of supplying addresses contrary to section 1 (1) (*b*) of the Accommodation Agencies Act, 1953, and he was guilty of an offence.

Case stated by a magistrate sitting at West London Magistrates' Court.

On June 1, 1954, an information was preferred by the respondent against the appellant, Douglas George McInnes, charging him that he on February 18, 1954, at 15 Hogarth Place, S.W.5, did accept a cheque for £3 from Hazel Phillis Berens in consideration of supplying or undertaking to supply to her addresses or other particulars of houses to let, contrary to section 1 (1) (*b*) of the Accommodation Agencies Act, 1953,[1] and further that on March 1, 1954, he demanded £4 from Derick Eustace Adkins for the same consideration contrary to section 1 (1) (*b*).

The following facts were found by the magistrate: The appellant carried on the business of an estate agent in the firm name of Douglas West, and his business was that of finding furnished accommodation. His method of business was as follows: On a person making an inquiry for accommodation, he would be asked his requirements and what rent he was willing to pay. He would then be told that the fee payable by him, if accommodated, was a sum equal to one week's rent of the premises taken by him and that a deposit of approximately half of the weekly rental which he was willing to pay would be asked for. In the event of the client being willing to pay the deposit, an agreement would be entered into and signed by the client and for and on behalf of the firm. Sometimes before and sometimes after the agreement was signed a list of addresses would be given to the client. After a client had obtained accommodation he would return and pay the balance of the fee due. Unsatisfied clients who had asked for a return of their deposit had received it back in full.

On February 18, 1954, Hazel Phillis Berens went to the firm and applied for accommodation. She was interviewed by one Stait, a servant or agent of the appellant, who produced a form of agreement which she read and subsequently signed. She paid the firm £3 in pursuance of the agreement as 50 per cent. of the approximate weekly rental. She was then given a list of addresses, probably before the agreement was signed, and thereafter received other lists daily for two weeks, from one of which she found accommodation for herself. She received no other assistance from the firm than the delivery of the lists. Having obtained the accommodation she later, in pursuance of the agreement, paid to the firm a further sum of £3 6s., making in all £6 6s., being equal to one week's rent of the premises taken by her.

[1] Accommodation Agencies Act, 1953, s. 1: "(1) Subject to the provisions of this section, any person who, during the continuance in force of this Act,—(*a*) demands or accepts payment of any sum of money in consideration of registering, or undertaking to register, the name or requirements of any person seeking the tenancy of a house; (*b*) demands or accepts payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let; . . . shall be guilty of an offence."

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McInnes v. Clarke.

In the case of Adkins the procedure was substantially the same, except that before the agreement was read Stait said that a deposit would be required and Adkins paid the firm £4.

The magistrate found that the appellant was carrying on an honest business.

It was contended on behalf of the appellant that the supplying of addresses or other particulars of houses to let was only incidental to the agreement and was not the consideration for the demanding or accepting of the sums of money, the true consideration for which was the obtaining by the appellant for the clients of living accommodation.

It was contended on behalf of the respondent that the appellant was guilty of the offences charged in that, as the payment of money was a condition precedent to the supplying of lists of accommodation, the money demanded and accepted respectively in each case was in consideration of the supplying or undertaking to supply addresses or other particulars of houses to let.

The magistrate was of opinion from the evidence and the terms of the agreements that unless the sums in the agreements described as deposits were first paid, neither applicant could obtain any list of addresses, and that the only assistance given by the appellant to the applicants was the delivery of the lists, from which each client had to seek accommodation for himself, and therefore, that the transactions were contrary to section 1 (1) (*b*) of the Act of 1953. He found the appellant guilty on each information, fining him 40s. on each with five guineas costs on the first.

Melford Stevenson Q.C. and *Roger Willis* for the appellant.
John Phipps for the respondent.

Lord Goddard C.J. This is a case stated by Mr. Guest, one of the metropolitan magistrates, before whom the appellant was summoned for breaches of the Accommodation Agencies Act, 1953. [His Lordship read section 1 (1) (*a*) and (*b*), stated the facts found by the magistrate, and continued:] The magistrate has also found that the appellant was conducting his business honestly, that is to say, it was not a mere catch-penny affair and he returned money to people who asked for their money back. That, of course, had a very great influence on the magistrate in the penalty he imposed because whereas the Act provides for a penalty not exceeding £100, he only imposed a penalty of 40s. and five guineas costs.

The magistrate was of opinion from the evidence and the terms of the two agreements that it was clear that, "unless the "sums in the [agreements] described as deposits were first paid, "neither applicant could obtain any list of addresses and I was "further of opinion that the only assistance given by the appel-"lant to the applicants was the delivery of the said lists from "which each client had to seek accommodation for himself, and

" therefore that the transactions were contrary to section 1 (1) (*b*) " of the Accommodation Agencies Act, 1953."

The two agreements show that what the appellant did was to say to a person: " If you give me a deposit of approximately half " the week's rent I will send you some names and addresses, " particulars of houses, and if you take one of them you have " to pay me the rest of the sum, which is to be equivalent to a " week's rent. If I cannot satisfy you I will give you your " deposit back." Having read the facts and the section I should have thought that the case was unarguable, because it seems to me that what the appellant has done clearly is to accept payment in consideration of supplying addresses or other particulars of houses to people who have applied to him. That he has also undertaken to give back the money which has been deposited if the transaction does not result in the client getting anything, does not seem to me to be here or there. The statute might have made some provision for the case where a man is honestly conducting a business, but it has not; what it says is, that he must not demand or accept payment of any sum of money in consideration of supplying, or undertaking to supply, to any person addresses or other particulars of houses to let. The appellant did. That was why he received the deposit, and the deposit was to be treated as part payment if the person took one of the houses on the list supplied; I do not think there is any doubt about it. I think the magistrate was right and this appeal fails and must be dismissed with costs.

Cassels J. I agree. I think that this Act was passed in order to meet a mischief. The mischief aimed at is an agent to whom a client applies in order to get some particulars of accommodation which that agent may have on his books which might meet the desires of the client. Evidently the practice which has been adopted by the appellant to avoid the application of the Act to his method of carrying on his business is to require a commission from the client who is making such an application. That commission is said to be a sum equivalent to the first week's rent. He further requires that there shall be a deposit of one half, and as soon as the client has put down the deposit of one half, the appellant agrees to supply the client with a list of addresses. In one of these agreements it is said that the client should get a daily list for eighteen consecutive working days. What was the consideration for that? The payment of half of the first week's rent, not to be credited against the rent, but to be credited against the demand which was being made by the appellant. But the Act has distinctly said: " Any person " who, during the continuance in force of this Act—(*a*) demands " or accepts payment of any sum of money in consideration of " registering, or undertaking to register, the name or requirements " of any person seeking the tenancy of a house: (*b*) demands or " accepts payment of any sum of money in consideration of

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CASSELS J.

"supplying or undertaking to supply, to any person addresses or "other particulars of houses to let . . . shall be guilty of an "offence."

It seems to me that so far from avoiding this Act, this particular practice simply put the appellant straight into it, and any client who had approached him and had walked out with an address would not be far wrong from telling the truth if in answer to the question he had said: "I have a list of addresses," and if the inquirer said: "What have you paid for them?" he said: "I have paid £3." Yet in the ordinary way of business, if you go into a house agent's and ask him if he has any houses, you expect to walk out with particulars of those houses on his books, not that you would walk out minus a sum of money. I think the magistrate came to the right conclusion on the facts and I agree that the appeal fails.

STREATFEILD J. I agree, and I have only to add that in view of the finding of the magistrate, that unless the sums described as deposits were paid, neither of the applicants could obtain any list of addresses, which in fact was the only assistance which the appellant afforded them, it seems to me idle to contend that the wording of these contracts in which the consideration is expressed to be a client accepting accommodation, can other than be regarded as a colourable evasion or attempted evasion of this Act of Parliament. I think in view of the finding of the magistrate it is quite clear that the real consideration, looking at the facts of the case, was that this money was paid in consideration of the supply of addresses to these clients. In those circumstances I agree that that is within the mischief aimed at by this Act of Parliament, and this appeal must fail.

Appeal dismissed.

Solicitors: *Willis & Willis; Director of Public Prosecutions.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

* LANE *v.* LONDON ELECTRICITY BOARD.

1955
Jan. 17, 18.

Parker L.J. (sitting as an additional judge).

[1952 L. No. 2380.]

Electricity — Regulations — "Danger" — Electricity sub-station with open duct on floor—Fall of electrician while inspecting premises—Parts of premises where apparatus placed to be "adequately lighted "to prevent danger"—"Danger from shock, burn, or other injury" —"Other injury" ejusdem generis with "shock, burn"—Construction—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy, 1908 (*S.R. & O.* 1908, *No.* 1312), *s.* 26.

Ejusdem generis rule—Statute.

The definition of "danger" in the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy, 1908, is "danger to health or danger to life or limb from shock, "burn, or other injury to persons employed, or from fire attendant "upon the generation, transformation, distribution, or use of "electrical energy."

An electrician employed by the defendants, while inspecting the premises of an electricity sub-station in course of reconstruction prior to installing some electric lighting, fell into an open duct on the floor between two pieces of apparatus and injured his knee. In an action for damages for personal injuries he alleged that the premises where the duct was situated were "inadequately lighted to "prevent danger" contrary to regulation 26 of the regulations:—

Held, that the words "or other injury" must be construed strictly ejusdem generis with the words "shock, burn" and referred to injuries resulting from the generation, transformation, distribution, or use of electrical energy; that the electrician's fall could not therefore be an injury resulting from a "danger" within the meaning of the regulations.

ACTION.

The plaintiff, James Lane, an electrician, was instructed by his employers, the defendants, to instal additional lighting at their sub-station at Downham, Kent, which was in course of reconstruction. He arrived at the sub-station at 8.15 a.m. on November 29, 1949. The sub-station was an entirely enclosed compartment with a large roller shutter, and was lighted by electric light, but daylight could be admitted by rolling up the shutter. On the morning in question the plaintiff and a maintenance fitter (also working in the sub-station) decided to keep the shutter closed and the two men accordingly depended for light on three electric lights suspended from the roof. In order to inspect the premises for the purpose of deciding where certain conduit tubing should be placed, the plaintiff had to look each way behind certain apparatus, in particular a transformer and the switchgear which were placed side by side against the wall there being between them a narrow space on the floor of which was a duct 21 inches deep and 18 inches wide used for carrying cables. The plaintiff alleged that in order to look behind those two pieces of equipment he had to go sideways into the space between them, and to put his foot across the duct. Having looked behind the transformer he went into the space again to look behind the switchgear, but in doing so his left foot missed the duct and he fell and injured his knee.

The plaintiff sought damages for personal injuries, alleging negligence by the defendants in failing to cover the duct with a grill, and negligence and breach of regulation 26 of the Regulations for the Generation, Transformation, Distribution and Use of Electricity, 1908,[1] in failing adequately to light that part of

[1] Electricity Regulations, 1908 (S.R. & O. 1908, No. 1312), reg. 26: "All those parts of premises in which "apparatus is placed shall be ade- "quately lighted to prevent danger."

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the sub-station where the duct was situated. The defendants denied negligence and any breach of the regulation.

On the issue of negligence, Parker L.J. found that there was no lack of reasonable care on the part of the defendants by their failure to cover the duct between the transformer and the switchgear. He rejected the plaintiff's evidence that the centre light in the sub-station had failed, thus causing a shadow in the space where the duct was situated; and found that the light was not inadequate. Accordingly, he held that there was no breach by the defendants of their common law duty towards the plaintiff.

The case is reported only on the question of breach of statutory duty.

Humfrey Edmunds for the plaintiff.
W. L. Mars-Jones for the defendants.

The following case was cited in argument: *Gatehouse* v. *John Summers & Sons Ld.*[2]

Parker L.J. stated the facts, reviewed the evidence, held that there was no breach by the defendants of their common law duty, and continued: Lastly there remain the regulations. The wording of regulation 26 is: "All those parts of premises in which "apparatus is placed shall be adequately lighted to prevent "danger." That is an absolute obligation, irrespective of questions of reasonable care which arise at common law.

It is argued on the part of the defendants that although that regulation admittedly applied because the sub-station was in part working, the injury to the plaintiff did not result from any danger within the meaning of the regulation, "danger" being defined by the regulations in the following terms: "Danger means danger "to health or danger to life or limb from shock, burn, or other "injury to persons employed, or from fire attendant upon the "generation, transformation, distribution, or use of electrical "energy."

In my opinion the words "or other injury" must be read in this context strictly ejusdem generis with "shock" or "burn"; in other words with "or other injury" due to electrical energy, for this reason: it is to be observed that whenever the phrase "so as "to prevent danger" and the like appears in the regulations, as it does, for example, in regulations 2, 3, 5, 7, 8, the regulations are all clearly referring to danger from electricity. On the other hand there are certain regulations where that form of words is not used: for example, regulation 6, which provides that "every "electrical joint and connection shall be of proper construction "...", and regulation 30, which provides: "Every sub-station "shall be substantially constructed, and shall be so arranged "that no person other than an authorised person can obtain

[2] [1953] 1 W.L.R. 742; [1953] 2 All E.R. 117.

" access thereto otherwise than by the proper entrance, or can " interfere with the apparatus or conductors therein, from " outside; and shall be provided with efficient means of ventila- " tion and be kept dry " which, of course, refers to matters quite apart from the risks arising from the use of electricity.

1955

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Parker L.J.

In my view the plaintiff cannot bring himself within regulation 26, although even if he could, he has not satisfied me that the lighting in this case was inadequate.

In those circumstances this claim must fail.

Judgment for defendants.

Solicitors: *Rowley, Ashworth & Co.; Gardiner & Co.*

E. M. W.

[COURT OF CRIMINAL APPEAL.]

*REGINA v. ROSSI.

1955
Jan. 24.

[PRACTICE NOTE.]

Cassels, Streatfeild and Slade JJ.

Criminal Law—Practice—Report on prisoner—Age—Date of birth to be stated in police and prison reports.

APPLICATION for leave to appeal against sentence.

Jacob Yahuda for the appellant.
H. F. Cassel for the Crown.

CASSELS J. The appellant pleaded guilty at the Middlesex Sessions to shopbreaking and was sentenced by the assistant chairman to three years' corrective training. He now appeals against his sentence. He does not appeal against his conviction because he cannot very well. He seems to have been the driver of a motor-car, and in fact was arrested close to it, which had been used in some shopbreaking of jeweller's premises. When he was arrested, a stolen clock and some other articles were found in his pocket. It was a serious case meriting serious punishment and, indeed, it was pointed out to the court that he had on December 20, 1939, at the Clerkenwell magistrates' court been convicted of two cases of larceny and sentenced to five and five months' imprisonment concurrent, and on April 3, 1943, he had been sentenced at the North London court to three and three months' imprisonment consecutive for receiving. Those two convictions, if they had been given at the requisite age, would now have qualified the appellant for a sentence of corrective training which in fact was passed, but the evidence which was put before the court was that he was 31. We are now informed

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that that was due to a mistake made by prosecuting counsel and that in fact he was 32, so that in truth he was really qualified for corrective training, but the evidence before the court that he was 31 clearly indicated that he was under 17 when the first of the qualifying convictions was passed upon him. That being so, and bearing in mind that for 12 years he has kept himself free from trouble, that he has certain responsibilities, and that this offence may well have been attributable to a certain amount of drink taken and keeping bad companions, this court has come to the conclusion in the circumstances of the case that there may be a reduction made in the sentence passed.

But there is one other observation the court desires to make and that is that where age is of importance for the consideration of the court, it is necessary that in police or prison reports which are presented to the court the prisoner's date of birth should be stated lest any mistake should be made in calculating what his age was at the time when he received the necessary qualifying conviction. If the date of birth is not stated and merely his age is given, which in the present case was stated to be 31, it is easy for the court to make a mistake in calculating what the prisoner's age really was at any particular time. As the Criminal Justice Act, 1948, makes provision for so many different types of sentences to be passed, and many of them depend upon the actual age of the prisoner at the time, this seems to the court to be of very great importance. We, therefore, suggest that in future no report about a prisoner should omit the date of his birth if the prisoner is being put before the court as one requiring a sentence either of corrective training or preventive detention.

In the circumstances of the present case this court reduces the sentence from three years' corrective training to imprisonment for 18 months.

Sentence varied.

E. M. W.

[QUEEN'S BENCH DIVISION.]

1955
Jan. 20.

*MORRISSEY *v.* GALER.

Lord Goddard C.J., Cassels and Streatfeild JJ.

Public Health—Nuisance—Animal—Statute providing that "animals "kept in such a place or manner as to be prejudicial to health or "a nuisance" shall be a statutory nuisance—By-law prohibiting the keeping of noisy animals causing nuisance—Whether ultra vires —"Serious"—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 92—*Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 249 (4).

By-law—Validity.

Justices convicted a man for an offence against a local authority by-law prohibiting the keeping in any premises "any noisy animal "which shall be or cause a serious nuisance to residents in the

" neighbourhood." Quarter sessions quashed the conviction holding that the by-law was ultra vires as it dealt with the same subject-matter as section 92 of the Public Health Act, 1936, under which " any animal kept in such a place or manner as to be prejudicial " to health or a nuisance " is a statutory nuisance. On appeal by the local authority:—

Held, that section 92 of the Public Health Act, 1936, on its true construction dealt with nuisances arising from premises in which animals were kept, i.e., insanitary or defective premises, and not with noisy animals; that the by-law was not ultra vires as it did not deal with the same subject-matter; and that quarter sessions were wrong and must hear and determine the appeal.

CASE STATED by West Kent Quarter Sessions.

An information was preferred by the appellant, James John Galer, against the respondent, Walter Benedict Morrissey, alleging that he, between November 15 and December 17, 1953, at Harrietsham, Kent, unlawfully kept noisy animals, namely greyhounds, which had caused a serious nuisance to residents in the neighbourhood contrary to a by-law made by the Kent County Council. The by-law provided: " No person shall keep within " any house, building, or premises any noisy animal which shall " be or cause a serious nuisance to residents in the neighbour- " hood." It also provided that proceedings for an offence should not be taken unless the nuisance had continued after the expiration of a fortnight from the date of a service of a notice alleging serious nuisance, signed by not less than three householders residing within hearing of the animal, and it was expressed to apply to all parts of the administrative county of Kent except such parts as are within any municipal borough.

On January 27, 1954, the respondent was convicted by the Bearsted justices, whereupon he appealed to quarter sessions. At the hearing of his appeal quarter sessions found that the by-law was made by the Kent County Council in pursuance of section 249 of the Local Government Act, 1933,[1] and was confirmed by the Secretary of State to come into operation on June 1, 1951.

It was contended by the respondent that the by-law was ultra vires the county council since (*a*) there was no real difference between it and the provisions of section 92 of the Public Health Act, 1936; (*b*) that if the animals were a nuisance the matter could be dealt with under that section; and (*c*) that since the by-law merely reiterated the provisions of an Act of Parliament it was nugatory.

It was contended by the county council (*a*) that the by-law was supplementary to the provisions of section 92 of the Public

[1] Local Government Act, 1933, s. 249, provides: " (1) A county " council . . . may make bye-laws for " the good rule and government of " the whole or any part of the county " . . . and for the prevention and " suppression of nuisances therein: " . . .

" (4) Where by or under any enact- " ment in force in any area provision " is made for the prevention and sup- " pression in a summary manner of " any nuisance, power to make bye- " laws under this section for that " purpose shall not be exercisable as " respects that area."

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Health Act, 1936 [2]; (*b*) that it was enforceable in a different manner and by a wider class of persons than the provisions of the statute, and (*c*) that as the by-law had been made by a public representative body and confirmed by the Secretary of State it ought to be benevolently interpreted and supported.

Quarter sessions were of opinion that the by-law was ultra vires because the provisions of section 92 of the Public Health Act, 1936, were wider than those of the by-law and they accordingly allowed the appeal. The county council appealed to the Divisional Court.

A. Melford Stevenson Q.C., *B. R. Clapham* and *P. W. Gibbings* for the county council.

A. Conolly Gage for the respondent.

Case cited in argument: *Thomas* v. *Sutters*.[3]

LORD GODDARD C.J. The by-law in question provides: "No "person shall keep within any house, building, or premises, any "noisy animal which shall be or cause a serious nuisance to "residents in the neighbourhood." I think it is a pity that the word "serious" was put in, because that may give rise to a great deal of dispute. If a nuisance is proved, it is a nuisance whether it is a serious nuisance or not, and it is entirely a matter for the justices to say whether they think it is serious or not. If the justices thought it was not a very bad nuisance they might refuse to convict, but, generally speaking, in law a thing is either a nuisance or it is not. However, we are not concerned with that point.

There are provisions in the by-law that before proceedings can be taken there has to be a notice given by not less than three householders to the person concerned. The point taken before quarter sessions was that the by-law is bad because the subject-matter is already dealt with by the Public Health Act, 1936, s. 92, and it is conceded, and no one doubts, that if the statute deals with precisely the same matter, the by-law would be ultra vires because if it deals with the same matter as the statute there is no necessity for it, and if it tries to go beyond the statute it is bad.

In my opinion it is perfectly clear that the by-law does not deal with the same matter with which the section deals. Section 92 of the Public Health Act, 1936, creates a statutory nuisance where "any animal is kept in such a place or manner "as to be prejudicial to health or a nuisance." It is the keeping,

[2] Public Health Act, 1936, s. 92, provides: "(1) Without prejudice to "the exercise by a local authority of "any other powers vested in them by "or under this Act, the following "matters may . . . be dealt with "summarily, and are in this part of "this Act referred to as 'statutory "'nuisances,' that is to say:— . . . "(*b*) any animal kept in such a place "or manner as to be prejudicial to "health or a nuisance; . . ."

[3] [1900] 1 Ch. 10; 16 T.L.R. 7.

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Lord Goddard C.J.

that is to say, the conditions under which the animal is kept, which may create a nuisance and in respect of which an abatement notice can be served. That does not deal with a noisy animal. A noisy animal may be kept in the most sanitary conditions and yet still be a nuisance. What puts this matter beyond doubt is that one finds this provision in Part III of the Act, which is headed "Nuisances and Offensive Trades," containing a fasciculae of sections, all dealing with premises. Section 92 deals, for example, with factories, houses unfit for human habitation and smoke nuisance, all matters which come from insanitary or defective premises. It is clear, to my mind, that section 92 is dealing with such matters and applies to the common case of pigs being kept so near to other houses as to cause a nuisance from effluvia or where animals are kept in such a manner or place that a nuisance arises. It does not deal with noisy animals at all.

Mr. Stevenson has called the attention of the court to certain local Acts in which local authorities have taken power to deal expressly with noisy animals and have taken that power under section 92. That is a recognition by Parliament that noisy animals do not come within section 92, but I am not relying simply on those private Acts but on the construction of the section. I am quite clear that it does not deal with noisy animals at all; therefore, the by-law is perfectly good and the case must go back to quarter sessions with a direction that their decision that it is ultra vires is wrong and they must hear the appeal on the merits.

CASSELS J. I agree.

STREATFEILD J. I agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co. for R. P. Tunstall, Maidstone; Monkton, Son & Collis, Maidstone.*

E. M. W.

[COURT OF APPEAL.]

* TREVETT AND ANOTHER *v.* LEE AND ANOTHER.

C. A.

1955 *Jan.* 12.

Evershed M.R., Birkett and Parker L.JJ.

[Plaint No. K73A.]

Nuisance—Highway—Obstruction—Hosepipe laid across highway by frontager—Whether unreasonable use of highway. Contributory negligence—Standard applicable—Analogy with negligence—Law Reform (Contributory Negligence) Act, 1945 (8 & 9 *Geo.* 6, *c.* 28), *ss.* 1, 4.

The defendants' house fronted on a country road carrying little but local traffic. The house, although equipped with water sanitation, was not connected with a water main and in time of drought,

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TREVETT v. LEE.

when the supply of rain water ran out, the defendants were accustomed to lay a small garden hosepipe across the road to enable water to be brought by gravity from a water supply on the other side of the road to their premises. On March 21, a woman on the road delivering milk fell over the hosepipe and was injured. She and her husband claimed damages against the defendants on the ground of negligence and nuisance. The county court judge held that, if there were any negligence on the part of the defendants, the first plaintiff had been guilty of such contributory negligence, in failing to step over the pipe, as to extinguish her claim in negligence. The plaintiffs appealed against the further holding of the judge that the hosepipe did not constitute a nuisance:—

Held, that there were two kinds of rights in a highway—that of the ordinary member of the public to use a highway, and that of the owner of a house abutting on a highway to use it for access to his house and for purposes properly connected with its use—and that the question whether a householder was or was not obstructing a highway, so as to give rise to a cause of action, was to be judged by balancing, on standards of reasonableness, the claims and conduct of the householder on the one side and those of members of the public on the other; that the question was one of fact; and that the judge, having found that the defendants' conduct in laying the pipe across the highway, in the circumstances of the case, did not constitute a nuisance, the appeal should be dismissed.

Observations of Romer L.J. in *Harper* v. *G. N. Haden & Sons Ld.* [1933] Ch. 298, 319, 320, and Devlin J. in *Farrell* v. *John Mowlem & Co. Ld.* [1954] 1 Lloyd's Rep. 437, 439 applied.

Quaere (1) whether a hosepipe laid across a highway by a member of the public who was not a frontager would constitute an obstruction; (2) whether, having regard to the provisions of sections 1 and 4 of the Law Reform (Contributory Negligence) Act, 1945, the same standard of contributory negligence as is applicable in claims for negligence is also applicable to claims based on nuisance.

APPEAL from Judge Armstrong sitting at Dorchester County Court.

In this action Mrs. Mary Blanche Trevett, the first plaintiff, and her husband, Victor Thomas Trevett, the second plaintiff, claimed damages for personal injury suffered by the first plaintiff, against the defendants Mrs. Betty Lee and her husband Ray Lee. The defendants were the owners of a dwelling-house which abutted on Clay Lane, Puncknoll, Dorset. The house had water sanitation, but was not connected with any public water supply. In times of drought, when the rain water in their tank failed, the defendants were accustomed to lay a hosepipe of a half-inch interior diameter across the road, which brought water by gravity from a tank on the opposite side of the road to the defendants' tank. On March 21, 1953, Mrs. Trevett was delivering milk for her husband and, although she saw the pipe, she failed to step over it and her heel caught in it and she fell and injured her back. The plaintiffs claimed damages on the ground of negligence and nuisance.

The county court judge dismissed the action, holding that, if there had been negligence, Mrs. Trevett had been guilty of such

contributory negligence as to extinguish her right to damages, and, secondly, that the defendants, by laying the hosepipe across the highway, had not created a nuisance. He assessed the damage, if the plaintiffs were entitled to damages, at £350.

The plaintiffs appealed.

Raymond Stock for the plaintiffs.
Robert Hughes for the defendants.

The following cases were cited in argument in addition to those referred to in the judgment: *Vanderpant* v. *Mayfair Hotel Co. Ld.*[1]; *Lingké* v. *Mayor, etc., of Christchurch*[2]; *Attorney-General* v. *Brighton and Hove Co-operative Supply Association*[3]; *Almeroth* v. *W. E. Chivers & Sons Ld.*[4]

EVERSHED M.R. This case arose out of an unfortunate accident which occasioned to the first plaintiff, Mrs. Mary Blanche Trevett, personal injuries in a country lane on March 21, 1953. Mrs. Trevett was, on the morning of that day, as agent for or servant of her husband, the second plaintiff, engaged upon delivering milk on a milk round, and she was proceeding up a highway known as Clay Lane, Puncknoll, in the County of Dorset. She came to a point on that lane where the highway passed and butted upon the premises of the defendants. It appears that the defendants' house, being erected immediately adjacent to the road, was so equipped and furnished that it had water sanitary arrangements, but it was not upon any general or public supply of water. For domestic and other uses the water for the defendants' house was accumulated in ordinary circumstances from rainfall in a tank on the premises, but, in time of dry weather, that tank was not sufficient for the ordinary requirements of the house judged by the ordinary standards of living of today. On the other side of this lane from the defendants' house, however, there was a tank or water supply fed from an artesian well or a spring, and that supply, even in periods of drought, was always adequate and enabled water to be taken from it to supply the ordinary needs of the defendants.

The method which, according to the evidence, the defendants adopted, when these dry conditions made it necessary or desirable for them to do so, was that they made use of a small garden hosepipe of an internal diameter of half an inch. This pipe was attached to the tank or supply on the far side of the road and laid across the surface of the road, not at right angles to the direction of the road, but somewhat at an angle, into the premises of the defendants. In the course of time—it took normally, I gather, a matter of a few hours—by process of gravity water from the supply on the far side of the road filled the tank which

[1] [1930] 1 Ch. 138.
[2] [1912] 3 K.B. 595; 28 T.L.R. 536.
[3] [1900] 1 Ch. 276; 16 T.L.R. 144.
[4] [1948] 1 All E.R. 53.

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was on the defendants' premises and thereby gave to the defendants the required supply of water for their domestic purposes.

On the morning of March 21, 1953, this process of taking water by means of a hosepipe was being employed by the defendants. Mrs. Trevett, proceeding up the hill with crates of milk bottles in each hand, saw the pipe. When she came to it, however, she misjudged her stride. Instead of stepping clean over it, her heel trod upon the pipe, the pipe rolled or moved under the weight of her heel, Mrs. Trevett was anxious that she should not break the milk bottles if it could be avoided and, as a consequence of her attempts to save the bottles, she lost her balance and fell heavily and suffered injuries to her person, which caused her pain, and in respect of which (if damages were proper to be awarded) the judge arrived at a figure by way of compensation of £350. It will be seen, therefore, that from Mrs. Trevett's point of view her accident was not unsubstantial, and that it was on any view of it most unfortunate for her that she suffered as she did.

It does not follow that because a man or a woman falls in the street and is hurt, or even grievously hurt, somebody else ought to pay damages, either for nuisance or negligence, or on any other ground, though I sometimes confess to a feeling that that view is apt to be somewhat generally entertained.

Mrs. Trevett and her husband sought to recover damages from the defendants, both on the ground of nuisance and negligence. The alleged negligence was, according to the claim, that the defendants had insufficiently warned passers-by of the presence of the pipe. Upon that question the judge's conclusion was that any negligence of that character (if such there was) was extinguished altogether by the contributory negligence of Mrs. Trevett, in failing to step over the pipe.

Since this matter of contributory negligence will arise again hereafter, I desire to state somewhat carefully that upon this matter the fault is, in my view, to be judged in the light of the alleged negligence of the defendants, which was failure to draw attention to the presence of the pipe, and—I am reading from the judgment—"if necessary, to assist persons over it." It was established that the plaintiff saw the pipe, and she was not infirm. And the claim in this court has been, not upon the ground of negligence, but upon the other head of nuisance. I therefore need say no more upon the negligence part of the case than that, so far as I can see, there is no ground upon which the judge's findings in respect of it could be successfully challenged.

The case based on nuisance has been of a much more formidable character and has led to arguments to which I for one am much indebted for their skill and interest. Clay Lane was a highway, and it is axiomatic, as a general proposition, that a man who obstructs a highway commits, and is liable to be charged in respect of the commission of, a public nuisance. But that short statement is in truth somewhat of an over-simplification, for

there is no doubt that not every obstruction of a highway constitutes a public nuisance. It is also well established that a private individual can only sue in respect of a public nuisance if he or she suffers some special damage as a result of it. So far as this case is concerned, that last point may be laid aside, for if there was here a public nuisance and if Mrs. Trevett's injuries were properly attributable to the existence of that nuisance, then beyond a peradventure she did suffer special damage as a result of it.

The law as regards obstructions to highways is conveniently stated in a passage in Salmond on Torts, 11th ed., p. 303: "A "nuisance to a highway consists either in obstructing it or in "rendering it dangerous," and then a number of examples are given, which seem to me to show that, prima facie, at any rate, when you speak of an obstruction to a highway, you mean something which permanently or temporarily removes the whole or part of the highway from public use altogether. To take the simplest and most obvious case, if I erect a fence or a wall half way across the road, I obstruct it, because to that extent the road ceases to be usable at that point as such. The alternative in the text which I read ("or in rendering it dangerous") adds a different conception of wrongful interference, namely, the putting upon a highway of something which, though it does not obstruct, that is, bar the highway in the sense that I have already mentioned, yet is liable to make it dangerous. Again, one example will suffice: if I make a small hole in the highway difficult to see, or put some greasy substance upon it, so that treading in the hole or on the substance is liable to cause a man to fall as a natural consequence of doing so, then it may be that I have caused a nuisance to the highway, not by obstructing it, but by rendering it dangerous.

In the present case the judge in the course of his very careful judgment used this language: "With regard to the claim on the "ground of nuisance, I am satisfied that if the pipe had been "placed where it was by an ordinary member of the public it "would amount to a nuisance, in that it obstructed the highway "substantially in the case of cyclists and to a certain extent in "the case of ordinary pedestrians." Mr. Stock contended that that was a finding of fact, and there being some evidence upon which the finding can be based it was accordingly conclusive in this court. I do not myself regard, and I do not think it is possible to regard, as a finding of fact a conclusion based upon an hypothesis: "I am satisfied that *if* the pipe had been placed "where it was by an ordinary member of the public it *would* "amount to a nuisance," etc. For my part, I am not entirely satisfied as at present advised (if it were necessary to come to a conclusion upon this matter) that I should agree with the judge's statement. By the phrase "an ordinary member of the "public," I take the judge to be referring to a person, other than an adjoining houseowner, who put the pipe there for some

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purposes of his own. He is saying, in other words, that, if a member of the public—though perhaps he would hardly be regarded as " ordinary "—for no purpose except for his own whim or entertainment laid a hosepipe across a road, that person would be creating a nuisance. I prefer upon that matter to express no final view. I am not satisfied, as at present advised, whether a pipe of this dimension would be an obstruction within the sense in which I think that word is used. On the other hand, particularly having regard to the evidence, it may well be that such an object is potentially dangerous if, as happened in this case, somebody just treading on it is liable by movement of the pipe to be cast off his or her balance and thereby to sustain a fall.

Let me, however, assume in Mr. Stock's favour and as the judge indicated, that the presence of this pipe on this morning in March, 1953, would prima facie have constituted the commission of a public nuisance on the part of the defendants who put it there. Then there remains what the judge called the more difficult question: Could the presence nevertheless be justified so as to discharge, so to say, the prima facie conclusion to which its presence would give rise?

Upon this part of the case Mr. Stock's argument briefly was this. He concedes that the owner or occupier of a house adjoining a highway may obstruct the highway in connexion with the use and enjoyment of his premises, but only to a very limited extent and in a closely restricted number of instances. It is generally conceded that a man may temporarily obstruct the highway by causing his motor-car or carriage to stop outside the house for the purpose of discharging passengers or goods going into the house. It is also clear on authority that, in certain circumstances at least, a man may temporarily block up more effectively part of the highway by erecting scaffolding on it. Mr. Stock's case is that the scaffolding cases are exceptional and are strictly related only to, and are justified only by, work of reparation or otherwise in connexion with the ordinary maintenance, repair, etc., of the house. For my part, I think the exception—and there is no doubt of its existence—which these illustrations indicate does not consist of a number of rather distinct and special examples, but resides in a broad principle, though the application of the principle in individual cases may be and often is a question of difficulty.

In order to state what I conceive the principle to be, I shall refer at once to two cases. The first is that of *Harper* v. *G. N. Haden & Sons Ld.*[1] That was a scaffolding case, but it is to be noted that the erection of the scaffolding by the householder was for the purpose, not of repair, but of adding another storey to the premises, which may be said perhaps to have been other than the ordinary use of premises. However that may be, this court held that, in the circumstances and on the facts of the case, the

[1] [1933] Ch. 298.

scaffolding did not amount to such a user or obstruction of the highway by the householder as rendered him liable as upon a public nuisance, because, as I follow it, the user was held in all the circumstances to be reasonable, judged both from the point of view of the householder and from the point of view of the other members of the public entitled as such to use the highway as such.

I take as a sufficient citation from the case the language of Romer L.J. After referring to the observations of Vaughan Williams L.J. in *Lingké* v. *Mayor, etc., of Christchurch*,[2] Romer L.J. proceeds as follows[3]: "It seems to me to be eminently "reasonable that the owner of a house adjoining the highway "should be entitled to use it for the purpose of carrying into his "house the materials necessary for repairing and rebuilding it "when occasion so requires, and if in so doing he causes an "obstruction of the highway not greater in degree or longer in "duration than the necessity demands, the other members of the "public using the highway have no ground of complaint. In "*Fritz* v. *Hobson*[4] the obstruction caused by such an owner was "greater than the occasion required, and he was held liable to "the plaintiff who had been obstructed. But the right of the "defendant to create a reasonable obstruction was painly recog-"nized by Stirling J. So, too, in my judgment, is it permissible "for such an owner, subject of course to obtaining any neces-"sary licence from the local authorities, to erect and maintain "for a reasonable time scaffolding and hoardings on the highway "where he could not otherwise conveniently repair or rebuild his "house. The law relating to the user of highways is in truth the "law of give and take. Those who use them must in doing so "have reasonable regard to the convenience and comfort of "others, and must not themselves expect a degree of convenience "and comfort only obtainable by disregarding that of other "people. They must expect to be obstructed occasionally. It "is the price they pay for the privilege of obstructing others."

The judgment was, of course, related to the facts of that case, namely, scaffolding. But the two paragraphs I have read satisfy me that in expressing his views of the conduct of the defendants in that case, and in stating that in his opinion the defendants justifiably obstructed the highway by the use of the scaffolding in the way they used it, Romer L.J. was applying, not some special rule about scaffolding, but a general principle inherent in the nature of highways and the rights of people (both members of the public walking up and down them and adjacent house-holders) in regard to highways. In other words, he is saying, as I conceive it, that there are two kinds of rights: there is the right of the ordinary person, the ordinary member of the public, to use the highway for passage from one point to another; and

[2] [1912] 3 K.B. 595, 602.
[3] [1933] Ch. 298, 319, 320.
[4] (1880) 14 Ch.D. 542.

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there is the right of the householder to use the highway for access to his house and for other purposes properly connected with that use. And the question whether a householder is or is not obstructing the highway so as to give rise to a cause of action is to be judged by balancing, on standards of reasonableness, the claims and conduct of the householder on the one side and the members of the public on the other.

That, I think, is well illustrated by the language of Devlin J. in the most recent case, which Mr. Stock not unnaturally referred to because it related to a pipe across the pathway. *Farrell* v. *John Mowlem & Co. Ld.*[5] where Devlin J. used this language: "A person whose property adjoins the highway, for example, has "a right of access to and from his property and if, in the exer- "cise of that right of access, he causes as he may do sometimes "an obstruction to the public using the highway, the question is "whether the obstruction is reasonable or not. There are two "sets of rights which have to be met and resolved on the "ordinary principle that a reasonable exercise of both must be "allowed." I need read no more, because what I have read sufficiently indicates the point which I am trying to make.

In the present case the defendants own or occupy this house adjoining the highway. The house was not supplied by main supplies of water, but obviously a supply of water is required, not only reasonably, but necessarily for the ordinary living conditions of the defendants in their house, for cooking, washing and all the rest of it, apart from sanitary use. If, as adjoining owners, the defendants would be entitled to obstruct temporarily the highway by causing a vehicle to pause outside it and deliver goods, then prima facie they would be able to justify some similar obstruction for the purpose of delivering, not dry goods, but water.

The method adopted, as the evidence has shown, was that, in periods of drought, they took the water from the known source on the other side of the road, not by carrying it across in buckets, as I suppose they might have done (though it would have been a very laborious and unsatisfactory method), but by laying across the road a small garden pipe. Nobody who has enjoyed the advantages of possessing a garden has at some time or other failed to see a garden hosepipe lying on the lawn, and nobody, I should have thought, would be alarmed at the spectacle as being one potentially dangerous to anybody walking about the lawn. However, that is what the defendants did. They had been warned that they should not allow this pipe to remain in the dark, for then, seeing that the roads in modern times are so even and smooth, a person might well trip against it or catch his foot under it, and a cyclist might come to grief upon it. But not only that, the defendants according to the evidence recognized their duty to keep a lookout, so that, if they saw any person incapacitated or overburdened, they, or one of them, would give

[5] [1954] 1 Lloyd's Rep. 437, 439.

warning, and, if necessary, give assistance. All that appears to have been done.

On all those special facts the question then remains, according to the principle which I have tried to state: was the user by the defendants of the highway in this manner reasonable, judged both from their own point of view and from the point of view of the other members of the public? For if so, the obstruction (if obstruction it were) would not constitute a public nuisance.

The judge held that the test was satisfied, that is, that in all the circumstances the user was reasonable. "The more difficult "question," he said, "is whether it can be justified as a "legitimate obstruction ancillary to the enjoyment of the "premises by the second defendant." Then, after dealing with a pleading point, he went on: "It is, I think, clear on the "authorities that the question is one of fact to be determined "in view of all the circumstances of the case including, of course, "the nature of the locality, the density of the traffic and the "extent and duration of the obstruction. This is a quiet village "street in no way comparable to a town street with pavements. "The interruption was only very occasional and temporary. In "so far as able-bodied pedestrians are concerned the obstruction "was of the slightest. On balance it seems to me, that carried "out with proper precautions, it is impossible to hold that this "operation was improper and beyond the rights of an occupier of "premises abutting on the highway."

In my judgment the judge correctly introduced that passage by his language, "the question is one of fact to be determined "in view of all the circumstances of the case"—assuming, of course, that the principle to which the facts are to be applied, or in relation to which they are to be judged, has been correctly apprehended. I see no reason to doubt in this case that it had been correctly apprehended. I think, accordingly, that the judge found as a fact, and that he was entitled on the evidence so to find, that here in all the circumstances what the defendants had done was reasonable. The judge having so found as a question of fact, I do not think that this court can, upon well established principles, possibly intervene; though in saying that I do not wish to be thought to hint that I feel doubt in my own mind of the correctness of the finding. So far as I have apprehended the case, the conclusion of fact is one at which, if it had been open to me, I think I should myself have arrived. However that may be, it was a finding of fact, I think the principles were properly stated. I think the evidence justified the conclusion, and I think as a result that the appeal must fail.

In the circumstances I prefer to say nothing about the one outstanding matter, namely, whether assuming (contrary to the conclusion I have stated) that this was a public nuisance giving to Mrs. Trevett a right of action, her claim was extinguished or alternatively diminished by her own conduct—what the judge

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described later as the error of judgment in failing to step clean over the pipe.

Having regard to the language of sections 1 and 4 of the Law Reform (Contributory Negligence) Act, 1945, it is not open to doubt that in a claim for damages based on nuisance the defendant may set up and rely upon a fault consisting of what is commonly called contributory negligence, so as to reduce or extinguish his own liability. But because the judge held on the negligence claim that any liability of the defendants in negligence was wholly extinguished by the conduct or fault of the plaintiff, it does not, I think, necessarily follow that, in so far as the claim is based on nuisance, there would be a similar extinguishment of the plaintiff's claim. But in the circumstances I do not find it necessary to say anything more about it, and I therefore do not express any conclusion on the question whether the standard of fault in the two kinds of claim is the same or similar, nor do I express any view what would have been the result, had I held that there was a cause of action available to Mrs. Trevett based on nuisance.

For the reasons I have stated, the judge, in my view, was entitled to hold, as he did hold, that the conduct of the defendants in laying this pipe at the time and in the special circumstances in which it was laid across the road, did not constitute a public nuisance, and therefore I think that the action was rightly dismissed and that this appeal ought to fail.

Birkett L.J. I am entirely of the same opinion. I therefore would only say a very few words. The county court judge has decided this case upon the principle which was enunciated in the passage in Salmond on Torts, 11th ed., p. 259. After dealing with the question of what constitutes a nuisance and the circumstances in which there may be liability for that nuisance, the passage quoted continued: "But 'a balance has to be main-" 'tained between the right of the occupier to do what he likes " 'with his own, and the right of his neighbour not to be " 'interfered with.' Therefore there is an exception to the " general rule in the case of acts reasonably done which are neces-" sary for the common and ordinary use of land and houses. " In *Bamford* v. *Turnley*[6] Bramwell B. said: 'Those acts " 'necessary for the common and ordinary use and occupation of " 'land and houses may be done, if conveniently done' "—the meaning of the word "conveniently" was, of course, to use all reasonable care and skill—" 'without subjecting those who do " 'them to an action. . . .' "

The judge, in the passage which my Lord read in full, said: "On balance it seems to me that carried out with proper " precautions it is impossible to hold that this operation was " improper and beyond the rights of an occupier of premises

[6] (1862) 3 B. & S. 62, 83–4.

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"abutting on the highway." I think that that conclusion was not merely right but was inevitable and, in my judgment, this judgment of the county court judge ought to be supported and this appeal ought to be dismissed.

PARKER L.J. I so entirely agree with both judgments that have just been delivered that I do not think I can usefully add anything, unless it be to sound a note of warning. In my opinion, the principle of which *Harper's* case [7] is really an example, is one which can only be applied when the facts are very special, as they are in this case. It is a principle which should be applied with extreme caution, but, on the facts found here by the county court judge, it is abundantly clear that he was entitled to apply the principle and to hold that the pipe in question did not amount to a nuisance. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Barnes & Butler for J. W. Miller & Son, Poole; Gibson & Weldon for Andrew Wetherall & Co., Poole.*

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[7] [1933] Ch. 298.

[COURT OF APPEAL.]

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[Plaint H. No. 513.]

Landlord and Tenant—Rent restriction—Furnished letting—Evidence—Onus of proof—Evidence of landlord that premises almost fully furnished—No evidence of cost of furniture or of value to tenant—Landlord's application for possession dismissed—Prima facie case of a furnished letting—Retrial—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2) (i)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10 (1).

The landlord was the owner of premises within the Rent Acts which she advertised to let as furnished premises. The tenant having inspected the premises, himself drafted a tenancy agreement between the landlord and himself, in which he agreed to take a tenancy of part of the premises, which were described as partly furnished, for one year at a weekly rental of £2 10s. The landlord having given to the tenant notice to quit sought to recover possession. The tenant claimed the protection of the Rent Acts, alleging that the premises were not furnished premises. The landlord gave evidence of the circumstances of the letting and of the furniture in each of the three rooms and kitchenette let. According to this evidence, the rooms were all fully furnished with a reasonable amount of furniture, except that the dining room had no table,

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the bedroom had no bed and the kitchenette was without a gas stove. She alleged that the tenant stated that he wished to supply these articles himself. She gave no evidence as to the cost of the furniture, or of its value to the tenant. She was cross-examined and it was not suggested to her that the furniture was valueless. At the close of the plaintiff's evidence, the tenant called no evidence, but counsel on his behalf submitted that no evidence had been given in accordance with the requirements of section 10 (1) of the Act of 1923, that the amount of the rent fairly attributable to the use of the furniture, regard being had to the value of the same to the tenant, formed a substantial portion of the whole rent. The county court judge accepted that submission and gave judgment for the tenant:—

Held (1) that notwithstanding the absence of any evidence of the capital value of the furniture included in a letting, or of any evidence of its value to the tenant, or to the landlord, the court, while having regard to the provisions of section 10 (1) of the Act of 1923, could infer that the premises were let as furnished or partly furnished premises and that the amount of rent fairly attributable to the use of the furniture formed a substantial part of the whole rent. (2) That in the special circumstances of the case, there was evidence on which the judge could and should have concluded that the onus on the question of substantiality under section 10 (1) had been discharged by the landlord, in the absence of any evidence to the contrary, and that the case should be remitted for a rehearing and further that, this being a Rent Act case, notwithstanding the fact that the tenant had elected to call no evidence, at the rehearing he would not be bound by such election.

Roppel v. *Bennett* [1949] 1 K.B. 115; 64 T.L.R. 452; [1948] 2 All E.R. 627 distinguished.

Per curiam. In cases of this character, evidence ought to be given of the capital value of the furniture and of the value of that furniture to the tenant, so that material is before the county court judge on which he can decide according to the tenor and meaning of section 10 (1) of the Act of 1923.

Appeal from His Honour Judge Gerwyn Thomas sitting at Cardiff County Court.

In these proceedings the plaintiff, Mrs. Sarah Elizabeth Hern, sought to recover possession of those parts of No. 13 Stockland Street, Grangetown, Cardiff, which she had let to the defendant Kenneth John Palmer.

Early in 1953, the landlord advertised the premises to let as furnished premises. The tenant had viewed the premises and seen the furniture which was in them and he had himself assessed the rent payable in respect of them at £2 10s. per week. The tenant had himself drawn up the tenancy agreement dated April 13, 1953. It provided as follows: "No. 13 Stockland Street, "Grangetown, Cardiff. Monday, April 13, 1953. We the under-"signed do hereby agree to the following terms for the tenancy "of part of the above premises: (1) Partly furnished (a) Front "Room, (b) Front Bedroom, (c) Dining Room and (d) Kitchen-"ette. (2) Rental at £2 10s. 0d. per week payable one month in "advance. (3) Minimum period of tenancy, 6 months, 1 year. "(4) The tenant shall keep the premises clean and decorate to "respectability."

The landlord served notice on the tenant to quit on April 13, 1954. The tenant having failed to quit, the landlord brought these proceedings to recover possession. The tenant's defence was that he was entitled to the protection of the Rent Acts.

At the hearing the landlord gave evidence as to the furniture in the three rooms and kitchenette the subject of the tenancy. It appeared from her evidence that the amount of furniture in each room was considerable and that they were, in effect, fully furnished, with the exception that there was no table in the dining room, no bed in the bedroom, and no gas stove in the kitchenette. With regard to these items, the landlord said that the tenant had told her he wished to provide them himself. The landlord gave no evidence as to the condition or value of the furniture beyond stating that the bedroom suite was new. In cross-examination it was not put to her that the furniture was of no value. At the close of her evidence, the tenant elected to call no evidence. Counsel submitted on his behalf that the plaintiff had not established that the amount of rent fairly attributable to the use of the furniture formed a substantial portion of the whole rent, so as to bring the case within the proviso to section 12 (2) (i) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[1] as amended by section 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923.[2] The county court judge accepted that submission and gave judgment for the tenant. He ordered that the standard rent of the premises should be fixed by the registrar, who held that the standard rent was 16s. 1d. a week.

The landlord appealed.

John Wilmers for the landlord.
Aubrey Myerson and *Miss D. M. Rowland* for the tenant.

EVERSHED M.R. I will ask Birkett L.J. to deliver the first judgment.

BIRKETT L.J. This is in many respects a most unusual appeal. It is an appeal by the plaintiff, Sarah Elizabeth Hern, against a judgment by Judge Gerwyn Thomas at the Cardiff County Court on October 13, 1954. The landlord brought an action against the tenant for possession of premises at No. 13 Stockland Street,

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2): "... Provided that—(i) this "Act shall not, ... apply to a dwelling-house bona fide let at a rent "which includes payments in respect "of ... use of furniture ..."

[2] Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1): "For "the purposes of s. 12 (2), proviso (i), "of the principal Act (which relates "to the exclusion of dwelling-houses "from the principal Act in certain "circumstances), a dwelling-house "shall not be deemed to be bona fide "let at a rent which includes payments in respect of attendance or the "use of furniture unless the amount "of rent which is fairly attributable "to the attendance or the use of the "furniture, regard being had to the "value of the same to the tenant, "forms a substantial portion of the "whole rent."

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Grangetown, Cardiff, and in the particulars of claim she alleged that these premises were let furnished to the tenant under a tenancy agreement of April 13, 1953, which, she said, had been determined by a notice to quit on April 13, 1954.

When these particulars of claim were delivered in that form, namely, "Here is a claim claiming possession of furnished "premises," a request was made on behalf of the tenant to deliver further and better particulars of that claim and also asking for some particulars about the annual value of the property. Those particulars were given, and it was said: "The ground on "which possession is claimed is, the premises were let to the "tenant as furnished premises, and are not subject to the Rent "Acts." So far as the landlord was concerned, therefore, her case was simple: she was saying, "I am claiming possession of "premises which are not governed by the provisions of the Rent "Acts inasmuch as the premises in question are furnished."

Thereupon a defence was put in which by paragraph 2 made it plain that the defence was that the premises were protected by the provisions of the Rent Acts.

The case is unusual in that the agreement made between the landlord and the tenant whereby the tenant went into possession of these premises was, as I understand it, drawn up by the tenant himself. In that agreement, which was dated April 13, 1953, it was said: "No. 13 Stockland Street, Grangetown, Cardiff. "Monday, April 13th, 1953. We the undersigned do hereby "agree to the following terms for the tenancy of part of the "above premises: (1) Partly furnished (a) Front Room, (b) Front "Bedroom, (c) Dining Room and (d) Kitchenette. (2) Rental at "£2 10s. per week payable one month in advance. (3) Minimum "period of tenancy 6 months, 1 year. (4) The tenant shall keep "the premises clean and decorate to respectability."

After the case had been opened, the landlord went into the witness box and gave the particulars about the agreement, about the letting, about the notice to quit, and said that the tenant had drafted the agreement and he had fixed the rent himself after viewing the house and the furniture. Then she gave evidence about what the furniture was, and she dealt with each room in turn—the lounge, the dining room, the kitchenette, and the upstairs portion of the letting—and she dealt with the carpet on the stairs, and the lino, and so on. It was not suggested in cross-examination that the whole of that furniture was completely valueless, or anything of that kind.

All that was then before the county court judge was the evidence of the landlord of the furniture in the particular rooms, without anything at all having been said of its capital value. Nothing had been said of its value to the tenant. Something perhaps was said, but not very much, about whether the furniture was new or old, or what its state was. It was just left in that way. It did appear from the cross-examination—at least, that is where it appears in the notes—that these premises had been

advertised as a furnished house to be let furnished. The tenant came and viewed the premises, saw the furniture, assessed the rent, drew up the agreement and entered into possession. When the notice to quit was served he raised the defence that the letting was governed by the provisions of the Rent Acts; in other words, that it was not a furnished letting.

[His Lordship read section 12 (2) (i) of the Act of 1920 and section 10 (1) of the Act of 1923, and continued:] The issue to be determined before the county court judge was clear: the landlord was saying, in effect, "This is a furnished dwelling"; the tenant was saying, "It is a dwelling which must be regarded "for the purposes of this trial as an unfurnished dwelling subject "to the provisions of the Rent Acts."

When the landlord had given evidence, and had been cross-examined, Mr. Myerson on behalf of the tenant thereupon said: "I shall call no evidence," and he made a submission to the county court judge that there was no case of substantiality proved. He referred to section 10 of the Act of 1923, and said that it had not been shown that the amount of the rent which was stated in the agreement fairly attributable to the use of the furniture formed a substantial portion of the whole rent. The judge accepted that submission, and said: "There is no evidence about "it, and therefore I must give judgment here for the defendant." The question is whether the judge ought to have done that.

The case is unusual because here was a house which contained this furniture specified by the landlord in each of the rooms. It is true that it was also given in evidence that the tenant brought a lot of furniture to the house himself. But here was a house which had been advertised as a furnished house; evidence had been given that in every room of the letting there had been the articles of furniture which were mentioned. The rent of the house, according to the evidence, had been fixed by the tenant himself after viewing the house and the furniture it contained.

The first question is: Was there here no case to answer, as the county court judge indicated, or had there been raised by the evidence a prima facie case which called for an answer by the tenant? It ought to be observed for the future that in cases of this kind a county court judge ought not to be left in the position in which the judge in this case was left. Evidence ought to be given of the capital value of the furniture, of the value of that furniture to the tenant, so that the material is before the judge on which he can decide according to the tenor and meaning of section 10 (1) of the Act of 1923. But in this case there was no evidence given of capital value; of any purchase price of any single article; of its condition at the time, or of its value to the tenant; there was no explanation given (in any detail, at any rate) of the necessity for the tenant to bring some of his own furniture, though the landlord when giving evidence did deal with that in some degree by saying, for example, with regard

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to the dining room that the tenant wanted his own table; with regard to the kitchenette "he said he would require his own "cooker"; with regard to the bedroom suite upstairs he said he would prefer to provide his own bed. But nothing was really given in evidence to show that any of those were necessitated by the fact that there was not adequate furniture already in the house. So there was a most regrettable state of affairs, inasmuch as evidence which could have been given about capital value, cost, condition, and so on, was not given.

However, it does not by any means follow, I think, in the special circumstances of the case, that, because there was that lack, therefore there was no case to answer. On the other hand, the prima facie case which may be said to be raised upon the evidence lies here: First, it is a factor which is not to be ignored that the premises in question had in fact been advertised as a furnished letting, and I gather that it was because of that advertisement that the parties in the case came together; at any rate, the original ground upon which they met (so to speak) was the fact that the landlord had advertised the premises as a furnished letting. I think that that raises some presumption that the furniture that was in the premises was certainly of some considerable value and was regarded by the landlord as being adequate for the furnishing of the premises so that it could properly be described as a furnished dwelling.

Secondly, the tenant himself came and viewed the premises and saw the furniture and, as I understand it, after seeing it, himself fixed the rent of £2 10s. Upon that it is a matter of comment that when this case had been concluded before the county court judge, there was an order made that the standard rent of the premises should be ascertained by the registrar, and counsel went before the registrar, called the necessary evidence, and the registrar fixed the standard rent of the premises as 16s. 1d., which is a very great difference from the rent of £2 10s. which had been fixed by the tenant. It is quite true that, in the defence which the tenant put in in the court below, he said that the standard rent of the dwelling-house was 23s. inclusive of rates for the whole of the house, and 15s. for the portion which he himself occupied, but he himself had fixed the rent in the agreement under which he took possession of the premises at £2 10s. It seems to me that when a submission is made that there is no case to answer, there was on those two matters mentioned a prima facie case which required some answer by the tenant.

That being the situation, the question is: What is the right and proper thing to do? One had an uneasy feeling throughout the hearing of this appeal that the proceedings in the county court were very unsatisfactory; the real issue to be determined under section 10 (1) of the Act of 1923 was really not dealt with in evidence at all. No attempt was made specifically to show that the use of this furniture to the tenant was a substantial

portion of the particular rent which had been reserved of £2 10s. But there again there was the undoubted fact that there had been the advertisement of a furnished letting, and that in every room there was the furniture which had been specified and detailed by the landlord, and the case in the county court turned merely upon this particular matter, that the judge said that the onus of proof of showing what he called substantiality within the meaning of the section had not been discharged by the landlord, and therefore there must be here judgment for the tenant.

The unfortunate character of that decision I think is apparent. One is left with an uneasy feeling that true justice has not been done. I quite appreciate that Mr. Myerson takes the view: "It was the duty of the landlord to discharge the onus of proof "and to call evidence with regard to capital value of the "furniture and to show that the conditions laid down in the "section had been fulfilled, and she did not do it. I was quite "entitled, therefore, to take advantage of that matter and to "say that that has not been proved." But all these various other matters to which I have referred did raise, in my view, a prima facie case, though not the adequate case that might have been presented if the evidence had been given in the way I have indicated and the capital value had been dealt with, and probably the cost of the furniture, the state of the furniture, the value of the furniture to the tenant, and the reason in more particulars why the tenant brought his furniture. If all that had been done, of course, the case would have been plain, but I do not for my own part think it very satisfactory that this case should be determined merely upon the submission made by Mr. Myerson that there was no evidence on this particular matter, when I think that there was some at any rate which required an answer. I think the more satisfactory thing would be that this case should go back for a rehearing, in order that the real matters in dispute shall be heard and shall be determined. I think further, with great respect to the county court judge, that the ordinary rule might here be followed that it should go back to another county court judge, who has not had the hearing which the present county court judge had, and who would have a mind that would be completely free from any of the former controversies.

In my view, therefore, this case should go back to a county court judge for determination of the real point at issue.

EVERSHED M.R. I am also of that opinion. I have in mind, like my brother, *Roppel* v. *Bennett*,[1] to which our attention was drawn. I am not, of course, seeking for a moment to qualify what this court laid down in *Roppel* v. *Bennett*,[1] nor, indeed, could I do so if I wished. I think, as Birkett L.J. has said, that the conduct of the landlord in failing to call any evidence whatever of the value of the furniture, either its capital

[1] [1949] 1 K.B. 115; 64 T.L.R. 452; [1948] 2 All E.R. 627.

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value or the value to the landlord or the tenant, or to anybody else, was temerarious in the extreme; but I cannot myself accept the view that, in the absence of evidence of that nature, the court can never in any case or in any circumstances hold or infer that premises let as furnished or partly furnished premises are not to be treated as bona fide let at a rent which includes payment for the use of furniture—having regard, of course, to the terms of section 10 of the Act of 1923: that is to say, that it cannot be treated as so let, unless the amount of rent which is fairly attributable to the use of furniture forms a substantial portion of the whole rent.

As my brother has observed, there are in this case special (I would say very special) facts or circumstances relevant to the question at issue. I do not seek to repeat them all, but refer to the fact of the advertisement of the dwelling-house as furnished; to the fact that the tenancy agreement, or the note of it which was prepared by the tenant himself, described the premises as "Partly furnished front room, front bedroom, dining-room and "kitchenette"; and to the fact that the landlord, in the course of her evidence, alleged that that record was accurate, that this was the letting of a partly furnished dwelling-house—a proposition which was challenged, I understand, in cross-examination, but in respect of which the judge accepted the evidence of the landlord. I add, finally, that the tenant in his defence, though he had himself fixed the rent of £2 10s. per week, asserted that the standard rent of the premises, that is the rent of the premises unfurnished, was 15s. a week.

In the light of those and the other facts to which reference has already been made, it seems to me that there was here clearly evidence upon which the judge could conclude, and I venture to think without more should have concluded, that the onus in connexion with the so-called question of substantiality had been discharged by the landlord in the absence of any evidence to the contrary.

I again venture to refer to the words of the Act: "This Act "shall not, save as otherwise expressly provided, apply to a "dwelling-house bona fide let at a rent which includes payments "in respect of board, attendance, or use of furniture." If that had stood alone, it would have been incontrovertible that this was a letting at a rent which included payments in respect of the use of furniture, because the document which the tenant himself prepared so described it.

In the light of that fact, the remaining question is whether the amount of the rent was substantial. I do not repeat what I have said, but if this be treated as a jury question: aye or no, on the evidence as it was produced was there here a substantial amount of rent attributable to the furniture? I for my part think that the jury clearly could have answered, and I am of the opinion should have answered, that question affirmatively. But

in any case, as my brother has observed, I think that if this appeal were dismissed and the matter allowed to rest where it is, there is, or would be, a grave likelihood of serious injustice being done. On that footing, as Mr. Myerson has conceded, the furniture which has been enumerated would be treated as in no way included in the letting. He says quite frankly that the landlord can take it away. But, if that is the result, then the conclusion is in flat contradiction to the bargain which the tenant himself recorded in writing, namely, that this was a partly furnished letting. It may, of course, be that, on a further investigation of the facts, it will be found that the amount attributable to the furniture in this case ought to be regarded as unsubstantial. That, however, is a question for future debate. I think that it would not be right to let the matter rest where it is, and I agree with the course which my brother has proposed. It reflects no criticism or disrespect whatever of the judge who tried this case that we should follow the almost invariable practice in this court of remitting the case for trial to another judge in the same district at some place and time convenient to the parties.

I only add this: it is a well-established principle in the practice of our law that, if a defendant elects to call no evidence, then, prima facie, his election is final, and if his submission, that is, the submission that he has no case to answer, ultimately fails, then in the ordinary case he cannot afterwards have another attempt by calling evidence to defeat the plaintiff's case. But this is a Rent Acts case, and Parliament has laid it down that the court shall not make an order for possession, unless it is satisfied on the various matters which Parliament has enumerated. In those circumstances, I think it would not be right, having regard to the special facts of this case, to treat the tenant as finally excluded from giving any evidence. For that reason I concur in the view which my brother has expressed, that this case should be remitted for rehearing, and the conduct of the parties at the rehearing will be unaffected by the election made by Mr. Myerson (not, if I may so, without some shrewdness) on the first occasion.

I think the appeal should be allowed.

PARKER L.J. I entirely agree with both judgments which have just been delivered and with the course proposed. There is nothing I can usefully add.

Appeal allowed.

Solicitors: *Jaques & Co. for D. Edmunds Rees, Caerphilly; Rhys Roberts & Co. for Leo Abse & Cohen, Cardiff.*

B. A. B.

[LEEDS ASSIZES.]

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*JACKSON *v.* NATIONAL COAL BOARD.

[1953 J. No. 30.]

Mines and Minerals—Coal—Breach of statutory duty—Roof—"Reasonably practical" precautions—Security of travelling road and working place—Fall of roof occasioned by an explosion of abnormal character—Whether roof made secure—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8).

A shot-firer employed by the defendants in their coal mine was killed by a fall of roof occasioned by an explosion of a most abnormal character. He was carrying in a hessian bag, which was normally used for holding stemming materials, cartridges and detonators which, by the Coal Mines (Explosives) Order, 1951, he ought to have carried in his powder canister and detonator case respectively. He put the bag at the foot of the coal face within easy reach of a hole which he was stemming and, when he fired a shot in the hole, either some material projected as a result of the shot, struck the bag and caused an explosion, or the contents of the bag were set off by sympathetic action. The explosion displaced props supporting the roof, which collapsed and buried the shot-firer. In an action by the widow against the defendants for breach of section 49 of the Coal Mines Act, 1911:—

Held, (1) that, in the circumstances, the fall of roof did not establish a failure to make the roof secure as required by section 49.

Dictum of Lord Tucker in *Marshall* v. *Gotham Co. Ld.* [1954] A.C. 360, 374; [1954] 2 W.L.R. 812, 820; [1954] 1 All E.R. 937, 943 considered.

(2) That it was not reasonably practicable to make the roof secure from the effects of such an explosion and, even if the defendants had been in breach of their duty under section 49, they were protected from liability by section 102 (8) of the Act.

ACTION.

The following statement of the facts is taken from the judgment: The plaintiff, the widow and administratrix of Lawrence Jackson, deceased, claimed damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants who were the owners of Crigglestone Colliery near Wakefield, and by whom the deceased was employed as a shot-firer, in respect of his death on December 16, 1952, when he was killed by being buried under a fall of roof. The plaintiff alleged breach of statutory duty by the defendants under section 49 of the Coal Mines Act, 1911,[1] by failing to make secure the roof of a travelling road and working place, and also negligence at common law. The defendants, in

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

[1] Coal Mines Act, 1911, s. 49: "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, . . . travel on or work in any travelling road or working place which is not so made secure."

addition to denying these allegations, relied in the alternative on section 102 (8) [2] of the Act, in that it was not reasonably practicable to avoid or prevent such breach, and also alleged that the accident was caused solely or was contributed to by the breach of statutory duty and negligence of the deceased.

The coal in the colliery was being worked by the "long wall" advancing" method. The first step in winning the coal was to undercut it by means of a cutter machine to a depth of 5 feet 6 inches from the face and a thickness of 5 inches, thus leaving the coal above the undercut unsupported. At an appropriate time shot holes were drilled in the face reaching to the same depth as the undercut. After the cutter and its crew had gone by the shot-firer came along and charged a shot hole, the charge consisting of two cartridges. The outer cartridge was primed by him with a detonator and he then stemmed the hole with stemming material carried in a hessian bag. He had a battery which was joined by a cable to the detonator leads and supplied the current to explode the detonator which in turn exploded the cartridges. The effect of a shot was to cause the coal to fall down into the undercut and a shot fired in the above manner should never normally cause a fall of roof and would be incapable of so doing.

The roof of the road running along the face was supported by bars and props, the bars being set against the roof at right angles to the face and each being supported by three props called the face prop, the middle prop and the gob prop respectively. The bars were adequate to support the roof and two props were adequate to support the bars. When the cutter was to begin its progress along the face it was necessary to remove the face props immediately ahead which would have got in the way of the cutter and for that reason the middle prop had to be set in the preceding shift. As soon as the cutter had gone by the face props were reset by one of the men following the machine and with the gob props were sufficient to support the roof without the middle props. In the next shift the conveyor belt had to be installed alongside the loose coal and that could not be done while the middle props were there.

The plaintiff contended that the fall which killed the deceased was caused, first, by the removal of middle props shortly after the coal cutter had done the undercutting and therefore before the roof had had time to settle, which practice was said to be likely to produce a fall of roof, and, secondly, by the firing of shots improperly close to the coal cutter and its crew. This explanation of the fall was rejected.

It was admitted on behalf of the plaintiff that the deceased

[2] S. 102 (8): "The owner of a "mine shall not be liable to an action "for damages as for breach of statu- "tory duty in respect of any contra- "vention of or non-compliance with "any of the provisions of this Act if "it is shown that it was not reason- "ably practicable to avoid or prevent "the breach."

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shot-firer had been guilty of breaches of regulations which had contributed to the fall, and it was found that the deceased was guilty of breaches of the following parts of the Coal Mines (Explosives) Order, 1951 (S.I. 1951, No. 1675): regulation 20 (2) which forbids shot-firers to charge any shot hole until the shot is about to be fired; regulation 7 (3) which provides that no cartridge shall be taken from the canister until it is required immediately for charging a shot hole; regulation 17 (2) which provides that no detonator shall be removed from the detonator case when not required for immediate use; regulation 25 (8) which prescribes that a cable not less than 20 yards in length shall be used when firing a single shot; regulation 28 (1) which requires the shot-firer to determine the danger zone likely to be created; and regulation 28 (2) which requires the shot-firer to ensure that all persons have withdrawn from the danger zone or have taken proper shelter, and to take proper shelter himself.

The theory of the defendants was that the deceased was carrying in his hessian stemming bag cartridges and detonators which he ought to have carried in his powder canister and detonator case respectively; that he put his stemming bag down in the normal place at the foot of the face within easy reach of the hole which he was stemming; that he fired the adjacent hole much too near to himself and the cutter crew, and that either some material projected as a result of the shot struck the hessian bag and so caused the explosion which produced all the otherwise inexplicable phenomena including the fall of roof, or possibly that the contents of the hessian bag being so close to the detonation in the shot hole were unintentionally set off by sympathetic action. A sufficiently strong explosion might displace a prop and, if one prop was displaced, it was likely to displace another and set up a series of displacements with a resulting fall of roof. The evidence was found to be sufficient to remove the defendants' theory from the category of speculation into that of reasonable inference.

G. Raymond Hinchcliffe Q.C. and *R. Withers Payne* for the plaintiff.

Geoffrey Veale Q.C. and *A. B. Boyle* for the defendants.

Cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Nov. 29. HALLETT J., after considering the evidence and stating the findings of fact summarized above, continued: I find that the fall of roof was occasioned solely by an explosion of a most abnormal character; that the explosion was caused in a most abnormal manner and by reason of numerous breaches on the part of the deceased, not only of regulations, but of obvious precautions for the safety of himself and others.

I must now turn to consider the law. The plaintiff primarily relies upon the provisions of section 49 of the Coal Mines Act,

1949. That section, however, has to be read in conjunction with section 102 (8) of the same Act.

As I shall have occasion to refer to *Marshall* v. *Gotham Co. Ld.*,[1] it might be as well to mention that the statutory provisions there under consideration were different. Regulation 7 (3) of the Metalliferous Mines General Regulations, 1938 (S.R. & O. 1938, No. 630) requires that the roof and sides of every travelling road, outlet and working place shall be made secure; but it was held by their Lordships in *Marshall* v. *Gotham Co. Ld.*[1] that the regulation must be read in conjunction with and qualified by the prefatory provisions contained in section 23 of the Metalliferous Mines Regulation Act, 1872, that "the following general rules "shall, so far as may be reasonably practicable, be observed." It may be, therefore, that the duty in the case of a metalliferous mine is a qualified duty, although I am not sure that all their Lordships in the House of Lords took that view. However that may be, under section 49 of the Coal Mines Act, 1911, there is no question that the duty is an absolute one. Two questions then arise. First, was the roof here made secure? Secondly, if it was not and, accordingly, there was a breach of section 49, are the defendants protected from liability in damages in this action by reason of the provisions of section 102 (8) ?

It is obvious and not disputed that, if the roof or side of a travelling road or working place in a coal mine falls, there is very strong, and indeed save in most exceptional circumstances conclusive, evidence that the roof or side has not been made secure as required by section 49. Mr. Veale, however, has contended that in the exceptional circumstances of this case the plaintiff has failed to prove that the roof was not made secure. He says that a roof is secure if it falls solely by reason of such an abnormal and extraneous cause as the evidence discloses in this case. If, contrary to his contention, it be held by me that in this case there was a breach of the duty imposed by section 49, Mr. Veale further contends that the defendants are entitled to escape liability by reason of the provisions of section 102 (8). He argues that no system of support which it would be reasonably practicable to adopt would make a roof secure against such an event as the evidence discloses to have caused the fall of the roof in the present case. If he be right in this second contention, which depends upon the same view as to the cause of the fall, his first contention is superfluous; but he has pressed me to consider and deal with both contentions and I think it right to do so. Either contention is, of course, only possible upon my view of what caused the roof to fall, and it is partly for that reason that I have reviewed the facts and stated my findings about them before I dealt with the law. Unless the cause of the fall was that alleged by the defendants, it is to my mind quite clear and I think undisputed that both Mr. Veale's contentions

[1] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

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must fail and that, subject to the question of contributory negligence, the plaintiff must succeed. A fall due to removing props too soon is clearly foreseeable and it is clearly practicable to defer removing props until the proper time.

By way of authority upon the questions of law I have been referred to four cases only, which are as follows: *Edwards* v. *National Coal Board* [2]; *Burns* v. *Joseph Terry & Sons Ld.* [3]; *Hayes* v. *National Coal Board*,[4] and *Marshall* v. *Gotham Co. Ld.*[5]

As regards Mr. Veale's first contention, I can derive no assistance from *Edwards* v. *National Coal Board*.[2] The fall there was admittedly due to what is called a "glassy slant," which is a well-known kind of latent geological defect which had actually been observed in another place or places in the same roadway. Accordingly, it was not contended that the side had been made secure and, indeed, it was not alleged that anything whatever had been done to make it secure. Observations will be found in the judgments, for instance in that of Singleton L.J.,[6] which make that quite plain. Accordingly, the defendants relied solely on what for shortness we have called in the present case the "escape" section, which is section 102 (8). There is one passage perhaps in the report which is of some slight interest [7]: "On the "other hand, counsel for the plaintiff argues that nothing short of "some external interference by some unauthorized third person, "or some occurrence which could not reasonably be anticipated, "can excuse the breach of the absolute duty." Tucker L.J., however, who delivered the leading judgment, expressed the view that the argument for the plaintiff limited unduly the operation of the escape section. He and the other members of the court had no occasion to consider the point which arises here with regard to whether the roof had been made secure.

Hayes v. *National Coal Board* [4] is a decision of my own, and of the four cases I have mentioned certainly the one most in point. Until my attention was drawn to it last week and I was supplied with a transcript of my judgment, I had completely forgotten all about it, and, because I came to it with a completely fresh mind after two and a half years, I found it quite easy to reconsider it with an unbiased mind, and I certainly should have had no hesitation in expressing the view that I was wrong two and a half years ago if that was the conclusion to which I had now come; but, reviewing my judgment in that case in cold blood, I still think it is right, although I am not sure that some of my reasoning may not have been too widely expressed. In that case a stretcher party was taking out of the pit a very badly injured man when they found their passage obstructed by a tub standing upon the rails. Obviously it was undesirable for them to jolt

[2] [1949] 1 K.B. 704; [1949] 1 All E.R. 743; 65 T.L.R. 430.

[3] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

[4] Unreported (Leeds Spring Assize, April 29, 1952).

[5] [1954] A.C. 360.

[6] [1949] 1 K.B. 704, 711, 713, 714.

[7] Ibid. 709.

the stretcher and desirable for them to handle it in as smooth a manner as possible. Accordingly, three out of four men who were following the stretcher to act as relief stretcher bearers set to work to move the tub out of the way, one of those men being the plaintiff Hayes. They turned the tub on its side, and then, because it was not lying parallel to the rails, they wanted to shift it a little more, which was rather difficult because it was heavy. One of them pulled and the other two pushed, and in doing that, accidentally knocked the tub twice against one of the props that held up the bars which held up the roof. As a result the prop was pushed out of the vertical and a small fall of matter took place, which injured the plaintiff.

It was upon those facts that I had to decide the two contentions which are equally raised in the present case. I held, rightly or wrongly, that although there had been a fall in the circumstances which I have described, it did not show a failure on the part of the defendants to make the roof of that particular road secure. I was influenced in so finding by, amongst other things, *Burns* v. *Joseph Terry & Sons Ld.*[8] In that case the question was whether transmission machinery was securely fenced within section 13 (1) of the Factories Act, 1937. Hilbery J. had applied to the decision of that question what can be called for short the test of "foreseeability." It was not disputed in that case[9] that in deciding whether machinery is dangerous for the purposes of section 14 (1) of the Factories Act, 1937, the foreseeability test is a proper test, and it was pointed out that in *Walker* v. *Bletchley Flettons Ld.*[10] du Parcq J. had applied that test both to the question of whether the machinery was dangerous and to the question of whether it was securely fenced. Hilbery J. had referred to a note in Redgrave's Factories, Truck and Shop Acts, which still appears in the 18th edition at p. 34, as being correct. On appeal, Somervell L.J. adopted the view that the foreseeability test applied both to the question whether the machine was dangerous and also to the question whether it was securely fenced, and Cohen L.J. agreed with him, delivering no separate judgment. Denning L.J., on the other hand, disagreed as regards applying the foreseeability test to the words "securely "fenced," but he did not disagree as regards applying that test to the word "dangerous." He said[11]: "It is apparent, there- "fore that in cases under section 14, unless section 15 applies, "the only inquiries are: first, is the machine dangerous; and, "second, if so, is it securely fenced? The answer to the first "question depends on foreseeability, and the courts apply the "test laid down by du Parcq J. in *Walker* v. *Bletchley Flettons* "*Ld.*,[10] recently approved by this court in *Smithwick* v. *National* "*Coal Board*,[12]" which was also a machinery case.

In the present case the word "dangerous" does not appear,

[8] [1951] 1 K.B. 454.
[9] Ibid. 461.
[10] [1937] 1 All E.R. 170.
[11] [1951] 1 K.B. 454, 467.
[12] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.

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but it seems to me that as regards the roof and sides of a travelling road or working place in a pit the word "secure" must mean substantially the same as "not dangerous by reason of liability "to fall." A ceiling, for instance, is I think secure in ordinary parlance, though an earthquake or a bomb, or even a bath overflowing in a bathroom overhead, may bring it down.

Turning now to *Marshall* v. *Gotham Co. Ld.*,[13] there again the cause of the fall was not in doubt. It was a latent geological defect known as "slickenside," which is a well-known kind of geological defect and a known danger; see, for instance, what is said by Lord Reid.[14] Accordingly, it was not contended there for the defendants that the roof had been made secure: see *per* Lord Reid [15] and *per* Lord Keith of Avonholm.[16] "It is obvious," said Lord Keith, "that the roof of the working place in which "the deceased man was working was not secure." Accordingly, the only question for decision was whether in the circumstances disclosed by the evidence the defendants were protected by the proviso, which, as I have said, corresponds in substance, though not in form, to what is contained here in the escape section, which is section 102 (8). Lord Tucker, however, made an observation which is very greatly relied on by Mr. Veale. That observation, I think, was not necessary for the decision of the case; and, since the fall in the present case was not caused on the one hand by an earthquake or an atom bomb or on the other hand by a geological hazard such as a glassy slant or slickenside, Lord Tucker's observation does not directly help me to decide upon Mr. Veale's first contention that this roof was secure. Lord Tucker said [17]: "I agree that the word 'secure' does not involve "security from the effects of earthquake or an atom bomb, but "I think that it must include security from all the known "geological hazards inherent in mining operations." Lord Tucker clearly thought that the cause there fell within the category of "known geological hazards inherent in mining "operations."

What I have to decide is whether the cause in the present case falls within the first category of earthquake or atom bombs or within the second category of known geological hazards. I can find no further assistance upon this point and I must therefore make up my own mind without the help of higher authority. Having held upon the evidence that the cause of the fall was that alleged by the defendants, I have come to the conclusion that the fall does not in the circumstances of this case establish a failure to make the roof secure as required by section 49.

I think I have probably already disclosed, with perhaps unwise candour, that I felt a certain temptation to burke deciding that question at all, having regard to what I am now going to decide with regard to the second contention, because, if I be wrong in

[13] [1954] A.C. 360.
[14] Ibid. 373.
[15] Ibid. 370.
[16] Ibid. 377.
[17] Ibid. 374.

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what I have held as regards the first contention, it is necessary for me to decide whether the defendants have shown that it was not reasonably practicable to avoid or prevent the breach. Having regard to the grounds upon which my own decision in *Edwards* v. *National Coal Board* [18] was reversed, I have been particularly careful to consider whether there is sufficient evidence, if accepted, to justify me in holding that it was not reasonably practicable to make the roof secure against that which on the defendants' case caused it to fall, namely, the displacement of a prop or props by an explosion such as could never have been contemplated, in my judgment, as even a possibility. It might perhaps have been better if some witness had been questioned upon that aspect of the matter, but it seems to me to be obvious without evidence that it was not reasonably practicable to set props supporting bars under a roof so that they would remain undisplaced by such an explosion.

The result is that in my judgment and my view of the law the decision of this case turns upon whether I accept the defendants' case as to what caused the fall. I have already stated that I do accept that case and I have indicated to some extent the reasons why I do so. Therefore, I rule that there was no breach of the defendants' duty to make the roof secure, but even if there was such a breach it was not reasonably practicable to avoid or prevent it.

Judgment for defendants.

Solicitors: *Raley & Pratt, Barnsley; C. M. H. Glover, Doncaster.*

[18] [1949] 1 K.B. 704.

[COURT OF CRIMINAL APPEAL.]

* PRACTICE NOTE (PREVIOUS CONVICTIONS).

C. C. A.

1955 *Jan.* 31.

Lord Goddard C.J., Cassels and Gorman JJ.

Criminal Law—Practice—Previous history of accused and convicted persons—Information to be given by police.

LORD GODDARD C.J. The judges of the Queen's Bench Division have considered the question as to the information and history of accused and convicted persons that should be given to the court, counsel and solicitors by police officers before and after conviction. They have resolved as follows:—

(1) Details of previous convictions must always be supplied by the police to the defending solicitor, or if no solicitor is instructed to defending counsel, on request. The judges are of opinion that there is no obligation on a police officer to satisfy himself that the prisoner has authorized a statement of previous convictions to be given as it is clearly within the ordinary authority of solicitor and counsel to obtain this information. In

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order that the defence may be properly conducted the prisoner's advisers must know whether they can safely put the prisoner's character in issue.

(2) There is no need for police officers to supply a list of previous convictions to the court before conviction because the prisoner's previous convictions are always set out in the confidential calendar with which the judge is supplied by the governor of the gaol whose duty it is to supply it. The police will, of course, give any information to the governor that he may require to enable him to perform his duty.

(3) A proof of evidence should be prepared by a police officer containing a factual statement of the previous convictions, date of birth, if known, education and employment, the date of arrest, whether the prisoner has been on bail and, if previously convicted, the date of his last discharge from prison if known. It may also contain a short and concise statement as to the prisoner's domestic and family circumstances, his general reputation and associates, and if it is to be said that he associates with bad characters the officer giving evidence must be able to speak of this from his own knowledge. This proof may be given either with his brief or at the outset of the case to counsel for the prosecution and to no one else, as unless the accused is convicted it has no relevance. It need not be prepared in two parts. If the accused is convicted it is to be given to the court and to counsel for the defence, but it will be for counsel for the prosecution in the first place to decide how much of this he asks the officer to prove, while it will, of course, be open to the presiding judge to put any questions he may think fit. The statement should not be handed to the court or to defending counsel until the officer is sworn. It may by leave of the court be given to the shorthand writer, who may use it to check his note, but he must only transcribe so much as is given in evidence.

J. D. P.

[COURT OF APPEAL.]

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Jan. 25.
Evershed M.R., Jenkins and Hodson L.JJ.

* *In re* CAMERON, DECD. CURRIE *v.* MILLIGAN.

[1954 C. 2271.]

Will—Construction—Annuity—One third of income of residuary trust fund payable to widow for life—If insufficient to provide £6,500 *in any year "free of English income and super-tax" trustees to pay balance "out of the income of the trust fund"—Whether annuity a continuing charge on income.*

A testator, who died in 1929, by clause 12 of his will directed his trustees to pay to his widow one third of the income of his residuary trust fund and "if one third of the income of the trust "fund shall in any year during the life of my said wife amount

"to less than £6,500 per annum free of English income and super-"tax my trustees shall in respect of that year pay or cause to be "paid to my said wife out of the income of the trust fund in "addition to one third of the income thereof such further sum as "will give to her a net income for that year of £6,500 free of "English income and super-tax." By clause 13 the testator directed that "subject to the interest of my said wife in part of the income "of the trust fund under the last preceding clause hereof" his trustees should hold the income of the trust fund on protective trusts for his son on his attaining the age of 25 years. Clauses 15 and 16 of the will contained directions to accumulate surplus income while the son was under 25. The testator's estate was large, and until 1938 there was surplus income which was accumulated, but from 1938 onward, owing to high rates of taxation, the widow's annuity had not been paid in full. The son died in 1940 and the question was raised whether accumulations of income made during the life of the son were liable to make good the past deficiency in the widow's annuity:—

Held, that clause 12, on its true construction, only conferred a right on the widow to resort in any year to the surplus income of that year to make up her annuity of £6,500. The interest which the testator gave to his son in income was inconsistent with the widow having a continuing charge on all income during her life.

In re Coller's Deed Trusts [1939] Ch. 277; 53 T.L.R. 859; [1937] 3 All E.R. 292 considered.

Decision of Roxburgh J. ([1954] 1 W.L.R. 1375; [1954] 3 All E.R. 329) affirmed.

APPEAL from a decision of Roxburgh J.[1]

By his will dated June 2, 1927, the testator Alastair Cameron, after giving certain specific and pecuniary bequests and directing his trustees to sell and convert into money his real and personal estate, and directing the payment of debts, funeral and testamentary expenses and legacies, directed by clause 12: "My "trustees shall pay or cause to be paid one-third of the income "of the residue of the said moneys (which moneys and the "property for the time being representing the same are herein-"after called 'the trust fund') to my said wife for her life . . . "I declare that if . . . one-third of the income of the trust fund "shall in any year during the life of my said wife amount to less "than £6,500 per annum free of English income and super-tax "my trustees shall in respect of that year pay or cause to be "paid to my said wife out of the income of the trust fund in "addition to one-third of the income thereof such further sum "as will give to her a net income for that year of £6,500 free of "English income and super-tax."

Clause 13 (1): "Subject to the interest of my said wife in "part of the income of the trust fund under the last preceding "clause thereof my trustees shall upon my [son] attaining the "age of 25 years hold the income of the trust fund upon . . . "protective trusts for my said son during the remainder of his "life."

Clause 14: "After the death of my said son my trustees

[1] [1954] 1 W.L.R. 1375; [1954] 3 All E.R. 329.

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" shall (subject to the interest aforesaid of my said wife in part " of the income of the trust fund during her life) stand possessed " of the capital and future income of the trust fund in trust for " the issue of my said son in such shares and in such manner " as his son should appoint. The son died without issue.

Clause 15: " If at my death my said son shall be under the " age of 25 years my trustees may until he attains the age of " 25 years apply or cause to be applied the whole or such part " as they in their discretion shall think fit of the income which " my said son would if he had attained the age of 25 years be " entitled to receive under the trusts hereinbefore contained " for or towards his maintenance education or benefit and may " either themselves so apply the same or may pay the same to " the guardians or guardian of my said son for the purpose " aforesaid without seeing to the application thereof and shall " accumulate the residue of such income and hold such accumu- " lations and the resulting income thereof for the person or " persons who shall eventually become entitled to the principal " fund from which the same shall have proceeded with power at " their discretion to apply the said accumulations or any part " thereof during the infancy of my said son as if the same were " income arising in the then current year."

Clause 16: " Upon my said son attaining the age of 21 years " and until he shall attain the age of 25 years my trustees shall " pay to him out of the income referred to in the last preceding " clause hereof such sums as with any income provided for him " by any settlement will make up his income to the sum of " £1,000 per annum at least and shall accumulate the remainder " (if any) of such income and hold such accumulations and the " resulting income thereof in the same manner and for the same " purposes as if they were made in pursuance of the last " preceding clause hereof."

Clause 18: " If the trusts hereinbefore declared shall fail or " determine then subject to the trusts powers and provisions " hereinbefore declared and contained and to the powers by law " vested in my trustees and to every or any exercise of such " powers my trustees shall hold the trust fund and the income " thereof in trust for such of my said sisters . . . as shall be " living at the failure or determination of the prior trusts " hereinbefore contained."

The testator died on February 23, 1929, leaving a widow and his only son. The son was born on October 5, 1916, and died on August 19, 1940, so that he attained 21 but did not attain 25. The income of the estate exceeded the sum necessary to pay the widow's annuity until 1938, and surplus income had been accumulated. After 1938, the income had been insufficient to pay the annuity in full.

A summons was taken out by the executor of the will to determine (inter alia): (3) whether on the true construction of the will and in the events which had happened, and having regard

to the insufficiency since the year 1938 of the income of the trust fund to provide the testator's widow with such a further sum as would give her a net income of £6,500 (as reduced in amount by the joint effect of section 25 of the Finance Act, 1941, and section 20 of the Finance (No. 2) Act, 1945), free of income tax and surtax (*a*) accumulations of surplus income made pursuant to clause 16 of the said will during the lifetime of the son and [subject to any answer which might be given to question 4]; (*b*) the income arising from accumulations so made were or was applicable for the purpose of providing the testator's widow with the said net income of £6,500 (so reduced as aforesaid); (4) whether there was an intestacy as to the income arising from the said accumulations subsequently to the expiration on February 23, 1950, of the period of 21 years from the testator's death and, if so, whether such income ought to be applied in the first place in or towards discharge after statutory charge for £1,000 and interest to which the widow of the testator would be entitled under such partial intestacy.

Roxburgh J. held that the widow had no power in right of her annuity to resort to accumulations of income in past years or to the income of such accumulations.

The widow appealed.

Charles Russell Q.C. and *Owen Swingland* for the widow.

W. A. Bagnall for beneficiaries contingently interested in capital.

P. S. H. Rossdale (*H. A. Rose* with him) for the plaintiff trustees.

The cases referred to in argument are cited in the judgment of Evershed M.R.

EVERSHED M.R. In my judgment, Roxburgh J. came to a correct conclusion upon the problem presented to us in this appeal. The problem is the not unfamiliar one, whether a limited gift to a widow—let us call it for the moment an annuity—is or is not so given as to confer upon the widow a continuing charge during her lifetime—for Mr. Russell does not contend for a further charge—upon the whole income of the residue of the estate.

[His Lordship stated the facts and continued:] The trustee has in hand accumulations of approximately £8,500, which represent the surplus of those years during which there was a surplus; and the claim of the widow is to resort to that accumulated surplus to make up during current, and perhaps future, years deficiencies in the one-third of her husband's income.

Romer L.J., in *In re Coller's Deed Trusts*,[1] said at the beginning of his judgment that the reported cases upon the

[1] [1939] Ch. 277, 280; 53 T.L.R. 859; [1937] 3 All E.R. 292.

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subject were numerous, and he proceeded: "The question is "always one of the proper construction of the instrument creating "the annuity, and must accordingly depend in every case upon "the precise language employed. No one case, therefore, can "be said to govern another." The Lord Justice then stated a number of principles, which included this: In the case of the gift of an annuity generally out of income and then a gift over opening with such words as "subject to payment of the annuity," the annuitant is prima facie entitled to a continuing charge upon the income of the fund out of which the annuity is expressed to be payable; and the strength of the argument for the widow in this case has been that there is nothing in the language of this will to rebut what should be regarded as the prima facie right of the widow to receive an annuity of not less than £6,500 a year out of all income of residue arising during her life.

For my part, I share the inclination, which Roxburgh J. expressed, to read clause 12 as intended, upon its proper construction and according to its special and peculiar—I use the word strictly and not meaning "odd" or "strange"—language, to confer only a right upon the widow to resort in any year to surplus income of that year beyond the one-third to make up the £6,500. It is quite true, as Mr. Russell observed, that the gift is "one-third of the income of residue" and not "one-third each "year of the income of residue for that year"; in other words, it is a gift in strict terms of one-third of the total income of residue during the period of the widow's life. But, when I read on and find the declaration that, if one-third of income shall in any year amount to less than £6,500, the trustees "shall in respect "of that year cause to be paid to the wife out of the income of "the trust fund in addition to one-third such further sum as will "give her a net income for that year," I get, I confess, a strong impression conveyed to my mind by the language, that the testator is intending only to look at the state of affairs, financially, year by year and is intending only to authorize resort to the two-thirds of income for the year in which the one-third has fallen short of the figure indicated. I appreciate the force of the argument that the words used are "shall . . . out of the income "of the trust fund" and not "out of the income of the trust "fund in that year." The omission there of a reference to a single year should not be regarded as insignificant, particularly having regard to the express reference in three other places to the year in question; but none the less I confess that the language does create in my mind the same impression of the testator's intention, having regard to the nature of the gift and particularly to the fact that it is not a case of an ordinary annuity of so much per annum out of residue, as was formed in my brother Roxburgh's mind.

I come, however, to the later clauses which the judge found, and which I find, determining in this matter. It is to be noted that clauses 13 and following deal, or deal so far as is relevant,

with provisions for the testator's son; and it is impossible to read them and not form the clear impression that the testator thought that he was conferring upon the son an interest in something which would be in reality available. I am putting it somewhat loosely, because I have in mind the point which Mr. Russell made that, even though the widow had a continuing charge on income and though strictly, therefore, during her lifetime no part of the income was free from her charge upon it so as to be available for the son, still there is authority for the view that, as a matter at least of administrative relaxation, an achieved surplus will be allowed to be distributed, and will be properly distributed, by trustees to the person entitled subject to the interest of the annuitant. The exact limits and extent of that permission or administrative relaxation were cited by Romer L.J. in *Coller's* case [2] from *In re Platt*,[3] and they are not entirely clear and precise. I should imagine that, in the ordinary case, unless the surplus were very secure, trustees would always require the protection of the court.

But whether those matters were in the testator's mind or no, it seems to me that the kind of interest he was conferring, or purporting to confer, upon his son plainly proceeded upon the view that the wife's interest in income was of a more limited character than that of having a continuing charge on the whole income. He opened clause 13 with the words "subject to the "interest of my said wife in part of the income of the trust "fund"—a phrase which he repeated in clause 14. Mr. Russell observed that, since she has, quoad any year, an interest in the whole income, therefore the phrase "the interest in part of the "income" is, on any view, inaccurate; but I am unable to go further with Mr. Russell and say that the reference, being inapt, is therefore colourless. Plainly the testator is referring to what may be called a "partial interest" in income conferred upon his wife. Though you may debate upon, and even quarrel upon, the meaning and extent of "a partial interest in income," having regard, however, to the nature of the problem here posed, I, like the judge, feel no doubt that the reference indicates, and indicates tolerably clearly, that of the two possible interests which such an annuitant might enjoy—an interest in any year to have the income of that year utilized in making up £6,500 for her, on the one hand, and a continuing charge on all income during her lifetime on the other—these references are directed to the former and not to the latter alternative.

The nature of the interest given to the son also reinforces that view. The testator speaks in clause 15 of the son "being entitled "to receive" something under the trusts thereinbefore declared; and there are the provisions as to accumulations, which may be treated and made available as though they were income, in a

[2] [1939] Ch. 277.
[3] [1916] 2 Ch. 563.

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context indicating that they were intended to be available for the son's maintenance.

Those matters point, and point somewhat forcibly, to the view to which, under clause 12, I am inclined to take. I will not use the word "devastating" which the judge used; but, granted that some colour is required to make the picture of clause 12 complete, the colour which clauses 13 and 14 provide, in my judgment, produces the picture which commended itself to the judge. For those reasons, I come to the conclusion that Roxburgh J. rightly interpreted the language used by the testator in this particular will, and I would accordingly dismiss the appeal.

JENKINS L.J. I agree that the judge came to a right conclusion in this case and that the appeal fails and should be dismissed.

HODSON L.J. I also agree.

Appeal dismissed.

Solicitors: *Johnson, Jecks & Landons; Lee, Bolton & Lee.*

B. A. B.

[MANCHESTER AUTUMN ASSIZES.]

1954
Dec. 16, 17, 20.
Pearce J.

*RUSHOLME & BOLTON & ROBERTS HADFIELD LD. *v.* S. G. READ & CO. (LONDON) LD.

Agency—Contract—Parties—Confirming house—Principal an Australian company, agent an English confirming house—Original indent by Australian company upon manufacturer containing term "confirmation and payment by" agent — Agent's contract with manufacturer for purchase of goods—Original indent cancelled by Australian company—Whether agent liable as principal.

Through their Australian representatives English manufacturers received an indent for goods from an Australian company, terms being confirmation and payment by a London confirming house. Under the heading Order No. 1144/Letter/2171 the exact indent was repeated in terms by the confirming house to the manufacturers, with the words "Purchased by (the confirming house), holders of "Purchase Tax No. Central 2/3793 of goods as stock intended for "exportation." Towards the bottom of the document were words confirming the indent received by the Australian representatives of the manufacturers, and a footnote indicated that any variation of the terms required written approval from the confirming house.

Before the delivery date the Australian company cancelled both orders and the manufacturers were unable to obtain payment therefrom. The confirming house refused to accept the goods and in an

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[Reported by JOHN WARD, Esq., Barrister-at-Law.]

action by the manufacturers against them for damages for breach of contract:—

Held, that the document headed Order No. 1144/Letter/2171 contained the true contract between the parties; that in that document the defendants assumed towards the plaintiffs the financial liability of a principal buyer and accordingly they were liable in damages for breach of contract.

ACTION.

The plaintiffs, manufacturers, claimed damages for breach of contract from the defendants in respect of their refusal to accept 10,000 yards of shirting material which the plaintiffs sold to the defendants under two written contracts. The defendants admitted the refusal to accept; and damages were agreed at £1,100. The defendants, however, denied liability as they contended that the true transaction was a sale by the plaintiffs to an Australian company and that in so far as the defendants were a party to the transaction they were merely the English agents and had no personal liability in respect of any breach of contract.

The facts are fully stated in the judgment.

J. D. Cantley Q.C. and *W. D. T. Hodgson* for the plaintiffs.
R. H. Mais for the defendants.

The following case was cited in argument in addition to those referred to in the judgment: *Universal Steam Navigation Co. Ld.* v. *McKelvie & Co.*[1]

Cur. adv. vult.

Dec. 20. PEARCE J. The plaintiffs are claiming damages in respect of two contracts. The defendants are a confirming house carrying on business in London. What the precise duties and liabilities of a confirming house are has been a matter in dispute. The first contract, dated June 6, 1951, is headed Order No. 1144/Letter/2171, and purports to be an order for 5,000 yards of shirting material given by the defendants to the plaintiffs with the words "Purchased by S. G. Read and Co. (London) Ld., "holders of Purchase Tax No. Central 2/3793 of goods as stock "intended for exportation." It sets out the names and addresses of the plaintiffs and the defendants and gives details of quality, quantity and price, delivery to be December loco/Manchester. The order requires five certified copies of invoice for Australia, and a shipping mark for Sydney is given. A footnote states, inter alia, "This order must be delivered within the specified "time. Any extension or alteration in delivery or price must "be notified for our written confirmation." There is nothing on the order to show that it has reference to any other transaction, except the following words, which appear towards the bottom of the document: "In confirmation of your agents' Indent No.

[1] [1923] A.C. 492; 39 T.L.R. 480.

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Rusholme & Bolton & Roberts Hadfield Ld. v. S. G. Read & Co. (London) Ld.

Pearce J.

"14." The order was accepted by the plaintiffs by letter of June 7 in these words: "We thank you for the above order for "Wembley Wear Ld. of Sydney, and have pleasure in con- "firming same herewith." The terms are then set out.

The document referred to as Indent No. 14 is a document dated May 29, 1951, purporting to be an order given by Wembley Wear Ld. of Sydney to the plaintiffs through their Australian agents, Lambert Muir, of Melbourne. It sets out the same details as the order by the defendants as to price, quality, quantity and delivery. It contains the following words: "Terms—confirmation and payment by S. G. Read & Co., 3–4, "Highgate Street, London E.C.1." It was sent by the plaintiffs' Australian agents to the plaintiffs in a letter dated May 29, 1951, which refers to it as "our order No. 14 account Wembley "Wear Ld." and was acknowledged by the plaintiffs by a letter of June 4 as "Indent No. 14 for 5,000 yards W.M. 24 from "Wembley Wear Ld." and the plaintiffs stated that they were applying to the defendants for confirmation. The copy of this Indent No. 14, or Order No. 14, given to Wembley Wear Ld. was produced by the defendants, and it bore the signature of the plaintiffs' Australian agents "On behalf of Roberts Hadfield."

The second contract, which was also for 5,000 yards, and the indent to which it refers are not different in any material particular from the first.

It is plain, therefore, that the transaction was this. The Australian company arranged with the plaintiffs' Australian agents that they should buy certain goods on certain terms "subject to confirmation and payment by" the defendants; and the defendants confirmed in a letter in which they purported to order the goods as principals and to become liable as such on the contract. This order was accepted by the plaintiffs, who proceeded with the manufacture of the goods.

Owing to a trade recession before the delivery date the Australian company cancelled both orders and the defendants refused to accept delivery. The parties and their solicitors have co-operated very sensibly in efforts to minimize the damage and to obtain payment from the Australian company. Unfortunately, they have been unsuccessful, and this action has been brought to decide which of two innocent parties shall bear the loss occasioned by the defaulting Australian company.

I am satisfied by the evidence of the plaintiffs' director (who seemed to be honest and reliable) that he would not have accepted this order without the interposition of an English confirming house, that he took no interest in the financial stability of the Australian company, that he made inquiries as to that of the defendants and found it satisfactory and that he relied on that fact in this transaction. Had he not had the order from the defendants he would not have agreed to supply the goods. He regarded the indent from the Australian company, not as a contract, but as an expression of a desire to purchase the goods.

He understood the indent to have been accepted as an indent and not as an order by his Australian agents, and, in his view, the fact that the indents were signed by the respective parties is merely an indication of a genuine desire to buy, and not an indication that a firm order was being made subject to conditions precedent. Where a confirming house confirms a contract, his view is that he is entitled to look to the confirming house personally to see that the contract is carried out.

The evidence of the defendants' director, Mr. Read, was, in my view, unreliable and I do not accept it. In spite of his denial in the witness-box I consider that his true view of the transaction is contained in two letters which he wrote to the Australian company after the cancellation. In a letter of September 28, 1951, he wrote: "These orders are sent to us for confirmation and they "have been confirmed on our official order sheet which of course "creates a liability as far as we are concerned, and the manufac- "turers can, of course, hold us responsible. Although we do not "raise any particular objection to you corresponding direct we "feel that it would be better if you had instructed us, and in "any case we think that in your letters you should have referred "to the confirmation which we sent to these various people on "your behalf." In a letter of November 28, 1951, he wrote: "On receiving an indent from overseas we confirm the same "to the manufacturer on an official order sheet, which order "sheet is sent out to comply with the various regulations "applying to the export of goods from the United Kingdom, "including purchase tax certificate number, which permits us "to handle the goods without having to pay British purchase "tax and obtain a refund on shipment. The terms with overseas "clients are arranged previously and we would point out that in "reference to your good selves the terms are . . . payment "against irrevocable letter of credit opened in our favour. "Normally such credits should be opened when the indent is "sent, but it is our usual procedure with established accounts "to cable for the credit when the goods are ready for shipment, "and by so doing avoid clients establishing several credits and "the necessary expense involved."

The view of the parties themselves as to what liability they were incurring is not a deciding factor where, as here, the transaction was in documents; but in cases of ambiguity some weight may properly be given to it as part of the surrounding circumstances. In *Chapman* v. *Smith* [1] Parker J. said: "My attention "was called to a great many authorities bearing on the question "whether a person expressed to contract as agent either for a "named or an unnamed principal, can himself be personally liable "on the contract. Having come to the conclusion that this "question is in each case a question of construction having regard "to the surrounding circumstances, I need not consider these "authorities in detail."

[1] [1907] 2 Ch. 97, 103.

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There is no authority that decides the position and liability of a confirming house. Both from the documents and the surrounding circumstances it appears to me that its functions are wider than those of a bank which has an irrevocable credit and pays against a delivery (after it has been properly checked for quantity) but has no liability on the contract.

The fact that a person is agent and is known so to be does not of itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability unless a contrary intention appears; and similarly where he signs in his own name without qualification. In *Brandt (H. O.) & Co. Ld.* v. *Morris (H. N.) & Co. Ld.*[2] Scrutton L.J. said: "Later, in *Gadd* v. *Houghton*,[3] which may "perhaps be called the leading case, Mellish L.J. states the "same principle[4] 'As is said in the note to *Thomson* v. *Davenport*,[5] when a man signs a contract in his own name he is "'prima facie a contracting party and liable, and there must "'be something very strong on the face of the instrument "'to show that the liability does not attach to him.' When "I find in this contract the words 'We have this day bought "'from you,' and the signature 'H. O. Brandt & Co.,' in "my view something very strong is needed to show that Brandt "& Co. have not contracted personally." He added later[6]: "The other fact which I take into account is that Messrs. Sayles "Bleacheries are foreigners, and while I think that one cannot "at the present day attach the importance which used to be "attached forty or fifty years ago to the fact that the supposed "principal is a foreigner, it is still a matter to be taken into "account in deciding whether the person said to be an English "agent has or has not made himself personally liable."

Counsel for the defendants stresses the dissenting judgment of Neville J. in that case, and the case of *Miller, Gibb & Co.* v. *Smith & Tyrer Ld.*[7] But that case was cited to the court in *Brandt* v. *Morris*.[8] It appears to me that the judgment of Scrutton L.J., which I have quoted, correctly sets out the law. In *Basma* v. *Weekes*,[9] Lord Reid, delivering the opinion of the Board, clearly affirmed *Higgins* v. *Senior*[10] and said[11]: "an "agent who contracts in his own name does not cease to be "contractually bound because it is proved that the other party "knew when the contract was made that he was acting as agent."

In his careful and ingenious argument counsel for the defendants contends as follows. The contract sued on is not the real

[2] [1917] 2 K.B. 784, 796.
[3] (1876) 1 Ex.D. 357.
[4] 1 Ex.D. 357, 360.
[5] (1829) 9 B. & C. 78.
[6] [1917] 2 K.B. 784, 797.
[7] [1917] 2 K.B. 141; 33 T.L.R. 295.
[8] [1917] 2 K.B. 784.
[9] [1950] A.C. 441; 66 T.L.R. 492; [1950] 2 All E.R. 146.
[10] (1841) 8 M. & W. 834.
[11] [1950] A.C. 441, 454.

contract. The real contract was the contract (sometimes called the indent) direct between the plaintiffs (through their Australian agents) and the Australian company. The contract sued on incorporates the indent by reference and, therefore, one must consider both documents. When one regards both those documents one sees that there was a firm contract of sale in the indent (which was headed as an order and of which copies were signed by both parties to it) made between the Australian company and the plaintiffs through their Australian agents subject to two conditions precedent, namely, confirmation and payment by the defendants. Those conditions precedent were fulfilled by the confirmation and the defendants' agreement to pay. But this was only an agreement to pay on delivery. It imports no other liability and if goods are refused even at the last moment, so that there is no delivery, the defendants have no obligation to pay. At most the defendants, like a del credere agent, guarantee the solvency of the buyer. A del credere agent is only liable in respect of an ascertained sum or certain sum due as a debt from the buyer to the seller; he is not the person with whom the seller is entitled to litigate disputes arising out of the contract and ascertain what is due on it. At best therefore the defendants have no liability at all; at worst they are not liable until judgment has been obtained against the Australian company.

I do not think the analogy of a del credere agent helps. Lord Mansfield took the view that he was liable to the seller in the first instance, but this view was corrected later, and as the law now stands the del credere agent is merely a guarantor of the buyer's solvency. It would seem that he is a guarantor to the seller of any mischief arising from the buyer's insolvency once that mischief has been quantified (see *Hornby* v. *Lacy* [12] and *Gabriel (Thomas) & Sons* v. *Churchill and Sim* [13]). If the defendants' liability were similar to that of a del credere agent, they would not be liable until the plaintiffs had sued the Australian company and quantified their damages in such litigation, and this action therefore, would not now lie.

I do not think that the defendants' liability is limited to that of a del credere agent. I do not accept the view that the real contract is the indent between the Australian company and the plaintiffs through their agent. If that were so the Australian company would have had a contractual duty to do all in their power to procure the performance of the condition precedent, namely, that a confirming house should confirm and make arrangements to pay. On the view that I take of the documents and surrounding circumstances there was no such contractual duty. If either party had taken no steps to implement the indent, the other might well have considered himself to have been badly treated; but I think that either party to the indent would have been surprised to be told that it constituted a breach

[12] (1817) 6 M. & S. 166.

[13] [1914] 3 K.B. 1272; 30 T.L.R. 658.

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of contract. The words "confirmation and payment by" the defendants meant that a confirmation such as the order now sued on was to be issued by the defendants and that financial liability was to be assumed by the defendants.

I see no reason why "payment" should be restricted to payment on delivery and should exclude other payments such as payments due for breach of contract. Such a restriction would make the defendants' functions less onerous, but also far less valuable. It would leave the English merchant completely unprotected against cancellation at the last moment. It would be less than the protection given by a del credere agent. I do not believe that that was the commercial intention of the parties.

The document means what it says, namely, that the defendants are assuming liability as between themselves and the plaintiffs. It would have been easy for the defendants to put a different wording in the document had the intention been otherwise. The defendants at first claimed that their wording "Pur- "chased by S. G. Read & Co. (London) Ld." was inserted on the compulsion of the Board of Trade as a condition of the defendants holding a purchase tax certificate; but in cross-examination Mr. Read had to admit that this was not so. He could have set out in terms that they were purchasing only as agents, but he said that that was omitted because it was obvious. I do not accept that explanation.

In my opinion the document on which the plaintiffs sue was the true contract between the parties. It was intended by the parties to impose, and by its terms does impose, a liability on the defendants in respect of the performance of the contract. I find nothing to counteract the presumption that the defendants incurred personal liability. The documents and the surrounding circumstances support the presumption. The plaintiffs are entitled to judgment for £1,100 and costs.

Judgment for the plaintiffs.

Solicitors: *Knott & Castle, Manchester; H. A. Crowe & Co.*

[COURT OF APPEAL.]

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Jan. 18, 19, 20.

Denning, Birkett and Parker L.JJ.

*JESS B. WOODCOCK & SONS LD. *v.* HOBBS.

[Plaint K. 15257.]

Husband and Wife—Property—Matrimonial home—Desertion by husband—Sale of home—Wife remaining in occupation—Claim to possession by purchasers for value with notice of wife's occupation—Exercise of court's discretion—Circumstances in which it may be exercised.

The defendant, having been deserted by her husband, remained in occupation of the matrimonial home, the husband paying the

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rent. The house was situated at the entrance to a yard in which the husband carried on a road haulage business. Later the husband bought the premises and still permitted the wife to remain in occupation. When the road haulage industry was nationalized and the British Transport Commission compulsorily acquired the husband's business he, through his solicitors, informed the Commission that the wife was acting as caretaker of the business and as such was living in the house rent free. His purpose was to avoid paying the rent. When, some four years later, on the denationalization of the industry, the Transport Commission sold what had been the husband's business to the plaintiffs, the Commission passed on the same information to the purchasers as to the position of the wife. The wife was in fact not acting as caretaker, having no duties to perform. Shortly after the conveyance had been completed the plaintiffs gave notice to the wife to quit and when she claimed to remain as a deserted wife they brought the present proceedings in the county court for possession. The judge having dismissed the action, holding that in the circumstances the plaintiffs must in law be held to have had notice of the wife's true position, the plaintiffs appealed:—

Held, that a deserted wife has no right to stay indefinitely in the marital home, but only a right to stay until such time as the court in its discretion orders her to go out; and that the court's discretion could be exercised in an action for possession and not only in a separate application made expressly for the purpose. Accordingly, having regard to the circumstances of the present case, the court in the exercise of its discretion, ordered the wife to vacate the house in three months.

APPEAL from Judge Andrews, sitting at Bow County Court.

The following facts are taken substantially from the judgment of Denning L.J.

Jess B. Woodcock & Sons Ld. claimed possession of a house, 132 Princes Road, Buckhurst Hill, which was occupied by Mrs. Hobbs, the defendant, a married woman who had been deserted by her husband. The husband had carried on a haulage transport business in a yard and had lived with his wife in this house at the entrance to the yard. For many years he was the tenant of the house at a standard rent of £1 a week. In 1940 he left his wife and went to live with another woman. The defendant remained in the house and her husband paid the rent as part of her maintenance. In 1948 the husband bought the house, but let the defendant remain in occupation and paid her £1 a week maintenance.

After the nationalization of the road haulage industry the British Transport Commission in March, 1950, compulsorily acquired the whole undertaking of Mr. Hobbs, including the house, for the sum of £7,180. On June 8, 1950, the Commission wrote to the defendant offering her a tenancy at 21s. 2d. a week, being the standard rent plus a permitted increase. The defendant did not answer the letter, but sent it to her husband, with whom she was not on speaking terms. The husband, through his solicitors, on June 12, 1950, sent the following reply to the Commission: " Mr. Hobbs was the original tenant of the premises " at the time he purchased, and has separated from his wife,

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" leaving her in occupation, and that whereas prior to his pur-
" chase he paid the rent, he has since that date treated the rent
" as part of the allowance which he makes to his wife and also
" as consideration for her acting as caretaker in respect of our
" client's business at the adjoining premises, answering inquiries,
" etc., in the absence of our client or any member of his staff."
In subsequent letters Mr. Hobbs, through his solicitors, told the Commission that his wife was there rent free as caretaker of the business. In fact, she was there simply as a deserted wife. The Commission did not press the matter. The defendant knew that her husband was putting her forward as a caretaker but passed all letters sent to her by the Commission on to her husband.

On April 12, 1954, on the denationalization of the road haulage industry the Transport Commission sold the whole of the undertaking, including the house, to the present plaintiffs for the sum of £9,500. On the form of tender the Commission said: " Mrs. " Hobbs, the occupier of No. 132 Princes Road, resides therein " rent free under an arrangement alleged to have been made in " January, 1943, between Alfred Thomas Hobbs and herself, on " condition that she acted as caretaker . . . The purchaser shall " purchase the property subject to Mrs. Hobbs' occupation thereof " and shall raise no objection or requisition as regards such " occupancy or the terms thereof." Shortly after the conveyance was completed the plaintiffs gave notice to quit to the defendant, and brought the present proceedings in the county court.

Judge Andrews dismissed the action. He held that the plaintiffs were purchasers for value, but that in the circumstances they must be taken to have had notice of the true position of the defendant. He intimated, however, that in different proceedings there might well be a question whether the court in its discretion should order the tenant to go out.

The plaintiffs appealed.

Horatio Vester for the plaintiffs.
M. P. Picard for the defendant.

The following cases were referred to in argument in addition to those appearing in the judgment: *Skinner* v. *Geary* [1]; *Errington* v. *Errington* [2]; *Vaughan* v. *Vaughan*.[3]

Denning L.J., having stated the facts as set out above, continued: Many cases have come before the courts lately where a husband owns the matrimonial home and then deserts his wife, leaving her there with the children. In such a case the husband cannot turn his wife and children out into the street simply because he is the legal owner of the house. He can only

[1] [1931] 2 K.B. 546; 47 T.L.R. 597.
[2] [1952] 1 Q.B. 211; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.
[3] [1953] 1 Q.B. 762; [1953] 1 W.L.R. 236; [1953] 1 All E.R. 209.

recover possession if the court thinks fit to order her to go. If he goes bankrupt and the house becomes vested in his trustee in bankruptcy, the trustee cannot get possession unless the court in its discretion orders her out: *Bendall* v. *McWhirter*.[1] So much is well settled. But the question is: What is to happen if the husband sells the house over her head or conveys it to someone else: can the purchaser or the assignee turn her out? The judges of the Queen's Bench Division have had to consider the question and they have held that, if the purchaser or assignee bought with full knowledge of all the facts, he stands in no better position than the husband.

A striking case was where the husband went to live with another woman and conveyed the house to her; and then this woman sought to turn out the wife. The husband no doubt said to his mistress: "I know that I cannot turn my wife out, so I "will convey the house to you. It will then be yours and you "can turn her out." The court refused to tolerate such a cynical disregard of the married state. The mistress was not allowed to turn out the wife: see *Street* v. *Denham*,[2] a decision of Lynskey J. Other cases have occurred where the husband has sold the house to a relative or friend at a very low price and the purchaser has sought to turn out the wife. The husband in these cases no doubt said to the purchaser: "I cannot turn her out, but if I sell "to you, you can. Once you have got her out, you can sell the "house with vacant possession. I will rely on you to give me "some of the proceeds." In those cases, too, the courts refused to allow the purchaser to turn out the wife: see *Ferris* v. *Weaven*,[3] a decision of Jones J., and *Savage* v. *Hubbold*,[4] a decision of Hallett J.

Mr. Vester said that those three cases were to be explained as cases of collusion; but they were not put on that ground, and I do not think it is the correct explanation. The conveyances were real enough. They were not shams. They were intended, it is true, as a means of getting round the law; but that is not itself a ground for denying their validity. I may instance the transaction by which hire-purchase finance companies do business. All those transactions are a means of getting round the law about bills of sale; but so long as there is a real purchase by the finance company and a real hiring back, the transactions are good.

The true explanation of the three cases is, I think, the ground taken by the judges, namely, that the mistress and the purchasers respectively took with full knowledge of the facts. They were therefore in no better position than the husband and took subject to the wife's right to stay in the house. The husband, it is true, had an ulterior motive. He wanted the wife turned out of the house, but that does not affect the legal position. It would

[1] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.
[2] [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.
[3] [1952] W.N. 318; [1952] 2 All E.R. 233.
[4] (Unreported), The Times, June 11, 1953.

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be the same if the husband had given the house to his mistress or to his brother-in-law by a deed of gift. If they took with full knowledge of the facts, they ought not to be able to turn out the wife any more than the husband could. This means, no doubt, that the wife's right is an equity. It does not arise on marriage, but only on the actual desertion. It does not therefore prevail against a prior mortgagee, whether legal or equitable: see *Lloyds Bank Ld.* v. *O—— (Trustee of the Property of), a Bankrupt*,[5] and *Barclays Bank Ld.* v. *Bird*[6]; but it does prevail against a subsequent purchaser with knowledge or, I would add, with notice of the facts.

Mr. Vester referred us to what Jenkins L.J. said in *Bradley-Hole* v. *Cusen*,[7] but those observations were by the way and the three cases were not cited to the court. I am quite sure that the learned Lord Justice could not mean on this occasion to override them. I think, therefore, that we should approach this case on the footing that those cases were rightly decided. I would not myself wish to cast any doubt on them, especially as they are so much in accord with justice and good sense.

The distinction between those cases and the present one is that here the purchasers did not have knowledge of the facts. The Transport Commission did not know that the defendant was a deserted wife: nor did the plaintiffs. They were told that she was a caretaker for her husband. Nevertheless, I think they had notice of her true position. The Transport Commission were, as the judge said, "extremely supine." The story of her being a caretaker was hardly credible when there was no caretaking to do. They made no inquiries of the wife herself. The plaintiffs are in no better position. They took subject to the occupancy of the defendant and, nevertheless, they made no inquiries of her as to her position. They took their chance. In addition there are the cases to which Mr. Picard referred us, which show that occupation is notice of the occupier's rights: see *Hunt* v. *Luck*,[8] *Universal Permanent Building Society* v. *Cooke*.[9] In these circumstances I think we should approach the case on the footing that the purchasers took with notice.

Thus far I find myself in full agreement with the county court judge, but there remains the question of discretion. The deserted wife has no right to stay indefinitely in the house. Her right is only to stay until such time as the court in its discretion orders her to go out. That is the only right she has against her husband, and it is the only right she has against his successors. The court always has a discretion in the matter. This brings me to the only point where I differ from the county court judge. He thought

[5] [1953] 1 W.L.R. 1460; sub nom. *Lloyds Bank* v. *Oliver's Trustees* [1953] 2 All E.R. 1443.

[6] [1954] Ch. 274; [1954] 2 W.L.R. 319.

[7] [1953] 1 Q.B. 300, 301; [1953] 2 W.L.R. 193.

[8] [1902] 1 Ch. 428.

[9] [1952] Ch. 95; [1951] 2 T.L.R. 962; [1951] 2 All E.R. 893.

that the discretion could not be exercised in an action for possession, but only in a separate application made expressly for the purpose. I think that it can be exercised in these proceedings. When the purchaser, as here, brings an action for possession and the wife sets up a claim to stay as a deserted wife, the court can, if it thinks fit, make an order for her to go.

The exercise of this discretion is no doubt an anxious task, but a similar discretion is exercised in the case of statutory tenants under the Rent Acts, and in applications under the Bankruptcy Act, 1914 (*Bendall* v. *McWhirter* [10]), and under the Law of Property Act, 1925 (*Bull* v. *Bull* [11]). In the case where a husband conveys the house to his mistress, or to a friend, at a low price simply to defeat the wife's right, the court would no doubt refuse to order the wife to go. It would not lend its aid to such a proceeding. But in the case where the husband sells the house to a purchaser who buys in good faith at a fair value, not knowing the wife's right (but subject to it only because he is taken by law to have notice of it) the court would, I think, be disposed to order her to go, but it would do what it could to lessen the hardship on her.

In the present case I think we should order the defendant to go. The purchasers bought in good faith at a fair value and they did not know she was a deserted wife. They were told she was a caretaker. She had been many years in the house paying no rent. When she was offered a tenancy at 21s. 2d. a week she did not accept it. If she had only accepted it, she could have been a statutory tenant with a status of irremovability, . . . but she has not at any time offered to pay any rent. She sought in these proceedings to set up the Statute of Limitations and claim a squatter's title. True it is that she left everything to her husband. She thought it was his duty to provide a roof over her head. It was he who set up the story of a caretaker so as to save himself paying rent. But, innocent as she is, she cannot be left there much longer without paying rent. I think we should make an order for her to give up possession in three months. That will give her time to apply to the courts for further maintenance from her husband to make up for the loss of her home.

Mr. Vester argued that the plaintiffs were entitled at law to possession on the ground that the wife had no equity or, alternatively, the plaintiffs had no notice of it. If we had held in his favour on either of those points, the order would have been for possession in four weeks. But when we told him that we were in his favour on the question of discretion, he did not seek further to argue those points, and we told him that he could argue them again on another occasion if he so wished.

In the result, therefore, differing from the county court judge only on this question of discretion, I think that this appeal should be allowed and an order made for possession in three months.

[10] [1952] 2 Q.B. 466.

[11] [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.

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BIRKETT L.J. I am of the same opinion. The difference between the judgment of this court and that of the court below is really on a point of procedure rather than on a substantive point. When the case was framed in the court below the line upon which the contest was to be fought was plain from the pleadings. Mr. Vester, when he presented the case in the particulars of claim, asserted in the first paragraph that the consideration for the wife remaining in the premises was "in "consideration of the defendant acting as caretaker of a transport "undertaking owned by the said Hobbs." In the defence it was made clear from paragraph 1 that what was being asserted was that the doctrine of *Bendall* v. *McWhirter* [12] in the Court of Appeal was the all-sufficient answer. That was, quite apart from other minor matters, the leading matter of contest. The county court judge, after listening carefully to the evidence upon this matter, came to the conclusion, which I think is right, that the position of the wife in the present case was that of a deserted wife. That was the position asserted in paragraph 1 of the defence to the particulars of claim.

When the judge came to deal with this matter, having resolved the question of fact (he merely said: "In my judgment, there-"fore, the defendant is residing at No. 132 Princes Road as a "deserted wife and not as a caretaker," that was the first major contest of fact upon which he had to find), he said: "In "the circumstances I am of opinion that the principles laid down "in *Bendall* v. *McWhirter* [12] apply, and that I cannot in this "action give possession against the defendant." He was saying: My conclusion is, upon these rather complicated facts and applying the law as I understand it, that the defendant's case does not differ from the decision in *Bendall* v. *McWhirter*.[12] He adds: "Therefore in this action she is secure and I can do "nothing about it." Then, to show that that was no mere passing reflection, but was a considered view, he said: "It seems "to me that the defendant or her husband would be well advised "to take immediate steps about paying the plaintiffs for the use "of their home; otherwise the defendant may find herself ejected "on grounds which are not relied on in the present action. "Denning L.J. [in *Bendall* v. *McWhirter*] speaks about the "discretion of the court whether to order possession or not, and "in my opinion in properly framed proceedings such discretion "may be of the greatest importance." The judge is saying that he cannot consider the matter of discretion in these proceedings. That is the point of procedure upon which we are differing from the judge. I think that upon that he was wrong.

The passages that he had in mind in *Bendall* v. *McWhirter* [12] were obviously where Denning L.J. said [13]: "What is the nature "of this right of the deserted wife which the courts have thus "evolved?" and then he goes on to discuss, in language which has now become quite familiar, what was the nature of that

[12] [1952] 2 Q.B. 466. [13] Ibid. 476.

right, and says that the wife has an irrevocable authority to stay in the matrimonial home. He then said [14]: "This authority, like "the old one,"—that is, the right to pledge a husband's credit under the common law—" is based on an irrebuttable presump- "tion of law. The husband cannot revoke it except by order of "the court under section 17 of the [Married Women's Property] "Act, 1882." A little later my brother said [15]: "The authority "which is thus conferred on her is an authority to stay in the "house until the court orders her to go out." What the county court judge was really saying was: I approve the application of that doctrine to the facts of this case, but I cannot consider the further question here of whether I ought in these proceedings to order the defendant to go out. I agree with what my Lord has said, that it is open to this court to deal with this matter of discretion and it does deal with it today.

I do not suppose that all the facts of this case will ever be fully ascertained. One is tempted to think—I think that there is very much to support it—that for a great deal of the time the defendant was merely made a tool of the husband's desire to have these premises free of rent. We are told that Mr. Hobbs only earned £500 a year, and £1 a week to a man with an income of that kind is quite a material matter. But he was plainly seeking to assert, as I understand from the evidence given by both husband and wife on an utterly false basis, namely, that she was in fact a caretaker, that the defendant should continue to live rent free, which, of course, would be a saving to the pocket of the husband. Again, I think it is clear, that at one stage in 1951 the defendant knew that it was being asserted that she was a caretaker and that her rights sprang from that matter. It is true that she took no steps in the matter although she consulted solicitors and the solicitors said: "We have not really had time "to investigate the matter." Although the true facts, in all their significance, may never be known, I think that enough is known for this court to exercise its discretion. It is plain that the deserted wife cannot claim to have a perennial tenancy whereby she can stay there and never be removed in any circumstances.

For the reasons given by my Lord, I think there is proper ground here to exercise discretion and that discretion ought to be exercised. Further, I think that a period of three months should be allowed, for the reasons my Lord has indicated. For those reasons I agree fully with the judgment given by my Lord.

PARKER L.J. I agree with the proposed order. I would only add this. At one time it looked as if we should have to decide, there being no decision of this court as yet on the matter, whether the protection afforded to a deserted wife in *Bendall* v. *McWhirter* [16] could be extended to a case where the property

[14] Ibid.
[15] Ibid. 477.
[16] [1952] 2 Q.B. 466.

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Parker L.J.

in which the wife continued to reside had been purchased by a purchaser for value with constructive notice of the wife's possession. Speaking for myself, I should on that matter have required considerable further argument, since, as at present advised, I see great difficulty in extending the wife's protection so as to give her any rights against a bona fide purchaser, whether with or without notice. I do not, however, in any way suggest that *Street* v. *Denham* [17] and *Ferris* v. *Weaven*,[18] to which my Lord has referred, were wrongly decided, since they could in any event be justified on their special facts. In both those cases the purchases were not by purchasers treating at arms' length, but they were purchases made at the instigation of the husband and so as to enable him to get a benefit therefrom; in other words, the transaction in each case was a device to get the wife out for the husband's benefit.

However, Mr. Vester, for the plaintiffs, has very fairly taken up the attitude that, provided the court can, as a matter of discretion, give his clients possession, albeit not immediate possession, he is content. As to that, it seems to me that, even assuming the true view to be that the protection afforded to the wife extends to a case where the purchaser has constructive notice of the wife's position, nevertheless a wide discretion must reside in the court to order her to go. The present case, as it seems to me, is a proper one in which such discretion should be exercised. Accordingly, I agree with the proposed order.

Appeal allowed.

Solicitors: *Ernest W. Long & Co.; Trotter, Chapman & Whisker, Epping.*

A. W. G.

[17] [1954] 1 W.L.R. 624. [18] [1952] 2 All E.R. 233.

[COURT OF APPEAL.]

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Jan. 20.
Denning, Birkett and Parker L.JJ.

* DAVIES *v.* GILBERT.

[Plaint No. K. 109.]

Landlord and Tenant—Rent restriction—Premises within the Acts—Land—Cottage let together with woodland—Woodland not rated—Woodland subsequently rated in excess of rateable value of cottage—Possession—Whether property under old or new control—Proper time to test rateable value—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2) (iii) *and* (6)*—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3).

In 1937 the then owner of a cottage and 4½ acres of woodland let the whole to the defendant at a rent of 7s. 6d. per week. The

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cottage was rated at £4 and the woodland was not rated at all. In 1938 the defendant cleared the undergrowth on the woodland and started business as a caravan site proprietor. In 1953 the 4½ acres were rated at £9, the cottage being still rated at £4. In 1954 the then owner sold the property to the plaintiff who gave the defendant notice to quit. The defendant claimed the protection of the Rent Acts:—

Held, that on September 1, 1939, when the new control under the Rent and Mortgage Interest Restrictions Act, 1939,[1] came into operation, the cottage and land were under the old control of the principal Acts since the rateable value of the land was less than one-quarter of the rateable value of the cottage; that the new control had no application; and that, since the proper time to apply the test of rateable value under the old control was when the landlord sought to enforce his rights, the property ceased to be protected and the landlord was entitled to possession.

APPEAL from Judge Rowe Harding, sitting at Bridgnorth County Court.

In 1937 the owner of a cottage, The Cuckoo's Nest, at Alveley, Salop, let it, together with 4½ acres of woodland, to the defendant, William Edward Gilbert, at a weekly rent of 7s. 6d. The cottage at that time was rated at £4; the woodland was not rated at all. In 1938 the defendant cleared away the undergrowth and started to carry on business as a caravan site proprietor. In 1953 the 4½ acres, having become a caravan site, were rated at £9 a year, the cottage remaining rated at £4. In 1954 the then owner sold the land to the plaintiff, Thomas Moses Davies, who farmed all the adjoining land and wished to put this land to agricultural use. The plaintiff therefore gave the defendant notice to quit, but the defendant claimed the protection of the Rent Restriction Acts.

The county court judge held that the cottage and land came within the old control imposed by section 12 (2) (iii)[1] of the Act of 1920 and that by reason of the increase in rateable value of the land the property ceased to be protected and the landlord was entitled to possession.

The defendant appealed.

J. P. Widgery for the defendant tenant.

R. J. Toyn for the plaintiff landlord.

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) (iii): "for the purposes of "this Act, any land or premises let "together with a house shall, if the "rateable value of the land or pre-"mises let separately would be less "than one quarter of the rateable "value of the house, be treated as "part of the house, but, subject to "this provision, this Act shall not "apply to a house let together with "land other than the site of the "house."

Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3): ". . . "for the purposes of the Rent and "Mortgage Interest Restrictions "Acts, 1920–1938, as amended by "virtue of this section, any land or "premises let together with a dwell-"ing-house shall, unless the land or "premises so let consists or consist "of agricultural land exceeding two "acres in extent, be treated as part "of the dwelling-house; but, save as "aforesaid, the principal Acts shall "not, by virtue of this section, apply "to any dwelling-house let together "with land other than the site of "the dwelling-house."

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No case other than that in the judgment was referred to in argument.

DENNING L.J. stated the facts and continued: The first question is whether on September 1, 1939, this property came within the old control. If it came within the old control, it remains governed by the Acts relating to old control and not by the Act of 1939. The question whether it came within old control in 1939 depends on whether the rateable value at that time of the 4½ acres was less than one quarter of the rateable value of the cottage. If it was, then the whole was controlled by the Rent Acts, 1920 to 1938, under the old control.

There is no evidence as to what the rateable value of the 4½ acres was at that time, but the judge heard all the evidence about the state of the premises in 1937, 1938 and 1939. I think he must have held that the value of the 4½ acres was so low that the rateable value would be less than one quarter of the rateable value of the cottage: it was producing virtually nothing. If that was so, then on September 1, 1939, these premises were controlled and new control does not come into the case at all.

But what is the effect of the new rating in 1953? This caravan site has now been rated at £9 a year, which is more than a quarter of the rateable value of the cottage, which remains at £4. Does this new rating take the premises out of old control? This raises the question: what is the proper time for the test of rateable value? Is it the initial date of the letting or is it the date when possession is sought by the landlord? Mr. Widgery referred us to section 12 (6) of the Act of 1920, which states that where the Act has become applicable to any dwelling-house it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies. That section has often been invoked but never, so far as anyone can trace, has the court applied it. I do not think that we should apply it today for the first time. I do not think that it applies in the present case any more than in any other of the cases in which it has been cited: see the observations of Scrutton L.J. in *Prout* v. *Hunter*.[1]

In my judgment the test of rateable value under the old control is to be determined when the landlord seeks to enforce his rights. At the time of these proceedings the rateable value of this woodland or caravan site was £9 and the rateable value of the cottage was £4; therefore the whole ceases to be within the Act and the landlord is entitled to possession. That is the ground upon which the county court judge decided this case, and I find myself in full agreement with him. It becomes, therefore, unnecessary to consider what the position would have

[1] [1924] 2 K.B. 736, 743; 40 T.L.R. 868.

been if this case had been one of new control. In my opinion this appeal should be dismissed.

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BIRKETT L.J. I agree.

PARKER L.J. I also agree.

Appeal dismissed.

Solicitors: *Stafford Clark & Co., for Weston, Fisher & Weston, Kidderminster; Woolley & Co.*

A. W. G.

[CHANCERY DIVISION.]

* *In re* CASTON CUSHIONING LD.

1955
Feb. 7.
ROXBURGH J.

[No. 0064 of 1955.]

Company—Winding up—Liquidator—Voluntary liquidation—Nomination by resolution of creditors—Majority in value and number necessary — Voluntary winding up superseded by compulsory winding up—Costs of liquidator in voluntary winding up—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 294—*Companies (Winding Up) Rules,* 1949 (*S.I.* 1949, *No.* 330 (*L.* 4)), *r.* 134.

Section 294 of the Companies Act, 1948, provides that if no person is nominated liquidator by the creditors in the voluntary winding up of a company, "the person, if any, nominated by the "company shall be liquidator. . . ." Rule 134 of the Companies (Winding Up) Rules, 1949, provides: "At a meeting of creditors "a resolution shall be deemed to be passed when a majority in "number and value of the creditors present . . . have voted in "favour of the resolution. . . ."

A resolution passed at a meeting of creditors of a company nominating a liquidator to act in the voluntary winding up of the company, instead of the liquidator nominated by the company at an extraordinary general meeting, was passed by a majority of creditors in value but not in number. There was no other nomination by the creditors:—

Held, that as the resolution was not passed by a majority in value as well in number as required by rule 134, the creditors had not nominated a liquidator, and by section 294 of the Companies Act, 1948, the liquidator nominated by the company was the liquidator.

A creditor petitioned for the compulsory winding up of the company, which was already in the course of being wound up voluntarily. The liquidator nominated by the company was present at the hearing of the petition, not to oppose it, but to protect himself because of certain adverse criticisms made against him in the petition:—

Held, that the liquidator was entitled to the costs incurred by him in the voluntary winding up out of the assets of the company in due course of liquidation.

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CASTON CUSHIONING LD., *In re.*

PETITION.

A creditor of Caston Cushioning Ld. for the sum of £5,197 9s. 8d. petitioned for the compulsory winding up of the company.

It was stated in the petition, so far as relevant: On August 16, 1954, at an extraordinary general meeting of the company an extraordinary resolution was passed for the voluntary winding up of the company, and one Stanley John Baker, a chartered accountant, was nominated as liquidator for the purpose of the winding up. On the same date and following that meeting, a meeting of the creditors of the company was held, at which a director of the company took the chair. There was produced to the meeting a statement of the company's affairs disclosing an estimated deficiency of approximately £6,868. The company was insolvent and unable to pay its debts.

At the meeting of the creditors the petitioner proposed that one R. W. Lambeth, a chartered accountant, be appointed liquidator of the company in the place of the company's nominee and that proposal was duly seconded and put to the meeting. The petitioner and another creditor, Latafoam (Holdings) Ld., together representing £4,795 14s. 9d. of the debts, voted for the appointment of Mr. Lambeth, and three creditors who represented only £2,336 19s. 6d. of the debts voted against it. Notwithstanding the majority in value of the vote in favour of the resolution, the chairman declared it lost, and, there being no other nominations, confirmed the appointment of the company's nominee, Mr. Baker, as liquidator.

It was further stated in the petition that the petitioner was not satisfied with the course which the voluntary winding up had taken and on further consideration he desired and submitted that it was just and equitable that the company should be wound up by the court.

The petition was not opposed, and the question relevant to this report was as to the validity of the resolution nominating a liquidator passed at the meeting of the creditors.

Ian Edwards-Jones for the petitioning creditor.
Ralph Instone for the liquidator.

The only case cited in argument relevant to the report is set out in the judgment.

ROXBURGH J., having stated the facts, continued: Until I examined the company legislation I should have assumed, as I now think quite wrongly, that Mr. Lambeth had in the circumstances been nominated by the creditors. I may say this problem has been left open since 1894 and never appears to have been deemed of sufficient importance to be solved in the various Companies' Acts passed since then. [His Lordship read section

294 of the Companies Act, 1948,[1] and continued:] It is plain from section 294 of the Companies Act, 1948, that Mr. Baker was appointed liquidator unless the creditors had nominated Mr. Lambeth. There is no doubt so far. But did the creditors nominate Mr. Lambeth? Without considering the legislation, I should have said without question that they did. But on looking into the matter I find a provision in rule 134 of the Companies (Winding Up) Rules, 1949,[2] from which it is plain that if this be a meeting to which rule 134 applies, the resolution was not passed, because it was not passed by a majority in number and value; it was only passed by a majority in value which was a minority in number.

It seems to me that there is no real ambiguity about that rule, and if that rule applied the resolution was not duly passed. That seems to me to be consistent with *In re Bloxwich Iron and Steel Company*,[3] where the court on an application gave effect to the wishes of the majority in value. It was nowhere stated in the judgment, though it was suggested in argument, that a resolution supported by a majority in value but a minority in number had been duly passed.

I am not absolutely certain in this case that rule 134 does apply. I am inclined to think that it does, but whether I am right or wrong about that, I should certainly not be prepared to lay down for the first time a proposition of law which would have the result that the question whether or not a resolution was passed at a meeting of creditors depended upon whether it did or did not fall within rule 134. That would introduce a wholly illegitimate trap for persons who have to try and make sense of this legislation, including in this particular connexion secretaries of companies and other people who are not expected to read deeply in the Law Reports.

Although I should have thought, therefore, that there was a crying need for some amendment of this legislation which would make it clear that in the event of the majority in value being a minority in number, their will should none the less prevail, unless and until some amendment of the law is made, I should not be prepared to hold that a different principle applied according to whether the meeting was one which fell within rule 134 or not.

[1] Companies Act, 1948: "Provisions applicable to a creditors' voluntary winding up. . . ."

S. 294: "The creditors and the company at their respective meetings mentioned in the last foregoing section may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator. . . ."

[2] The Companies (Winding Up) Rules, 1949, r. 134: "At a meeting of creditors a resolution shall be deemed to be passed when a majority in number and value of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution. . . ."

[3] [1894] W.N. 111.

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Surprising as it is to come to this conclusion, Mr. Baker was, in my judgment, duly appointed liquidator. There is no question about his removal because he does not resist and nobody resists a compulsory order today, and he will therefore be automatically removed by the making of a compulsory order. But what is important is the question not only of his costs today, with which I am immediately concerned, but another matter which depends on the same principles, namely, the costs and expenses which he has incurred hitherto in acting as liquidator, because admittedly he has so acted up to this time.

This is an important question and it is extraordinary that there should be no clearer statutory definition as to the manner in which creditors pass a resolution at a meeting. It is not limited to this class of case at all. It applies, as far as I can see, to every meeting of creditors in which that sequence of events (which cannot be altogether uncommon) occurs, namely, that the majority in value is a minority in number.

The petitioning creditor is plainly entitled to his order in default of any opposition because the liquidator has not appeared to oppose on behalf of the company, but to protect his own interest as he was, in the circumstances, well entitled to do. The petitioner's costs in the ordinary course will be ordered to be paid out of the assets. So far as the liquidator is concerned, as it seems to me the position is this: he was appointed liquidator. In the petition there is a vague allegation, which I am told was not intended to be a reflection upon him but which anybody reading the petition would assume was intended to be a reflection upon him, and I think that ought to be struck out of the petition. As it is said that it was not intended to make any reflection, I do not think it ought to remain in the petition at all. It is quite unnecessary, in order to found a cause of action, to have it there, and it should be struck out of the petition.

That being so, as he was liquidator, and has taken a very reasonable course, and has come here to defend a charge against himself, it is plain that he is entitled to his costs out of the assets in due course of liquidation.

Winding-up order made.

Solicitors: *Kingsley Napley & Co.; Middleton, Lewis & Co.*

I. G. R. M.

[CHANCERY DIVISION.]

* *In re* DONCASTER AMALGAMATED COLLIERIES LD.

1955
Feb. 2.

Vaisey J.

[No. 00974 of 1954.]

Mines and Minerals—Coal—Nationalization—Company adjustment—Shareholders' rights—Preference and ordinary shares—Compensation—Adjustment proposals—Date when "finally determined"—Coal Industry Nationalisation (Company Adjustment) Regulations (S.I. 1948, *No.* 2360) *regs.* 2 (5), 23—*Coal Industry Nationalisation Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 25.

Regulation 2 (5) of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, made under section 25 of the Coal Industry Nationalisation Act, 1946, relating to adjustments as between classes of debenture and share holders of companies having assets transferred, provides: "No adjustment proposal shall "have effect for the purpose of these Regulations unless notice "thereof under paragraph (2) is served before the expiry of nine "months from the date when the amount of the compensation to be "made under the Act in respect of the transfer of the company's "transferred interests, and in respect of any claim under section 17 "of the Act, is finally determined":—

Held, that the words "finally determined" meant that the period of nine months was to be calculated (subject to any extension by the Minister under Regulation 23) from the day whereon the review of all determinations of the value of compensation units by the valuation board, which should have been submitted for review to the referees, should be finally completed.

ORIGINATING SUMMONS.

Section 25 of the Coal Industry Nationalisation Act, 1946, directs that provision shall be made by regulations with regard to adjustments as between classes of debenture and share holders of companies, having assets transferred to the National Coal Board.

Regulation 2 (5) of the regulations made under section 25 of the Act (S.I. 1948, No. 2360) provides: "No adjustment proposal "shall have effect for the purpose of these Regulations unless "notice thereof under paragraph (2) is served before the expiry "of nine months from the date when the amount of the com-"pensation to be made under the Act in respect of the transfer "of the company's transferred interests, and in respect of any "claim under section 17 of the Act, is finally determined."

Regulation 23 provides: "Any period or date specified in "these Regulations as the period within which, or the date by "which, anything is to be done may, notwithstanding that the "period has expired or the date has passed, being a period, be "extended, or, being a date, be postponed:—(*a*) in the cases "mentioned in paragraph (5) of regulation 2 . . . by the Minister; ". . . on such terms . . . as may seem just. . . ."

Doncaster Amalgamated Collieries Ld.'s colliery assets were on January 1, 1947, transferred to the National Coal Board. A special resolution was passed on May 29, 1953, for its voluntary

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winding up. The liquidators, being uncertain as to the date from which the period of nine months prescribed by regulation 2 (5) began to run, took out an originating summons to determine the question whether on the true construction of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, the applicants as joint liquidators of the company ought to distribute the assets thereof available for its contributories on the footing that the period of nine months referred to in regulation 2 (5) (being the period before the expiration of which any adjustment proposal under that regulation must be served on the company) was to be calculated from:—(*a*) The day whereon the value of those of the company's assets which by virtue of the Coal Industry Nationalisation Act, 1946, became vested in the National Coal Board, and which constituted five "compensation units" was determined for the purposes of the said Act; or (*b*) the day whereon the review of all determinations of the value of "compensation units" by the Yorkshire District Valuation Board which should be or had been submitted for review to the referees appointed for that purpose pursuant to section 12 (5) of the said Act and the regulations made thereunder should be finally completed; or (*c*) any and what other day.

The material facts are sufficiently stated in the judgment.

Ralph Instone for the liquidators.
T. D. D. Divine for a preference stockholder.
P. J. Sykes for an ordinary stockholder.

VAISEY J. In this summons, the joint liquidators in the voluntary winding-up of the Doncaster Amalgamated Collieries Ld. are the applicants, and the respondents are a holder of preference stock in the capital of that company and a holder of ordinary stock in the company. The summons raises a question on the true construction of the Coal Industry Nationalisation (Company Adjustment) Regulations, 1948, and particularly of regulation 2 (5). Indeed, the question really depends on the true construction, not of that small sub-paragraph of the regulation as a whole, but merely on two words in it, those two words being "finally determined."

This company is one of the coal companies which come under the provisions of the Coal Industry Nationalisation Act, 1946. It was incorporated in 1937 and the coalfield which it operated is situated in the Yorkshire district. It had a very large issued share capital of preference stock and a still larger amount of ordinary stock. There have been two successive reductions of capital, one in 1948, when 6s. 8d. was paid off both classes of stock, and another in 1951 when 8s. 4d. was similarly paid off.

The question which arises here is as to the period of nine months which is mentioned in regulation 2 (5) in these words: "No adjustment proposal"—and I will return to that expression

in a moment—" shall have effect for the purpose of these Regulations unless notice thereof under paragraph (2) is served before the expiry of nine months from the date when the amount of the compensation to be made under the Act in respect of the transfer of the company's transferred interests, and in respect of any claim under section 17 of the Act, is finally determined."

The earlier part of regulation 2 provides for the making of proposals for adjustment, which really means that in certain circumstances the preference stockholders are entitled to a further allowance in respect of their capital over and above what they would normally receive under the winding-up provisions. In point of fact, there has been no application for any adjustment; no preference stockholder has said that he wants to formulate an adjustment scheme under section 25 of the Act, and the liquidators say that they have no reason to suppose that any such scheme is in the least likely ever to be propounded.

Section 25 of the Act, the marginal note to which is: "Adjustments as between classes of debenture and shareholders of companies having assets transferred," provides for regulations being made for regard to be had to the relative expectations of any capital yield from their respective interests, and it is under that section that, if a scheme were formulated, it would take effect.

That being the position the liquidators, who have in hand a sum of over £200,000 which, in the absence of any adjustment scheme, would belong to the ordinary stockholders, are anxious to distribute that sum as soon as possible. The question is when the liquidators are entitled to assume that the risk of an adjustment proposal being made will no longer concern them, even as a possibility.

The two suggestions which are made, one on behalf of the preference stockholders and the other on behalf of the ordinary stockholders, are to this effect. The preference stockholders say that the moment at which for the first time it can be said that the amount of the compensation to be made under the Act in respect of the transfer of the company's transferred interests is finally determined, is the date whereon the review of all determinations of the value of compensation units by the Yorkshire District Valuation Board, which shall have been submitted for review to the referees appointed for that purpose under section 12 of the Act and the regulations, has been finally completed. On the other hand, it is suggested that the appropriate date from which the nine months will run is the date whereon the value of those of the company's assets which became vested in the National Coal Board and which constituted five compensation units was determined for the purposes of the Act.

I think it is extremely unfortunate that the liquidators should be obliged to withhold from the ordinary stockholders a sum of money which almost certainly will go into their pockets, and that they should be obliged to hold it up for an indefinite time. It

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seems to me most desirable, if it can be achieved, that that money should be distributed at the earliest possible moment; but, as is pointed out by the liquidators, before the company's share of the compensation allocated to the Yorkshire district can be finally known, and as against which the company's claim for compensation has to be set, it is necessary to await the outcome of those cases within the district which are being taken before the referees for review (that is, under section 25 of the Act), for the reason that only after the value of all compensation units within the district has been conclusively ascertained will the amount be known of any necessary scaling down of such variations in order to adjust them to the total compensation allocated to the district. It is said that such cases for review are not expected to be disposed of before March, 1955.

The liquidators go on to say that if the nine months' period for the purposes of the regulation does not begin to run until all these cases have been disposed of by the referees, it will not expire until the end of 1955—that is, assuming that the estimate of March, 1955, proves to be accurate.

The liquidators further say that, in order to avoid prejudicing any preference stockholder who may be minded to formulate an adjustment scheme, and possibly to avoid exposing themselves to a risk of personal liability, they have been advised that they should retain for the duration of the nine months' period a sum sufficient to meet the maximum amount which could possibly be allocated to the preference stockholders under an adjustment scheme plus a sum for costs; and they have been further advised that the maximum amount in question would be 2s. 4½d. per £ of the preference stock as it was on the primary vesting date as defined in the Act, on the ground that the highest price at which the stock had changed hands during the three years before that date was 22s. 4½d. per £ of stock. They point out that that would involve withholding from distribution a total sum of the order of over £200,000, and if that had to be retained by them throughout the year 1955 it would be a considerable hardship to the ordinary stockholders as no adjustment scheme has yet been, or seems likely to be, propounded. They therefore seek the directions of the court.

I am bound to say that it seems to me that " the amount of " the compensation to be made under the Act in respect of the " transfer of the company's transferred interests " under the regulation which I have read, must have the same meaning as when those terms are used in section 10 of the Act. I do not see how there can be any final determination while these deductions or additions are still possible owing to the action of other companies in the Yorkshire district in referring their schemes to the necessary tribunal. It seems to me that " finally determined " is not really an expression which can be construed as referring to anything short of the ultimate date on which the exact amount which is going to be paid for the company's assets under

the Act has been made out to the last penny. After all, the word "finally" is a very strong word and so is the word "determined."

Mr. Sykes, with great ingenuity and commendable briefness, has referred me to regulation 9 in which the words "finally" "determined" also appear. Fortunately, I have not to construe that regulation, but it contains two very extraordinary expressions, one a reference to compensation being "finally or more "fully determined" and the other a reference to it being "finally "or sufficiently determined." What the meaning of that is in that regulation I do not pause to inquire, but I do not think it can throw any light on the plain and unqualified words "finally determined" as they appear in regulation 2 (5).

I thought at one time that some difficulty would arise in determining this point, because of regulation 23, which provides: "Any period or date specified in these Regulations as the period "within which, or the date by which, anything is to be done "may, notwithstanding that the period has expired or the date "has passed, being a period, be extended, or, being a date, be "postponed" by the Minister of Fuel and Power or by any tribunal set up under the Act. Most unfortunately, I think that that regulation, as far as I can understand it, only allows the Minister to extend the period or postpone a date, and it does not allow him to limit a period or anticipate a date.

Therefore, however meritorious the case may be for an earlier distribution, it seems to me that, once I have arrived at the conclusion that sub-paragraph (5) of regulation 2 means exactly what it says and nothing else, there is nothing in regulation 23 which would enable the Minister to anticipate what seems to me to be a date plainly indicated in regulation 2 (5). I think that it is a pity that, if the Minister took power to extend the period or postpone a date, he did not also take power to limit a period or anticipate a date; but there is nothing in the regulation which apparently allows that to be done; and the result is that, in my view, the words "finally determined" in regulation 2 (5) mean exactly what they say, and that the final determination of the amount must be and can only be the day whereon the review of all determinations of the value of compensation units by the valuation board which shall have been submitted for review to the referees shall be finally completed. The unfortunate result of that is, I am afraid, that the liquidators cannot anticipate the date which is apparently laid down in the regulations, with the consequence that the ordinary stockholders will have to be kept out of this very large sum of money until the nine months' period from the day formulated in alternative (*b*) of the summons has expired.

I do not think it would be helpful for me to suggest that the liquidators might in certain circumstances obtain the leave of the court to make a further distribution on evidence that the risk of any adjustment scheme being propounded in relation to

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this company is non-existent, but I merely mention that as a possibility. Short of that I do not think I can do anything except declare, as I am asked to do, what I believe to be the meaning of the words " finally determined " in the regulation in question, and I will declare as asked by alternative (*b*) of the summons, subject to the insertion of the provision: " unless the period is " extended by the Minister under regulation 23 "; and having so declared I must express my regret that it is an unfortunate conclusion to arrive at in this particular case but I see no way out of it at the moment.

Solicitors: *Linklaters & Paines.*

J. L. D.

[QUEEN'S BENCH DIVISION.]

1955
Jan. 24.

Pearson J.

*WALLACE *v.* FREEMAN HEATING CO. LD. AND ANOTHER.

[1952 W. 169.]

Legal Aid—Costs—Taxation—Special expense—Appeal—Transcript of shorthand notes—Civil aid certificate—Expense not authorized at date of issue of certificate—Disallowed on taxation—Invalidity of retrospective authorization—Error or mistake—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), s. 2 (2) (*a*)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 14 (3).

The successful plaintiff in a running down action was granted a civil aid certificate for the purpose of appealing to the Court of Appeal on the question of damages. The certificate was in the usual form and contained no special authority for the incurring of any particular expenditure. The defendants entered a cross-appeal on the issue of liability. For the purposes of the appeal the plaintiff's solicitors bespoke a copy of the transcript of the judgment and of the evidence in the court of trial. On the hearing of the appeals the plaintiff succeeded in obtaining an increased award of damages which was reduced to a figure slightly above that awarded at the trial in view of the defendants' succeeding in establishing contributory negligence on the part of the plaintiff.

On the taxation of the plaintiff's solicitors' bill of costs the amount of the shorthand writer's account was disallowed by the taxing master on the grounds that the civil aid certificate granted to the plaintiff only authorized an appeal on the question of damages which did not necessitate the bespeaking of a transcript of the evidence.

On the disallowance of the shorthand writer's account being reported to the local legal aid secretary, he confirmed that he intended his first certificate to cover the shorthand writer's account, and an amended certificate was granted pursuant to regulation 8 of the Legal Aid (General) Regulations, 1950, authorizing the shorthand writer's account to be incurred, and this fact was referred to by the plaintiff's solicitors in their objections to the taxation. The taxing master overruled the objections. On appeal:—

Held, that by virtue of regulation 14 (3) of the Legal Aid (General) Regulations, 1950,[1] (1) the incurring of a special expense, such as the bespeaking of a transcript, must be referred to and specifically considered and authorized by the appropriate area committee, and that in the absence of express authority there was no necessary implication in the civil aid certificate that this particular expense could be incurred; (2) that an expense having been incurred which was not authorized by the legal aid committee at the time of the issue of the certificate, they could not validly give authorization for it retrospectively.

Semble, if prior approval for the incurring of an expense has been given, but this fact is omitted by mistake from the certificate, the matter can be rectified under regulation 8 of the General Regulations.

SUMMONS adjourned into open court.

The plaintiff, Mrs. Wallace, brought an action against the defendants for damages in respect of injuries sustained by her in a road accident. The action was heard on July 16, 1952, by Croom-Johnson J. at the Glamorgan Summer Assize. Judgment was given for the plaintiff, who was awarded £125, together with special damages.

On August 20, 1952, the plaintiff obtained a civil aid certificate for the purpose of appealing to the Court of Appeal. The certificate was in the usual form and it granted legal aid to the plaintiff in connexion with the following proceedings: "An appeal to the "Court of Appeal against the judgment of Croom-Johnson J. "in the action in so far as the appellant will ask the Court of "Appeal to vary the amount of damages awarded under the said "judgment. . . ." Paragraph 4 of the certificate to which the marginal note was "Insert any special conditions" was left blank. On August 21, 1952, the plaintiff gave her notice of appeal to the Court of Appeal raising the issue mentioned in the civil aid certificate. The defendants entered a cross-appeal on the issue of contributory negligence.

[1] Legal Aid and Advice Act, 1949, s. 2 (2): "Where a person "receives legal aid in connection with "any proceedings—(*a*) the expenses "incurred in connection with the pro- "ceedings, so far as they would "ordinarily be paid in the first "instance by or on behalf of the "solicitor acting for him, shall be so "paid except in the case of those "paid direct from the legal aid fund "as provided by this Part of this "Act."

Legal Aid (General) Regulations, 1950, reg. 2 (2): "Any document "purporting to be a certificate issued "in accordance with these regula- "tions shall, until the contrary is "proved, be deemed to be a valid "certificate issued to the person "named therein."

Reg. 8 (1): "The appropriate Area "Committee may amend a certifi- "cate—(*a*) where it appears to the "Area Committee that there has been "some error or mistake in a certifi- "cate;"

Reg. 14 (3): "Where it appears "to the assisted person's solicitor "necessary for the proper conduct of "the proceedings to take or to apply "to the court for leave to take any "one or more of the following steps, "namely:—. . . (*b*) to bespeak any "transcript of shorthand notes of "any proceedings . . . he shall "(unless the certificate provides for "the act in question to be done) "apply to the appropriate Area Com- "mittee for authority so to do, and "no payment shall be allowed on "taxation for any such step taken "without their approval."

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In February, 1953, the plaintiff's appeal and the defendants' cross-appeal were heard and both the appeal and the cross-appeal were allowed, the Court of Appeal increasing the damages to £275, but holding that, since the plaintiff was guilty of contributory negligence to the extent of 50 per cent., the net amount that the plaintiff was entitled to recover was £137 10s.

After the granting of the civil aid certificate the plaintiff's solicitors bespoke a transcript of the judgment and the whole of the evidence in the court of trial for the purposes of the appeal. The cost of the shorthand writer's account, £27 0s. 10d., was disallowed on the taxation of the plaintiff's solicitors' bill of costs. The plaintiff's solicitors thereupon made objections to the taxation in respect of that amount in the terms set out in Pearson J.'s judgment.

The taxing master, in his answers to the objectors, rejected these contentions.

The plaintiff appealed.

R. J. Harvey for the plaintiff.

The defendants were not represented.

PEARSON J. This is a chambers summons adjourned into court by request because it raises a problem of some general application, arising in the taxation of the legally aided plaintiff's costs in a running down case.

The action was brought by the plaintiff against two defendants, a limited company and an individual. The writ was issued on February 12, 1952, and pleadings closed by the end of June, 1952. On July 16, 1952, the action was heard by Croom-Johnson J. at the Glamorgan Summer Assize, some eight witnesses were called and the judge decided in favour of the plaintiff and awarded a sum of £125 plus special damages.

On August 20, 1952, the plaintiff obtained a civil aid certificate to appeal to the Court of Appeal. That civil aid certificate was in the usual form and it granted legal aid to the plaintiff as appellant in connexion with the following proceedings: "An "appeal to the Court of Appeal against the judgment of Croom-"Johnson J. in the action" described "in so far as the appel-"lant will ask the Court of Appeal to vary the amount of "damages awarded under the said judgment and to enforce." Then paragraphs 1, 2 and 3 are filled in in the usual way and paragraph 4 (to which the marginal note is "Insert any special "conditions") is left blank; so there is not any special authority for the incurring of any particular expenditure. On August 21, the plaintiff gave her notice of appeal to the Court of Appeal raising the issue mentioned in the civil aid certificate, that is to say, complaining of the alleged inadequacy of the sum awarded, and the defendants put in an appeal on the issue of contributory negligence.

In February, 1953, the plaintiff's appeal and the defendants' cross-appeal were heard and they both succeeded, it being held that the amount awarded should be increased to £275, but that there was 50 per cent. of contributory negligence and in the result the amount net that was recovered was £137 10s. There followed taxation. The plaintiff's solicitors' bill was taxed on October 18, 1954. The only item which matters for the present purpose is that there is an entry: "Attending shorthand writer, "bespeaking transcript, and subsequently attending obtaining "same," followed by the item "Paid his account, £27 0s. 10d." and that amount was disallowed by the taxing master.

The solicitor whose bill it was made objections to the taxation in respect of the disallowance of the shorthand writer's account for £27 0s. 10d. The reasons for objection raised, in substance, two points: First it was stated: "The plaintiff's appeal was on "the quantum of damages, and the defendants' appeal on the "issue of liability made it necessary for a transcript of the pro-"ceedings in the court of trial to be available in the Court of "Appeal: (a) for the full and accurate presentation of the case to "the court by counsel; (b) for the consideration by the court of "all the issues involved, and (c) to enable the Court of Appeal to "hear counsel for the plaintiff on the findings of the trial judge. "Inasmuch as a transcript of the proceedings below was neces-"sary for the reasons already specified, the plaintiff's (appellant) "solicitors were justified in assuming that under section 2 (2) (*a*) "of the Legal Aid and Advice Act, 1949, the legal aid certificate "granted to prosecute the appeal, also gave, or intended to give, "authority to instruct and incur the shorthand writer's account "of £27 0s. 10d.—the subject-matter of these objections."

Pausing there, I would call attention to the words "also "gave, or intended to give."

The objections continue: "On the disallowance of the short-"hand writer's account being reported to the local legal aid "secretary, he confirmed he intended his first certificate to cover "the shorthand writer's account, and an amended certificate was "granted pursuant to regulation 8 of the Legal Aid (General) "Regulations, 1950, authorizing the shorthand writer's account "to be incurred. With respect, it is submitted that the legal aid "certificates granted are sufficient authority for the shorthand "writer's account of £27 0s. 10d. to be included and allowed in "the plaintiff's bill, under the order of February 5, 1954," which, I think, should be February 5, 1953.

That is the only evidence concerning the amended legal aid certificate. On reading those objections one would think—and this is agreed and admitted—that the solicitor made no application to the legal aid committee for authority to incur the expense of obtaining from the shorthand writer a transcript of his shorthand note before the expense was incurred, that is to say before the shorthand note was obtained. It is admitted that no specific application was made and one must read these objections as

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meaning that no such authority or approval was applied for and none was issued at the original time in August, 1952. But after this item had been disallowed on taxation, the solicitor went back to the legal aid committee and the legal aid committee's secretary was willing to say that the first certificate issued was intended to cover the shorthand writer's account, and, therefore, an amended certificate was issued.

When the matter came before the taxing master he reconsidered it and he put his answers to the solicitors' objections to the taxation of the bill as follows: "This is a taxation of the "costs of an assisted appellant under the Legal Aid and Advice "Act, 1949, which raises two important questions: (1) Is specific "authority from the area committee necessary to bespeak a "transcript of the judgment and evidence in the court below for "use on the appeal, or is the legal aid certificate authorizing the "appeal of itself sufficient authority? In this case there was an "appeal by the plaintiff on damages, and a cross-appeal by "the defendants on liability. Although the plaintiff was an "assisted person as far as her appeal was concerned, she obtained "no legal aid certificate to defend the cross-appeal, which must "be treated as a separate proceeding (see the note to R.S.C., "Ord. 58, r. 6, Annual Practice (1955), p. 1260, referring to "*Jones* v. *Stott* [1]) and one for which a separate legal aid certi- "ficate would be necessary. The plaintiff was not, therefore, an "assisted person in connexion with the cross-appeal on the issue "of liability. Having on August 20, 1952, obtained her legal aid "certificate authorizing her appeal as to damages only, she "bespoke a transcript of the judgment and the whole of the "evidence in the court below. No specific authority to obtain "this transcript was given, nor it seems was such authority "requested. The matter is regulated by regulation 14 (3) (*b*) of "the Legal Aid (General) Regulations, 1950, which is as follows: "'Where it appears . . . necessary for the proper conduct of "'the proceedings to take . . . any . . . of the following steps, "'namely:—(*b*) to bespeak any transcript of shorthand notes of "'any proceedings; . . . he shall (unless the certificate provides "'for the act in question to be done) apply to the appropriate "'Area Committee for authority so to do, and no payment shall "'be allowed on taxation for any such step taken without their "'approval.' The note to R.S.C., Ord. 66a, r. 4 of the Annual "Practice (1955), p. 1524, which is dealing with payment for "transcripts for the Court of Appeal, is in the following terms: "'Legal Aid.'—'Under Regulation 14 (3) of the Legal Aid "'(General) Regulations, 1950, the solicitor for an assisted person "'who considers it necessary to bespeak any transcript of short- "'hand notes of any proceedings must first obtain the authority "'of the appropriate Area Committee. . . .'" The important

[1] [1910] 1 K.B. 893 (C.A.).

words there are " must first obtain," and the taxing master had, no doubt, these words in mind.

The answers continue: " The certificate in this case did not " provide for the obtaining of a transcript, and the cost of the " transcript was therefore disallowed on taxation, which took " place on October 16, 1954. The solicitors' contention that " section 2 (2) (*a*) of the Act is sufficient authority for obtaining " a transcript is fallacious. It might equally well be claimed that " this section authorizes obtaining reports from medical experts " and tendering their evidence in accident cases, or obtaining " reports and tendering surveyor's evidence in building disputes " or claims for damages for breach of repairing covenants. For " all these matters specific authority is necessary under regula- " tion 14. No doubt the legislature decided that special control " should be kept on such items as being the most expensive likely " to be incurred, and among which the expense of transcripts is " apt to be the highest. Moreover, in this case, the expense of " the whole transcript could not be considered as being ordinarily " incurred as the assisted appeal was as to damages only, and " the transcript contains evidence (pp. 16 to 28) relating solely " to liability. The authority for this, if such is required, is " contained in the Practice Note of the then Master of the Rolls " dated April 8, 1941 ([1941] W.N. 84, and referred to in the " notes on R.S.C., Ord. 58, r. 11 at p. 1270 of the Annual " Practice) which states: ' if the only issue of fact is that of " ' liability, evidence relating to damages must not be copied and " ' vice versa.' That an appeal is possible without any transcript " of evidence being necessary there can be no doubt, so that in " view of regulation 14, it would not be right to accept a legal aid " certificate to appeal as constituting automatically an authority " to obtain a transcript.

" Turning to the second question, after the taxation the appel- " lant's solicitors approached the area committee informing them " of the disallowance of the cost of the transcript, and the com- " mittee eventually saw fit on November 19, 1954 to amend the " legal aid certificate to include authority to obtain ' a transcript " ' of the evidence and judgment.' The regulation providing as " it does that no payment shall be allowed, the effect of this " procedure, if accepted, would be to give the area committee " power to overrule the taxation by their subsequent amendment " of their certificate and thereby override the regulation. The " acceptance of retrospective authority opens the door wide to " many abuses. For example, in the present case, the area " committee after the event have purported to give authority to " obtain ' a transcript of the evidence and judgment of the " ' High Court,' whereas the proceedings for which the legal aid " certificate was originally given was to appeal as to damages only " and for this purpose a transcript of the evidence as to liability " would not have been necessary and would no doubt not have

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" been authorized at the time the legal aid certificate was origin-
" ally granted, there being at that date no cross-appeal as to
" liability. For all the above reasons I overrule this objection."

There is a possible query as to the accuracy of the statement that the transcript contains evidence on pp. 16 to 28 relating solely to the issue of liability and not relating at all to the other issue which was concerned in the plaintiff's appeal as to the amount of the plaintiff's damages. I looked at the shorthand note and certain pages between 16 and 28 do have some bearing on the issue of the plaintiff's damages, but not very much. It is not an unreasonable view for the master to take of that pure question of fact, but it is not necessarily correct. Subject to that query I agree with the taxing master's answers to the objections and adopt them as part of my judgment.

There are some observations which I wish to add on the main points as well as on a specific and very interesting point which was argued before this court by Mr. Harvey on behalf of the plaintiff. First, there is the question of the true construction of the legal aid certificate: Does it by itself expressly or by necessary implication authorize the expense of bespeaking a shorthand transcript to be incurred? The answer must be, on the face of the certificate, quite plainly in the negative, because the certificate only authorizes the appellant to appeal on the question of damages, and there is no entry in paragraph 4 where the marginal note " Insert any special conditions " occurs. It is true that if there were no special provision in the regulations it may well be that section 1 (5) of the Act would have been sufficient to authorize this expense.

Section 1 (5) provides: " Legal aid shall consist of representa-
" tion, on the terms provided for by this Part of this Act, by a
" solicitor and so far as necessary by counsel (including all such
" assistance as is usually given by solicitor or counsel in the steps
" preliminary or incidental to any proceedings or in arriving at or
" giving effect to a compromise to avoid or bring to an end any
" proceedings)." But there is a provision in the Act for regulations to be made. Section 12 (1) provides: " The Lord Chancellor
" may make such regulations as appear to him necessary or
" desirable for giving effect to this Part of this Act or for
" preventing abuses thereof," and obviously a possible form of abuse which might need to be prevented is the incurring of unnecessary expense. It may well be for that reason, and with that object in view, that regulation 14 was included in the Legal Aid (General) Regulations, 1950. [His Lordship read regulation 14 (3) so far as relevant, and continued:] That obviously means that the question whether the bespeaking of a transcript should be authorized is a question which must be specifically submitted to and considered and decided by the local area committee, and it is clearly not covered by a civil aid certificate which merely authorizes an appeal. There must be a specific authorization of the incurring of these expenses. It does not necessarily have to

be in the legal aid certificate itself, but it must be in fact given. Accordingly, I hold as a matter of construction that there is no necessary implication in the civil aid certificate that the costs of bespeaking a shorthand transcript can be incurred.

The other main point is whether the legal aid committee's authority or approval can be given retrospectively; whether a retrospective approval or authority is an effective approval or authority. That is a question of construction again and, in my opinion, the answer is that it must be obtained first before the expense is incurred.

There are three reasons for that: First, the opening words of regulation 14 (3): "Where it appears to the assisted person's "solicitor necessary . . . to take" certain steps. That is, in my opinion, referring to the time before the step has been taken. It is the time at which it appears to the assisted person's solicitor necessary to take a step. It does not state: "Where it appears "or has appeared," nor does it state: "Where it appears to the "assisted person's solicitor to be or to have been necessary."

Secondly, there is the wording towards the end of paragraph (3): "He shall apply to the appropriate area committee "for authority so to do." That again, to my mind, implies an authority to do something in the future. The authority comes first and the taking of the step comes next.

Thirdly, there are these words which seem to me clear and emphatic: "No payment shall be allowed on taxation for any "such step taken without their approval." In my judgment a step is taken without their approval if there is no subsisting authority at the time when the step is taken. If the step is taken first and authority or approval purports to be given afterwards, it is still true to say that the step was taken without their approval. The step was taken when there was no subsisting authority.

Accordingly, on those two points, I agree with the answers of the taxing master.

But what was mainly argued here in this particular case was an ingenious point of Mr. Harvey's which was on these lines: He said that what the legal aid committee did or purported to do was not to issue a new retrospective authority, but merely to amend their certificate, and Mr. Harvey called attention to regulation 2 (2). [His Lordship read the paragraph and continued:] Accordingly, Mr. Harvey submitted there is a presumption that any certificate is a valid certificate, and it was part of his argument to contend that an amended certificate is a certificate within the meaning of that regulation. Next, he drew attention to regulation 8 dealing with the amendment of certificates, and which provides: "The appropriate area committee may amend "a certificate (*a*) where it appears to the area committee that "there has been some error or mistake in the certificate," and he submitted that there is no other relevant power in regulation 8 to amend a certificate and that therefore it must be inferred that

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this certificate was amended by reason of some error or mistake in the certificate and in order to rectify that error or mistake. He argues, therefore, that the proper inference is that the error or mistake was that in fact an authority had been given but it was not mentioned in the certificate; the error or mistake in the certificate was the omission to mention the true specific prior authority which had in fact been given.

I think that if the prior approval or authority had in fact been given and was omitted by mistake from the civil aid certificate, it may well be that that could be put right under regulation 8; but I think it is more a question of what inference is to be drawn from the facts of this particular case, having regard to the evidence which is before me. The principal evidence is what the appellant has said in the reasons for objection here. I have already read it but I will read the material passage again to illustrate this point: "On the disallowance of the shorthand writer's account being re- "ported to the local legal aid secretary, he confirmed he intended "his first certificate to cover the shorthand writer's account, and "an amended certificate was granted pursuant to regulation 8 of "the Legal Aid (General) Regulations, 1950, authorizing the "shorthand writer's account to be incurred." I find myself unable to infer from that that in fact a prior approval existed. The proper inference is that no prior approval was applied for or given. The legal aid secretary no doubt said that he intended the original certificate to cover everything, and that he would issue an amended certificate to put the matter right. That would be a mistake on the part of the legal aid committee or their secretary, as to what was authorized; as to what was in fact the expenditure covered by a civil aid certificate in this form; but it does not, to my mind, lead to the inference that in fact there was a prior approval orally or in writing or at all. I think that the right inference is that there was no prior approval given at all, and that it is not right to infer from the amendment of the legal aid certificate and from the facts of this case that there was any such prior approval in fact.

So for that reason I hold that this ingenious special point which was introduced into the argument by Mr. Harvey does not succeed. Accordingly, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Wrentmore & Son for Thos. John & Co., Cardiff.*

J. A. G.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* CARVER.

1955
Jan. 31

Lord Goddard C.J., Cassels and Gorman JJ.

Criminal Law—Sentence—Imprisonment and fine—Maximum sentence of imprisonment—Power of court to impose further imprisonment in default of payment of fine—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 3—*Criminal Law Amendment Act,* 1922 (11 & 12 *Geo.* 5, *c.* 56), *s.* 3—*Criminal Justice Act,* 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 14 (1) (*c*).

The appellant was convicted under the Criminal Law Amendment Act, 1885, of permitting premises to be used as a brothel and was sentenced to the maximum term of imprisonment of six months and a fine of £200, and in default of payment, a further term of six months' imprisonment. On appeal on the ground that the court had no power to impose the further term:—

Held, that whatever might have been the position before the passing of the Criminal Justice Act, 1948, section 14 (1) (*c*) of that Act gave the court power to fix a term of imprisonment, in addition to any term already imposed, if a fine was not paid.

Rex v. *Brook* [1949] 2 K.B. 138; 65 T.L.R. 273; [1949] 1 All E.R. 787 applied.

APPEAL against sentence.

The appellant, Gladys Mary Carver, was convicted at the County of London Quarter Sessions of permitting premises to be used as a brothel contrary to the Criminal Law Amendment Act, 1885, s. 13, as amended by the Criminal Law Amendment Act, 1922, s. 3, after a previous conviction, and was sentenced to six months' imprisonment and a fine of £200, and in default of payment a further term of six months' imprisonment.

Counsel for the appellant contended that since the maximum term of imprisonment under the Act was six months, no further term could be imposed on failure to pay the fine, the only remedy being by way of distress under the Levy of Fines Act, 1822.

Peter Bruce for the appellant.
Michael Corkrey for the Crown.

LORD GODDARD C.J. The appellant was convicted under the Criminal Law Amendment Act, 1885, of permitting premises to be used as a brothel after a previous conviction for that offence and the court imposed the maximum sentence of six months' imprisonment and ordered her to pay a fine. When I say the "maximum sentence" what I mean is this: the statute, as amended, under which she was convicted, authorizes the court to impose imprisonment for six months and a fine not exceeding £250. The court imposed the sentence of imprisonment for six months, and as they looked upon it as a very bad case they also imposed a fine of £200. Then the court said that in default of payment the appellant would serve a further term of six months making twelve months in all.

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Mr. Bruce has contended that that sentence is not authorized by law because, Parliament having provided a maximum sentence of six months, no further sentence of imprisonment could be imposed. But the statute provides that the sentence that can be imposed is six months plus a fine. If a person does not pay the fine obviously it does not mean that the person with no money is to be in a better position than the person who can afford to pay, because it would mean that, if he could afford to pay, he would lose £200.

One looks to see what are the powers of the court under the Criminal Justice Act, 1948, which made very considerable changes in the law in regard to the recovery of fines. In the decision of this court—and we are bound by it—in *Rex* v. *Brook*,[1] this court said that an entirely new procedure was introduced by the Act of 1948 with regard to the payment of fines and, although the Levy of Fines Act, 1822, and the Queen's Remembrancer Act, 1859, were not repealed, so that certain matters of machinery still had to be carried out, as for instance, entry of the fine on the estreat roll and the return to the sheriff, we have now to consider simply the provisions of section 14 of the Act of 1948, which provides: "(1) Subject to the provisions of this section, where a "fine is imposed by, or a recognizance is forfeited before, a court "of assize or quarter sessions, an order may be made in accord-"ance with the provisions of this section." That seems to me to apply to any fine. Fines have always been enforced before courts of summary jurisdiction by means of a sentence of imprisonment being imposed in default of payment or in default of distress. The Summary Jurisdiction Act, 1879, provides a short code of the length of imprisonment that can be imposed according to the size of the fine. Under section 5 of that Act the maximum sentence that can be imposed by a court of summary jurisdiction for non-payment of a fine is three months, but it has always been the policy of the legislature, certainly before courts of summary jurisdiction, to deal with the question of non-payment of fines by a sentence of imprisonment. The Criminal Justice Act, 1948, introduced a considerable change in the law. Among other things, courts before whom accused persons were convicted on indictment were given powers to impose fines for felony; they had always power to impose a fine for misdemeanours, and the section provides: " . . . where a fine is "imposed "—it does not limit it to cases where a fine but no sentence of imprisonment is imposed—" by . . . a court of assize "or quarter sessions, an order may be made . . . (*c*) fixing a term "of imprisoment which the person liable to make the payment is "to undergo if any sum which he is liable to pay is not duly "paid or recovered."

In these circumstances, we think that quarter sessions were entitled to make the order which they did. It may be that the

[1] [1949] 2 K.B. 138; 65 T.L.R. 273; [1949] 1 All E.R. 787.

sheriff can still distrain on the goods. If he does so while the appellant is serving her sentence and recovers the sum of £200 by distraint, when her sentence of six months is up, there will be an end of it; but if distraint does not produce the £200 or the fine has not been paid, she will have to do a further six months. In all these circumstances the appeal is dismissed.

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Appeal dismissed.

Solicitors: *Alfred Bieber & Bieber; P. W. Tice.*

J. D. P.

[COURT OF APPEAL.]

* SIMMONS *v.* PENNINGTON & SON.

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Nov. 26, 29.
Denning, Hodson and Parker L.JJ.

Solicitor—Negligence—Sale of land—Land of client sold by auction—Requisition by purchaser as to title — Requisition answered in accordance with general conveyancing practice—Purchaser thereby enabled to refuse to complete and to recover deposit—Opportunity for resale—Advice against resale pending trial of action to recover deposit — Property damaged by fire — Uninsured — Remoteness of damage.

Premises owned by the plaintiff were subject to an obsolete covenant restricting their use to that of a private dwelling-house, but had in fact been used continuously for many years, both before and after the plaintiff became owner, for business purposes, without any complaint being made. In 1948 the plaintiff sold the premises by auction to B, who paid a deposit. The property was described in the particulars of sale as "valuable and commanding freehold "corner shop premises," and by special condition of sale No. 7 it was stated that the property was sold subject to the restrictive covenants as to user contained in a deed of 1870 (which restricted the user to that of a private dwelling-house), so far as those covenants were subsisting and capable of taking effect. Answering a requisition as to title, whether the premises were subject to restrictive covenants, the defendants, acting as solicitors for the plaintiff, replied: "Yes. See special condition 7. There appear to have "been breaches of the covenant as to user but no notice of breach has "been served." The purchaser accepted that reply as a repudiation of the contract, and in an action recovered his deposit from the plaintiff.

While that action was pending another purchaser offered to buy the premises, but on the advice of the defendants, through their managing clerk, not to sell pending the trial of the above action, the plaintiff refused the offer. Subsequently the property was badly damaged by fire, and, as he had allowed the insurance to lapse, the plaintiff suffered loss. In the present action he claimed damages from the defendants for negligence as his solicitors:—

Held, (1) that the defendants having, in answering the requisition, acted in accordance with the general practice of conveyancers, which had been followed for many years without any ill consequence, they could not be held to have acted negligently or failed to come up to a reasonable standard of care, for they could not reasonably have anticipated the result which had flowed from it.

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(2) That it was unnecessary to determine whether or not the defendants had been negligent in advising the plaintiff not to resell pending the trial of the deposit action, because the claim of the plaintiff failed on the ground that the damages were too remote and that the loss by fire was entirely due to the failure of the plaintiff to insure, an omission which the defendants could not be expected to foresee.

Decision of Harman J. affirmed.

APPEAL from Harman J.

The plaintiff, in about 1922, became the owner of some shop premises at 297 Romford Road, Forest Gate. The land, which had originally belonged to one Gurney, had been bought from him in 1870 by one Weddall with a view to building on it. Gurney had imposed restrictive covenants whereby the purchaser covenanted that he would not "use, exercise or carry on or permit "to be used, exercised or carried on upon the said premises hereby "granted any trade, manufactory or business whatever . . . but "to use the said premises as private dwelling-houses only." When the premises were purchased by the plaintiff their character had greatly changed. They had been converted to business premises and consisted of a shop, with a garage or workshop behind. No complaint had been or ever was made of the use to which the premises were put.

In 1948 the plaintiff, desiring to sell the premises by auction, placed them in the hands of his agent, who in his particulars of sale described them as "valuable and commanding freehold corner "shop premises," and a special condition which was inserted on the advice of the defendants, Pennington & Son, Lincoln's Inn Fields, the plaintiff's solicitors, read: "7. The property is sold "subject to the restrictive covenants as to user and other matters "contained in a deed dated September 29, 1870, and made "between John Gurney of the one part and George Edward "Waddell of the other part as far as the same are still subsisting "and capable of taking effect and the purchaser shall in the con-"veyance to him covenant to observe the same so far as aforesaid "and to indemnify the vendor in respect thereof. A copy of the "said restrictive covenants may be inspected at the offices of the "vendor's solicitors at any time during business hours or at the "auction room and the purchaser whether he inspects the same "or not shall be deemed to purchase with full notice thereof."

One Barnett purchased the premises at the auction for £9,000, signed a contract and paid a deposit. He had known the premises for twenty-seven years as shop premises. In due course his solicitors made the following requisition as to title:

"(14) Is the property, or any part thereof, subject to any "covenant or agreement restrictive of the use or enjoyment there-"of or otherwise? If so, has the same been duly observed or "performed?" The answer returned by the defendants, acting as the plaintiff's solicitors, appointed to carry through the conveyance, was "Yes, see special condition 7. There appear to have

"been breaches of the covenant as to user but no notice of breach "has been served." On receipt of this answer the purchaser refused to complete the purchase and demanded the return of his deposit. Later he brought an action against the plaintiff to recover the deposit, and in 1951 obtained judgment against the plaintiff.

In 1949, pending the trial of the action, the plaintiff had another opportunity of selling the property, but was advised by the defendants, through their managing clerk, that it would be unwise to do so pending the trial of the action. In October, 1949, a fire at the premises caused a great deal of damage, at a time when they were uninsured, the plaintiff not having renewed his insurance since the auction sale, on the understanding that the purchaser would insure.

In the above circumstances the plaintiff brought the present action against the defendants for damages for negligence as his solicitors in answering the requisition as to title in terms which represented, impliedly or expressly, that the restrictive covenant was or might be enforceable, and also in advising against a sale in 1949 when the premises were uninsured.

Harman J. acquitted the defendants of negligence in regard to the answer to the requisition, but found that they were negligent in regard to the advice given in regard to the sale in 1949. He held, however, that the fire damage was too remote and was attributable to the plaintiff's own omission to insure the premises, an omission which the defendants could not be expected to have foreseen.

The plaintiff appealed.

Melford Stevenson Q.C. and *J. T. Molony* for the plaintiff.
Gerald Gardiner Q.C. and *P. M. O'Connor* for the defendants.

All cases cited in argument are mentioned in the judgment.

DENNING L.J., having stated the facts, continued: The action about the deposit came to trial in 1951 before Romer J. and then it went to the Court of Appeal. Both courts held that the purchaser was entitled to recover his deposit. The reason was because of the answer which the defendants gave to the requisition. It was wrong, they said, for the solicitors to answer "Yes," because that meant that there was a restrictive covenant; and to say: "There appear to have been breaches of the covenant," because that meant that the covenant was still subsisting. Both courts said that the answer to the requisition was plain and unambiguous. It meant that the property, although sold as shop premises, was still subject to a covenant forbidding it to be used except as a private dwelling-house. It showed that the vendor was not going to make a good title. It was equivalent to a repudiation or a refusal to perform his part of the bargain, and the purchaser on

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that account was entitled to call off the contract. That appears, I think, most distinctly, from the judgments of Evershed M.R. and of Birkett L.J. in the Court of Appeal. The Master of the Rolls said that the answer to the requisition provided the purchaser "with a heaven sent opportunity to resile from a bargain of which "he had already repented and he embraced that opportunity with "alacrity . . . he undoubtedly took advantage of the rigour of the "game and the loss must fall upon the vendor." So the answer to the requisition was a fatal mistake. It enabled the purchaser at once to get out of the bargain. He was entitled to cancel the contract forthwith and did so.

The plaintiff, as vendor, naturally enough turns round to his solicitors and blames them for what has happened. He says: "I "instructed you to carry this contract through for me. Instead "of doing so, you repudiated it and lost me the contract. It is "all very well for you to say you did not mean to repudiate it, "but everyone knows that, in order for a statement to be a "repudiation, it must be clear and unequivocal, evincing an "intention no longer to be bound by the contract. If you made "such a statement on my behalf you must have been negligent."

I find it very difficult to give a satisfactory answer to this argument, but I know there must be one: for I am quite satisfied that the solicitors here were not negligent. Let any lawyer put himself in their position. They knew that there were some old restrictions on these premises which had not been enforced for years. The restrictions were in all probability obsolete, but the solicitors could not assert categorically that they were obsolete. It would obviously not be right for solicitors, without full investigation, to commit the vendor to a warranty that the restrictions were obsolete. So they guarded their client by putting a special condition in the contract saying that he sold the property subject to the restrictions so far as they were still subsisting and capable of taking effect: and when it came to the answer to the requisition, they tried to protect their client by saying the same thing over again or, rather, what they thought was the same thing. It was, in the words of the very experienced managing clerk who dealt with it, a "stock requisition," and he answered in the "stock "form." He answered it in the way in which Harman J. said such questions had been answered from the time of the memory of man, or at all events for a long time. But by ill luck the courts have held that the words which the solicitors used, instead of protecting their client, amounted to a repudiation of the contract. That was, in my view, not their fault: it was not a thing which could reasonably have been anticipated to flow from the answer to the requisition. The solicitors acted in accordance with the general practice of conveyancers. No ill consequences had ever been known to flow from an answer in this form. Now that the case has gone adversely to the vendor, we can see that it was a mistake, but it is so easy to be wise after the event. One has

to try to put oneself in the position of the solicitors at the time and see whether they failed to come up to a reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor. It seems to me, applying that test, that it is impossible to say that these solicitors were guilty of a breach of duty to their client. It was one of those misadventures and misfortunes which do sometimes happen even in the best conducted businesses. I think that Harman J. was right in holding the solicitors were not guilty of negligence in regard to the answer to the requisition.

The next point is as to the advice which the solicitors gave to their client, that he should not sell pending the action. The judge has found that the solicitors were negligent in giving that advice, because the action only affected the deposit. Neither side was at that time insisting on the sale or asking for specific performance. If the solicitors had thought about the matter for ten minutes, they would have realised there was no objection to the sale. I do not propose to say anything on the question of negligence because, in my judgment, the plaintiff's claim on this point fails because the damage is too remote. The market price did not go down at all and no damage would have been sustained if the property had been insured. The trouble was that the property was not insured against damage or loss by fire, and that was the fault of the plaintiff himself. He had the whole insurance entirely in his own hands: and the loss was due to his own omission to insure. The ordinary prudent course for owners of property is to insure against fire, and he did not do it. The defendants could not be expected reasonably to foresee that damage by fire would fall on the vendor. It was not, to use Asquith L.J.'s phrase in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*,[1] a thing which was "on the cards." The result is that I am in complete agreement with the judgment of Harman J. on both points and I would dismiss the appeal.

HODSON L.J. I agree. The gist of the plaintiff's action on the first point was that he had lost the benefit of his bargain for the sale of his property by reason of the negligence of the experienced managing clerk employed by the solicitors who were doing the work for him. The particular act of negligence relied upon is the giving by the clerk, Mr. Ridpath, of an answer to a requisition, which had the effect, as this court has held, of making the vendor say to the purchaser that he was forcing on him a property essentially different from that which was advertised. Reference to the advertisement shows that the property in question was advertised as "freehold corner shop premises." The answer to the requisition: "Is the property, or any part "thereof, subject to any covenant or agreement restrictive of

[1] [1949] 2 K.B. 528, 540; 65 T.L.R. 274; [1949] 1 All E.R. 997.

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" the user or enjoyment thereof or otherwise? If so, has the " same been duly observed or performed?" was " Yes. See " Special Condition 7. There appear to have been breaches of " the covenant as to user but no notice of breach has been " served." There being a covenant against user of the premises except for the purpose of a private dwelling-house, that was the answer which the managing clerk naturally gave, and he drew attention to the special conditions in the catalogue which, if followed up, would have shown the purchaser the existence of the restrictive covenant. Admittedly, in answering the question in what was described as the usual way, he had not in mind, nor had anybody else in mind until long after this action started, that he was raising the difficulty in this case and that he was putting forward a description of the property which was not the same but vitally different from the property advertised for sale. That is the force of the plaintiff's case. He says that the solicitors ought to have been alive to this and to have stated that the restrictive covenant was obsolete, which was admitted on both sides at the hearing before Romer J.

Harman J. has considered this matter and I think it worth while to read what he said. " Was he [the managing clerk] " negligent in putting his answer in that way even though he " did not mean to do so? If he did it by carelessness it may well " be negligence on his part. I cannot see that there was any " negligence at all. He answered in a way which, although " unfortunate in form, was in substance a way in which such " questions have been answered from the time of memory of " man." I should imagine the judge was drawing on his own experience as a practitioner in the Chancery Court. He went on: " Both the experienced Chancery counsel who represented " the plaintiff thought he should succeed and that this pretext " of the purchasers would not be held valid. It turned out to be " wrong, but if Mr. Ridpath was wrong he was wrong in very " good company, and everyone knows that it is not every piece " of wrong advice which a lawyer gives which is held in our law " to be negligence."

Both the counsel referred to, Mr. Milner Holland and Mr. Dunbar, gave evidence in this case and they thought the opinion expressed by Romer J., that this inconsistency defeated the plaintiff, was wrong. They advised an appeal and a division of this court took a different view. In those circumstances, it would be a remarkable thing if a solicitor's managing clerk who had produced that result, which was ultimately found to be wrong, should be held to be negligent within the ordinary principles of the law of negligence. Harman J., it is said, misdirected himself on the matter, but I cannot accept that. What he said was: " I do not think I need deal at any great length " with the question of a solicitor's liability or negligence. It is " the same as anybody else's liability; having regard to the degree

" of skill held out to the public by solicitors, does the conduct of " the solicitor fall short of the standard which the public has " been led to expect of the solicitor? " I think that that direction was right and consistent with authority.

To my mind, the strongest way in which the plaintiff's case could be put is that this is not a case of negligent advice, which is the subject-matter of most of the decisions on solicitors' negligence, but it is really a case of misdescription by a professional man in describing a piece of property. It is said that a solicitor acting for a vendor if he misdescribes the property, having regard to the professional skill which a solicitor must be expected to exercise, must be regarded as negligent. I have in mind, in considering the direction which Harman J. gave to himself, the language of Scrutton L.J. in *Fletcher & Son* v. *Jubb, Booth & Helliwell.*[2] " . . . it would be extremely difficult to define " the exact limit by which the skill and diligence which a " solicitor undertakes to furnish in the conduct of a case is " bounded, or to trace precisely the dividing line between that " reasonable skill and diligence which appears to satisfy his " undertaking, and that crassa negligentia, or lata culpa " mentioned in some of the cases, for which he is undoubtedly " responsible. It is a question of degree and there is a border-" land within which it is difficult to say whether a breach of duty " has or has not been committed." " Crass " and other adjectives attached to " negligence " are no longer used.

The judge did not limit himself in any way. He did not direct himself by that adjective, although he did quote a passage from a decision in the House of Lords in *Purves* v. *Landell*[3] in which it appears. He had also before him a Scottish case, *Adam Bell* v. *Strathern & Blair,*[4] in which a number of the authorities were brought together, and in particular there was a passage which does seem to me to be applicable to this case which has not any direct reference to professional advice but rather to other professional activities. In *Cooke* v. *Falconer's Representatives,*[5] Lord Fullerton said: " A professional man does not warrant that " what he does will certainly have the effect which is expected " from it. . . . He warrants only that he shall bestow on the " matter committed to him, the skill generally possessed by his " brethren in the profession. It is not enough, in order to recover " damages from a professional man, to show that something which " was committed to him to do, has not had the effect which was " expected from it; he must show an act of gross ignorance, such " as could not have been committed by any other ordinarily " informed member of the profession." I have no hesitation in

[2] [1920] 1 K.B. 275, 280; 36 T.L.R. 19.
[3] (1845) 12 Cl. & Fin. 91; 8 E.R. 1332.
[4] (1954) 104 L.J. 618.
[5] (1850) 13 D. 157, 172.

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coming to the conclusion on this evidence that the judge came to a right conclusion on this part of the case.

On the second question, I agree with what my Lord has said as to the remoteness of the damage claimed and I have very little to add. It is unnecessary to go further and consider whether in any event the judge was right in finding negligence against the solicitors in view of the fact that during the pendency of the litigation in question Mr. Ridpath had advised his client not to sell the property. I think, in fairness to Mr. Ridpath, it might be well to set out the reasons why he said that he gave that advice. The first one was: "I thought the status quo should be main-"tained, as there was a pending action, until the action was "decided." That may be not a very good reason, but it is a very natural reaction of a solicitor to give such advice to his client when an action which concerns a particular subject-matter is before the court. To continue with his answer: "A second "reason was that in the defence we were claiming forfeiture of "the deposit and I thought that the court might order, if they "decided that there was a binding contract, that the purchaser "should have an opportunity of completing the purchase instead "of forfeiting his deposit." There seems to be some force, at any rate, in that reason, although it is perfectly true, no doubt, if Mr. Ridpath had thought the matter over deeply or considered the matter with his principals or with counsel, he would have appreciated that if the property had been in fact disposed of and his client was free to sell and had sold there would be no question of specific performance of the contract should it arise. The third reason he gave was: "That in the defence we were asking the "court for a declaration that we were entitled to resell, and I "thought that if we were asking the court to say that we are "entitled to resell we should not resell until the court says we "can." It is unnecessary to express any conclusion about that matter and I for my part am not prepared, in those circumstances, nor is it necessary to do so, to criticize the judge's finding upon it. I have drawn attention to the answers which the solicitors gave which show, at any rate, that there was something to be said for the view that there was no negligence on that part of the matter. I agree that the appeal fails.

PARKER L.J. I agree that the appeal should be dismissed. The first ground upon which it is said the defendants were negligent is based on the answer given by Mr. Ridpath to requisition 14. That requisition, and the answer to it, have been already read, but it is to be observed that nowhere in the answer is there a plain statement, as it is said there should have been, that any restrictions as to user were obsolete and unenforceable. On the contrary, it has been held by this court that the words are plain and unambiguous and amount to a statement that the restrictions

are living restrictions of which there have been breaches and that, accordingly, the statement in the answer amounts to a repudiation, in that it was being stated that property of a different description was being sold from that advertised in the particulars. In those circumstances, the plaintiff says, in effect: "I employed "you, the defendant, to carry through the transaction. I did "not employ you to repudiate it, and your statement giving rise "to this repudiation was a misstatement made with no con- "ceivable excuse and you have fallen short of your duty to "exercise reasonable skill." In the light of after events that argument is a very attractive one, but at the same time I have no doubt that it fails. To state affirmatively that the covenants were obsolete and unenforceable was something Mr. Ridpath was not called upon to do. That was a matter for the purchaser to satisfy himself about. Indeed, if Mr. Ridpath had taken upon himself to state that the restrictions were obsolete and it turned out that he was wrong in some respect, it might well be said that he was negligent for having taken upon himself something which it was not part of his duty to do.

What it really comes to is this. It is said that he should have used some more negative words such as "There appears to have "been a user inconsistent with the covenant, assuming it is not "obsolete, but no notice of breach has been served"; in other words, some words which fell short of affirming that the restrictions were living restrictions. For my part I am quite satisfied that at the time when that answer was made no one, be he solicitor or counsel, could reasonably be expected to foresee the difficulties which might follow according to whether one formula was used rather than another.

So far as the second question is concerned, I find it unnecessary to go into the question whether the advice given by Mr. Ridpath was given negligently, because it has not been shown, as it must be shown before damage can be recovered, that it was, to use the phrase used by Asquith L.J., "on the cards," not merely that a fire might result but that a fire might result at a time when the plaintiff was uninsured. For these reasons, in my opinion the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Cree, Godfrey & Wood, for Preston & Redman, Bournemouth; Hewitt, Woollacott & Chown.*

A. W. G.

[CHANCERY DIVISION.]

1955
Feb. 10.

Danckwerts J.

* *In re* BRASSEY'S SETTLEMENT. BARCLAYS BANK LD. *v.* BRASSEY.

[1954 B. 5457.]

Settlement — Construction — Investment clause — Power to invest in stocks of "any British colony or dependency"—Whether Dominion stocks included — "Colony" — "Dependency" — Statute of Westminster, 1931 (22 & 23 *Geo.* 5, *c.* 4), *ss.* 1, 2.
Canada. Commonwealth.

A settlement made in 1936 gave the trustees power to invest in "any of the public stocks or funds or government securities "of Great Britain or Northern Ireland or India or any British "colony or dependency or any foreign government or state," and in "the stocks (etc.) of any company . . . or corporation authority "or body . . . in Great Britain or Northern Ireland or India or "any British colony or dependency or any foreign country."

The trustees, who desired to make investments in certain Canadian companies, took out a summons to ascertain whether this was within their powers under the investment clause:—

Held, that after the coming into force of the Statute of Westminster, 1931,[1] it was not possible to hold that a self-governing Dominion was a "colony or dependency," so that the language of the investment clause did not cover investments in the Dominion of Canada.

In re Maryon-Wilson's Estate [1912] 1 Ch. 55; 28 T.L.R. 49 and *British Coal Corporation* v. *The King* [1935] A.C. 500; 51 T.L.R. 508 considered.

ADJOURNED SUMMONS.

The facts are stated in the judgment.

A. H. Droop for the trustees.
R. Cozens-Hardy Horne for the tenant for life.
John Bradburn for other beneficiaries.

The cases cited in argument are referred to in the judgment.

[1] Statute of Westminster, 1931, s. 2: "(1) The Colonial Laws "Validity Act, 1865, shall not apply "to any law made after the com- "mencement of this Act by the "Parliament of a Dominion. (2) No "law and no provision of any law "made after the commencement of "this Act by the Parliament of a "Dominion shall be void or inopera- "tive on the ground that it is repug- "nant to the law of England, or "to the provisions of any existing "or future Act of Parliament of the "United Kingdom, or to any order, "rule or regulation made under any "such Act, and the powers of the "Parliament of a Dominion shall "include the power to repeal or "amend any such Act, order, rule or "regulation in so far as the same is "part of the law of the Dominion."

S. 7: "(1) Nothing in this Act shall "be deemed to apply to the repeal, "amendment or alteration of the "British North America Acts, 1867 "to 1930, or any order, rule or regu- "lation made thereunder . . . (3) The "powers conferred by this Act upon "the Parliament of Canada . . . "shall be restricted to the enactment "of laws in relation to matters "within the competence of the Par- "liament of Canada . . ."

DANCKWERTS J. This is a question of construction which arises on a settlement made by the first defendant on August 5, 1936. It is concerned entirely with the investment clause of the settlement in question.

As the settlement was made in 1936 it was later in date than the Statute of Westminster, 1931, which declared and regulated the status of British Dominions and the United Kingdom as between themselves.

The clause in question is in these terms: "Trust moneys "may at such discretion as aforesaid be invested in or upon "(A) Any of the public stocks or funds or government securities "of Great Britain or Northern Ireland or India or any British "colony or dependency or any foreign government or state or "any security the interest on which is or shall be guaranteed by "Parliament." I need not read (B) and (C). (D) is: "The "stocks funds bonds debentures debenture stock mortgages "obligations or securities or the guaranteed preference or "ordinary stock or shares of any company (whether limited or "unlimited and whether public or private) or corporation "authority or body (whether public municipal county local or "otherwise) in Great Britain or Northern Ireland or India or "any British colony or dependency or any foreign country."

The trustees (and in this they are supported by the beneficiaries) are desirous of investing part of the settlement funds in stocks or shares of banking companies carrying on business in the Dominion of Canada. Therefore the question arises whether they may lawfully make that investment under the terms of this investment clause.

I have been referred to a decision in the Court of Appeal in 1911 of *In re Maryon-Wilson's Estate*.[1] The point in that case was whether a power to invest in stocks or securities of any British colony or dependency—similar words to the material words in the present case—permitted investment in the stocks of any province of the Dominion of Canada unless that province had complied with the requirements of the Colonial Stock Act, 1900. Therefore the question in that case was whether investments in the stocks of a constituent province of the Dominion of Canada was permissible under that clause. The point decided by the Court of Appeal was no more than this: that subject to the provisions of the Colonial Stock Act, 1900, the provinces of Canada were not either British colonies or dependencies, but were part of the whole Dominion of Canada. The case is of some interest because the court expressed the opinion that "dependency" was a wider term than "colony." They said: "Its exact meaning has not been judicially deter-"mined," but they expressed the opinion that Canada was a colony or dependency. It was observed that the word "dependency" might in certain ways be regarded as a more

[1] [1912] 1 Ch. 55; 28 T.L.R. 49.

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dignified phrase than "colony." On the other hand, Cozens-Hardy M.R. and Farwell L.J. indicated that "clauses in trust "instruments enlarging the power of investment beyond what "the general law sanctions ought to be construed strictly."

It is said on behalf of the persons who wish investments of this kind to be made, that if Canada was a dependency in 1911 it would still be a dependency now, because certain sections of the British North America Act, 1867, have been expressly reserved by the Statute of Westminster, 1931. Therefore, if Canada is a dependency, it is still a dependency and is still within the words in the relevant investment clause.

The Statute of Westminster was passed as a result of certain Imperial Conferences, and in the report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 it is said[2]: "They [Great Britain and the Dominions] are autono-"mous communities within the British Empire, equal in status, "in no way subordinate one to another in any aspect of their "domestic or internal affairs, though united by a common "allegiance to the Crown, and freely associated members of the "British Commonwealth of Nations." The report proceeds: "On "the question raised with regard to the legislative competence of "members of the British Commonwealth of Nations other than "Great Britain, and in particular to the desirability of those "members being enabled to legislate with extra-territorial effect, "we think that it should similarly be placed on record that the "constitutional practice is that legislation by the Parliament at "Westminster applying to a Dominion would only be passed "with the consent of the Dominions concerned."

The preamble to the Statute recites: "And whereas it is "meet and proper to set out by way of preamble to this Act "that, inasmuch as the Crown is the symbol of the free associa-"tion of the members of the British Commonwealth of Nations, "and as they are united by a common allegiance to the Crown, "it would be in accord with the established constitutional "position of all the members of the Commonwealth in relation "to one another that any alteration in the law touching the "Succession to the Throne or the Royal Style and Titles shall "hereafter require the assent as well of the Parliaments of all "the Dominions as of the Parliament of the United Kingdom: "And whereas it is in accord with the established constitutional "position that no law hereafter made by the Parliament of the "United Kingdom shall extend to any of the said Dominions as "part of the law of that Dominion otherwise than at the request "and with the consent of that Dominion: And whereas it is "necessary for the ratifying, confirming and establishing of "certain of the said declarations and resolutions of the said "Conferences that a law be made and enacted in due form by "authority of the Parliament of the United Kingdom." Then

[2] See Halsbury's Statutes of England, 2nd ed., Vol. 6, p. 194.

the Statute proceeds to provide by section 1 that the expression "Dominion" means "any of the following Dominions, that is "to say, the Dominion of Canada, the Commonwealth of "Australia, the Dominion of New Zealand, the Union of South "Africa, the Irish Free State and Newfoundland." Those last two have ceased to be dominions, Newfoundland by becoming a province of Canada, and the Irish Free State by virtue of the Ireland Act, 1949, which provided that the Irish Free State ceased to be a dominion though it does not become a foreign country for the purposes of any instrument. [His Lordship read section 2 of the Statute of Westminster, 1931, and continued:] An example of the effect of that section was the Act passed by the Canadian Parliament restricting the right of appeal to the Privy Council which was considered by the Privy Council in *British Coal Corporation* v. *The King*.[3] In that case a preliminary objection was taken to the competency of a petition for special leave to appeal to the King in Council from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec in a criminal matter on the ground that the petition was incompetent by reason of the Canadian statute to which I have just referred. It was held by the Privy Council that the petition was incompetent. The headnote states: "Before the Statute of Westminster, "1931, the Canadian Legislature was subject to the limitations "imposed by the Colonial Laws Validity Act, 1865, by which "legislation repugnant to an Act of the Imperial Parliament was "declared void, by section 129 of the British North America "Act, 1867, and also by the doctrine forbidding extra-territorial "legislation. These limitations were abrogated by the Statute "of Westminster." The result was that the preliminary objection succeeded.

However, Mr. Bradburn, on behalf of persons interested under the settlement, relied upon a passage in the advice of the Privy Council delivered by Lord Sankey.[4] Lord Sankey referred to section 7 of the Statute of Westminster which reserved from the effect of the Statute certain sections of the British North America Act, 1867, being sections which prevented any alteration of the Canadian constitution. Then he observed: "But it "is well known that section 7 was inserted at the request of "Canada and for reasons which are familiar. It is doubtless "true that the power of the Imperial Parliament to pass on its "own initiative any legislation that it thought fit extending to "Canada remains in theory unimpaired: indeed, the Imperial "Parliament could, as a matter of abstract law, repeal or disre-"gard section 4 of the Statute. But that is theory and has no "relation to realities. In truth Canada is in enjoyment of the "full scope of self-government: its Legislature was invested "with all necessary powers for that purpose by the Act, and

[3] [1935] A.C. 500; 51 T.L.R. 508. [4] [1935] A.C. 500, 520.

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"what the Statute did was to remove the two fetters which "have already been discussed."

It seems to me that in deciding this question I must have regard to realities and not to abstract theory. Since the Statute of Westminster, 1931, I cannot possibly hold that the Dominion of Canada is either a colony or a dependency. No doubt the change in political thought was gradual, but there has been a change, as it seems to me, in the way in which the position of the Dominions and the Mother Country was regarded during the years which passed between 1911 and 1931, and the Statute of 1931 was passed to give effect to that change in political thought. That change in thought is expressed in the report of the Imperial Conference of 1926 in the words which I have already read. It described Great Britain and the Dominions as being equal in status, and in no way subordinate one to another in any aspect of their domestic or internal affairs, being united by a common allegiance to the Crown, and being freely associated as members of the British Commonwealth of Nations. I cannot see how states equal in status and in no way subordinate one to another in any aspect of their domestic or internal affairs can possibly be said in any respect to be dependent one upon another. As it seems to me, they are equal sovereign states and not dependencies, and, of course, not subordinate to the Parliament of the United Kingdom. The Statute of Westminster was giving effect to that conception. and I have to give effect to it also. Accordingly, I am compelled to conclude, however convenient it might have been to decide in the other way, that in this settlement the words "British colony or dependency" cannot be given effect to in such a way as to include the Dominion of Canada.

It is very strange that a clause should have been inserted in this form in 1936. No doubt it was taken from some old and obsolescent precedent in a book of conveyancing precedents. It would have been so easy to have inserted the word "dominion" before the words "colony or dependency." I cannot say why the draftsman elected to omit that word, but I am afraid that I must construe the words in the investment clause as I find them, and the decision must be as I have already stated.

[His Lordship then gave leave to amend the summons by the addition of an application under section 57 of the Trustee Act, 1925, and made an order conferring on the trustees the power to invest in stocks, etc., "in any dominion."]

Orders accordingly.

Solicitors: *Norton, Rose, Greenwell & Co.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* LONGMAN. WESTMINSTER BANK LD. *v.* HATTON.

1955 *Feb.* 4.

Danckwerts J.

[1953 L. 152.]

Will—Forfeiture clause—Protective trust—Beneficial interest in income subject to forfeiture if income became payable to any other person—Authority given by beneficiary for payment of debts out of future dividend of a company—Dividend never declared—Authority nugatory—Interest not forfeited.
Trust—Protective trust.

A testatrix appointed a bank to be the executor and trustee of her will and devised and bequeathed her residuary estate on trust to pay the income to her son and, on his attaining the age of 55 years, on trust as to the income and capital for him absolutely.

These provisions were subject to a forfeiture clause, if he should commit, permit or suffer any act whereby any part of the income or capital of the residuary estate became vested in or payable to any other person.

The testatrix died in 1949, and in 1953 the son gave letters of authority to firms of solicitors acting for sundry creditors, authorizing and requesting the bank to pay to the respective solicitors the sums of money mentioned in the letters "from the "dividend due to me in July next from [a certain company]." The dividend was, however, passed and never declared.

The bank took out a summons to determine whether the son had incurred a forfeiture of his interest under the trusts of the will:—

Held, that as the company had passed its dividend, the authorities given by the son were nugatory as, there being nothing on which they could or did operate, the words of the forfeiture clause did not apply and no forfeiture had been incurred.

ORIGINATING SUMMONS.

By her will dated October 11, 1949, Evelyn Mary Longman appointed Westminster Bank Ld. executor and trustee of her will and she devised and bequeathed her residuary estate "(a) upon "trust to pay the income arising therefrom to my son John "Edward Hatton Longman until he attains the age of 55 years "provided always and I hereby direct that if my said son shall "commit permit or suffer any act default of [sic] process whereby "the said income or any part thereof or the capital of my "residuary estate or any part thereof would or might but for this "present proviso become vested in or payable to any other person "or persons then the whole of such income as aforesaid shall "immediately thereupon absolutely cease and determine as if "my said son were dead and both capital and income of my "residuary estate shall be held by the bank upon trust for my "said grandson. On my said son attaining the age of 55 years "then subject as aforesaid (b) upon trust as to both capital "and income of my residuary estate for my said son absolutely. "(c) In the event of my said son predeceasing me or surviving "me dying under the age of 55 years then upon trust as to both

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Longman, *In re.* Westminster Bank Ld. *v.* Hatton.

" capital and income of my residuary estate for my said grandson " absolutely."

The testatrix died on October 12, 1949, and in March, 1954, her residuary estate included 4,893 shares in W. E. and J. Pebody Ld. of £1 each.

The testatrix's son John Edward Hatton Longman, by a statutory declaration dated October 20, 1951, abandoned the use of his Christian names Edward Hatton and his former surname of Longman and assumed the first names of John Christopher and the surname of Hatton. The infant defendant Christopher Francis Hatton was born on January 7, 1948, and was the son of the defendant John Christopher Hatton.

In May, 1953, John Christopher Hatton gave to three separate firms of solicitors, acting for sundry creditors, letters of authority to the Bank Trustee Department authorizing and requesting the bank to pay to the respective solicitors on behalf of the respective creditors the sums of money therein mentioned " from the " dividend due to me in July next from W. E. and J. Pebody " Ld." He also gave to another firm of solicitors a letter of authority to the Bank Trustee Department requesting the bank to pay to the said firm of solicitors " on behalf of [a named com- " pany] for the satisfaction of a debt due to them the dividend " due to me in July next from W. E. and J. Pebody Ld."

The bank was advised that, in view of the forfeiture provisions in the will, as the letters of authority referred to a dividend which had not been declared (and was in fact never declared), the bank could not safely act on these authorities and the bank gave notice to the firms of solicitors to that effect.

The bank also wrote a letter to John Christopher Hatton informing him that unless the authorities were withdrawn with the consent of the creditors before the dividend was received he would incur a forfeiture, if he had not already done so; and in consequence of that letter he forthwith purported to revoke the letters of authority.

In view, therefore, of the forfeiture provisions contained in the will and in view of the circumstances, the bank took out a summons to ascertain whether on the true construction of the will and in the events which had happened the defendant John Christopher Hatton had incurred a forfeiture of his life interest under the trusts thereof and if so from what date such forfeiture was incurred.

Hector Hillaby for the plaintiff bank.

The first defendant John Christopher Hatton did not appear.

M. J. Fox for an infant grandson of the testatrix.

Cases referred to in argument: *In re Mair* [1]; *In re Baker* [2]; *In re Forder.* [3]

[1] [1909] 2 Ch. 280.
[2] [1904] 1 Ch. 157.
[3] [1927] 2 Ch. 291.

DANCKWERTS J. stated the facts and continued: The first authority given to the bank by the first defendant has in fact been withdrawn. I do not think that that makes any difference to the decision which I have to reach in this case, as a much more important event happened, namely, that both in 1953 and in 1954 the company in question passed its dividend and consequently there was no dividend which became payable by the company in July, 1953, or at any time in the years 1953 and 1954. Accordingly, it seems to me that the authorities given by the son were completely nugatory, and that there was nothing on which they could operate and they never did operate on anything. Therefore, it seems to me that, in the events which happened, the words of the forfeiture clause do not apply.

Any decision in a case of this kind must depend on the precise terms of the clause which is involved and also on the events which have happened.

Mr. Fox on behalf of the grandson referred me to *In re Baker*,[1] *In re Mair*[2] and *In re Forder*.[3] But, in my opinion, none of those three cases really touches the point on which the present case turns. The important words in the will are "shall commit "permit or suffer any act default or process whereby the said "income or any part thereof or the capital of my residuary estate "or any part thereof would or might but for this present proviso "become vested in or payable to any other person or persons." In the events which happened the dividend payable in July, 1953, or indeed in any other part of 1953, was never paid and, therefore, it never did form any part of the income of the residuary estate. Consequently, there was no act by the son which in any way directed any payment of income of the estate to anybody else. It seems to me that the word "might" carries the matter no further. In my view, therefore, though one may consider the son to be very lucky, in the events which have happened he has not forfeited his interest in the income of the estate.

Declaration accordingly.

Solicitors: *Peacock & Goddard for Buchanan & Llewellyn, Bournemouth; Official Solicitor.*

J. L. D.

[1] [1904] 1 Ch. 157.
[2] [1909] 2 Ch. 280.
[3] [1927] 2 Ch. 291.

[COURT OF APPEAL.]

C. A.

1954
Oct. 28.

Lord Goddard C.J., Hodson L.J. and Vaisey J.

*LAWSON *v.* LAWSON.

Husband and Wife—Justices—Cruelty—Sodomy—Corroboration—Submission to, but not consent, by wife—Desirability of corroboration of wife's evidence—No legal necessity for corroboration.

On a summons by a wife against her husband before justices on the ground of persistent cruelty, the substantive allegation was that the husband had insisted on his wife committing acts of sodomy with him. The justices found that the wife, although submitting to the acts in question, was not a consenting party to them. They directed themselves as to the desirability of, but not of the necessity for corroboration of the wife's evidence. They accepted the wife's story as true, and were of opinion that it was corroborated in certain respects by other evidence given. They accordingly found the husband guilty of persistent cruelty. The husband appealed to the Divisional Court who affirmed the decision of the justices. The court was of opinion that the justices, having correctly directed themselves as to the desirability, but not the legal necessity for corroboration, were entitled to accept the wife's evidence, even if the matters relied on did not amount to corroboration. The husband appealed:—

Held, that a wife who is forced to submit to acts of sodomy or to attempts at sodomy, but who is not a consenting party thereto, is not an accomplice; and that although in sexual cases, including cruelty cases, a warning should be given that it is dangerous to convict on the uncorroborated evidence of the complainant, if that warning be borne in mind, there is no legal necessity for corroboration even in the case of an accomplice, and justices or a jury may accept the evidence of the wife even in the absence of corroboration; and that the appeal should be dismissed.

Statham v. *Statham* [1929] P. 131; 45 T.L.R. 127 distinguished.

Appeal from a decision of the Divisional Court (Lord Merriman P. and Barnard J.) dismissing an appeal by the respondent husband from a decision of justices on a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, whereby they found him guilty of persistent cruelty to his wife.

The cruelty alleged by the wife was that the husband on three occasions insisted on committing acts of sodomy upon her and that he had insisted on her masturbating him. The justices having advised themselves of the desirability but not of the necessity for corroboration of the wife's evidence accepted it as being true, and convicted the respondent. They were also of opinion that certain facts proved before them constituted corroboration of the evidence given by the wife. The Divisional Court held that the justices having properly directed themselves were entitled to come to the conclusion that the wife's evidence was true even in the absence of corroboration and that she had established a case of persistent cruelty. The husband appealed. The

material facts are set out in detail in the judgment of Lord Goddard C.J.

Joseph Jackson for the appellant husband.
D. R. Ellison for the respondent wife.

The only case cited in argument is referred to in the judgment.

LORD GODDARD C.J. This is an appeal from a decision of the Divisional Court, consisting of the President and Barnard J., to whom the present husband, who had been the respondent in the court below and before the justices appealed against the decision of the justices, that he had been guilty of persistent cruelty to his wife.

The cruelty alleged by the wife was that her husband insisted on committing acts of sodomy upon her on at least three occasions, on one of which she was so much hurt that she said she was unable to walk for some days. The wife further alleged that the husband insisted on her masturbating him. This is a minor point, but I attach rather more importance to it, perhaps, than the President did in one particular respect, because, if true, it shows that he was a man who was given to filthy practices with his wife. The importance I attach to that is that, in my opinion, a statement which the man made in front of a police constable could, and I think did, amount to corroboration of that matter, and would tend to show that the wife's evidence was true. If it can be shown that the wife has given evidence on three or four matters and, at any rate, one of those matters is corroborated, I think it may rightly lead the tribunal of fact to come to the conclusion that she was a truthful witness.

The reasons which the justices gave for their decision were as follows: "1. That on the evidence given before us, it was "proved that the defendant (*a*) in April, 1953, and June, 1953, "committed sodomy upon the complainant against her wish; "(*b*) that on many occasions he tried to force the complainant to "submit to sodomy up to and including November, 1953." So there are two findings on sodomy; one finding that sodomy had been committed, and another finding that sodomy had been attempted on several occasions. "On Wednesday, November "25, 1953, the defendant had insisted upon the complainant "masturbating him against her wish. 2. That the complainant "had not consented to the acts of sodomy committed upon her, "or to being a party to the act of masturbation." That, as I understand it, means that, although the wife submitted to what was done, she was not a consenting party and submitted to it against her wishes or against her will. "3. That the com-"plainant's evidence that after the second act of sodomy upon her, "the defendant told her 'that if she bought Vaseline it would "'not hurt so much' was true, and rejected the defendant's "explanation that the Vaseline was for some other purpose, as

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"untrue. 4. That the complainant's statement made in the "presence of police officer Whittaker 'Look what you made me "'do on Wednesday night before I went to my mother's' and "the defendant's reply 'that is personal between us' referred "to the act of masturbation insisted upon by the defendant on "Wednesday, November 25, 1953, and not to a discussion about "money as stated by the defendant. 5. That the defendant had "offered to buy two single beds if the complainant would return "to him. 6. That on Saturday, November 28, 1953, the day the "complainant left the matrimonial home, the defendant tried to "pull her upstairs. 7. That the complainant's distressed and "nervous condition was the outcome of the defendant's conduct "towards her."

Then the justices say: "In coming to our decision we con- "sidered the question of corroboration raised by the defendant's "solicitor, and being advised of the desirability but not the "absolute necessity for corroboration, and having considered the "evidence of the parties, we accepted the complainant's evidence "as true, and further that paragraphs 3, 4 and 5 set out above "corroborated her allegations."

The Divisional Court made a very careful analysis of the evidence and both judges came to the conclusion that the justices were quite justified, on the evidence, in preferring the evidence of the wife to that of her husband, and came to the conclusion that she had made out her case. There was a difference of opinion between the two judges whether the acts relied on amounted to corroboration. In my opinion, however, it is not necessary for this court to consider the matter of corroboration, for the reason that cases such as the present are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution, and a jury should always be directed, if it is a trial on an indictment, that whether the person concerned is to be regarded as an accomplice or not, it would be undesirable or dangerous to convict upon the evidence of that person alone, but that it is open to the jury, if they are satisfied with the evidence, to convict.

The question of corroboration very often comes up. It does so in three different ways. First, it arises in the case of the unsworn evidence of a child. Although such evidence may be taken in certain cases, for example, if a man is being tried for an offence against the child, there can be no case to go to the jury unless the evidence is corroborated. Then, it is for the judge to say whether there is any evidence that can amount to corroboration, and it is for the jury to say whether they are satisfied with the evidence that is tendered as corroboration.

The second case in which the question of corroboration arises is where the witness, whose evidence it is said should be corroborated, is an accomplice. An accomplice is a person who, in a matter of crime or in such a case as the present, is a consenting party or a participant in the crime. In such a case, a

jury is always directed that it is unsafe to convict upon the uncorroborated evidence of an accomplice; but there again, if the jury are satisfied that the evidence of the accomplice has established the case and if they feel that they can, without doubt, trust that evidence, it is within their province to convict, and they do convict quite often.

The third case is the ordinary sexual case, where a woman complains of an indecent assault or a rape. It has been the practice of judges for very many years to warn juries that they should be reluctant to convict on the uncorroborated evidence of the woman, because it is so easy to make a charge of that description and so extremely difficult to repel.

Therefore, it really comes to this, that, in substance, the warning given to a jury is the same whether you are warning a jury about the evidence of an accomplice or whether you are warning them about the evidence of a woman in a sexual case, and it makes no difference whether the act which the woman alleges has been committed is what I may call a natural act or an unnatural act, as it was in this case.

After a very full and careful analysis of the evidence, the Divisional Court decided that the justices were entitled to come to the conclusion that the wife's evidence was true and that she had made out her case. The judges in the Divisional Court had not, of course, seen the witnesses any more than we have, but I think it would be a very strong thing for this court now to say that, in their opinion, the evidence was not such as the justices were entitled to rely upon.

Some comment was made by Mr. Jackson, who put every conceivable point that could be put for his client, that it was unfortunate that the two justices in this case were both women. I do not think that that is a disadvantage in such a case as this, because, in the first place, one of the great advantages of lay magistrates is that they live, work and act amongst the people in their district. They know their characteristics, their trials, their difficulties, and so forth, and are often in a very good position to come to a conclusion on the question whether the person with whom they are dealing is telling the truth. Women justices can often be very valuable judges of fact when they have to consider whether women are telling the truth. Very often, I think that a woman may be able to come to a better conclusion than a man on the question whether a woman is likely to be telling the truth, though of course there is always the risk of mistakes which cannot be avoided in human justice.

In the present case the justices found that the wife was not a consenting party. That means that she, being forced by her husband, submitted to the acts which were done but that she was not a willing party to them. That seems to me to remove her from the category of an accomplice.

Putting that aside for the moment, if the justices came to the conclusion that these acts had been committed upon the

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wife, then whether she was an accomplice or not, provided she was not a consenting party, in the sense that she voluntarily allowed her husband to satisfy himself in this unnatural way, I do not see how it could be said that she was not assaulted and was not entitled to say that these were acts of cruelty committed upon her, or, at any rate, attempted acts of cruelty, which she must have resisted and, for that reason, the husband could not consummate them. That, surely, would be a case of persistent assaults upon her.

I do not propose to say more about the question of corroboration than this, that I think that the acts here which the justices say, in their opinion, corroborated her evidence, are not very strong. The President thought—and, on the whole, I agree with him—that the justices having come to the conclusion that her story about buying Vaseline was correct, that would afford some corroboration of her story that she complained that these acts of her husband hurt her and he told her to go and buy Vaseline, because that would make it easier. He denied that, but admitted that he did tell her to buy Vaseline. That is the point it corroborates. The reason he gave for telling her to buy the Vaseline the justices rejected, but I think this did amount to some corroboration.

The second matter relied on as corroboration was the statement that the husband made in front of the police officer, when the woman made what was obviously intended to be a reproach and complaint to the husband. He said: "That is "personal between us," in other words, "Something very "private that took place between us." The justices thought that corroborated her story about masturbation. As I have already said, that in itself, is not corroboration with regard to the masturbation, but it enabled the justices, in my opinion, to come to a conclusion on the question whether she was telling the truth about a very shocking incident when she gave as one reason why she left her husband that he made her masturbate him shortly before. When she went back to the house with the police officer, she said something which could be interpreted as relating to this incident and the husband then said: "That is "personal between us." I do not think it goes any further than this, that it would enable the justices to come to the conclusion that the woman was a truthful witness; that in some of the things she said she was telling the truth and was not inventing these shocking stories. Of course the story about the husband offering to buy two single beds is neither here nor there, nor is the fact that he attempted to pull her upstairs; but, as I have said, corroboration, although most desirable in these cases, is not necessary in point of law. I do not think that *Statham* v. *Statham*,[1] to which we have been referred, lays that down. When reference is made to that case, the great thing to

[1] [1929] P. 131; 45 T.L.R. 127.

remember about it is that it depended upon very peculiar and special facts. There is no doubt there, that the husband explained to his wife what he desired to do to her, and she readily consented to place her body to him in the way he wanted and thereby became a principal in the felony. That is a very different case from the case here, where the justices expressly found—and I think were well justified in finding—that the woman, although she may have submitted, was not a consenting party.

For those reasons, I can find no reason why we should disturb the decision of the Divisional Court, and, therefore, the appeal fails and must be dismissed.

HODSON L.J. I agree. The findings of the justices here are very clear, that the husband: "(*a*) In April, 1953, and June, 1953, "committed sodomy upon the complainant against her wish. "(*b*) On many occasions tried to force the complainant to submit "to sodomy up to and including November, 1953. (*c*) On Wednes- "day, November 25, 1953, had insisted upon the complainant "masturbating him against her wish." They made a separate finding: "That the complainant had not consented to the acts of "sodomy committed upon her, or to being a party to the act of "masturbation," and they directed themselves that there was a desirability, but not an absolute necessity, for corroboration of her evidence. The Divisional Court, on the hearing of the appeal, upheld the decision of the justices.

There has been some confusion of thought in this case, at any rate, in argument, because the argument has been conducted in this court on the footing that the wife was an accomplice. involving, to my mind, that she was what the magistrates found she was not, namely, a consenting party to the acts of sodomy and the specific act of masturbation. I think it was open to the justices, on the evidence, to find as they did, and as the Divisional Court agreed they were entitled to find, that this woman was not a consenting party and that the acts were inflicted upon her against her will. In those circumstances, no particular rule relating to an accomplice applies.

Statham v. *Statham*,[2] to which my Lord has referred, does not, however, assist the husband, because that was a case in which the wife alleged sodomy against her husband, and an insufficient direction had been given to the jury who tried the case. The facts in that case showed clearly that the husband had explained to her the exact physical act which he wished to do to her, that she consented and placed her body at his disposal for the act to be committed and that no compulsion of any kind was put upon her. Her only reason for not allowing her husband to do it again was because she said it hurt her too much and she could not stand it again. That is not this case.

The law is, as I understand it, that in cases of cruelty, just as much as in other sexual cases, corroboration is looked for.

[2] [1929] P. 131.

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That does not say the court cannot act without corroboration. Of course, in a case of this kind of an unnatural offence, one looks more anxiously for corroboration, and here the justices came to the conclusion, on one view of the case, in favour of the wife without any corroboration at all. I respectfully agree with what the President said in his judgment in dealing with this point. He said the justices "having, as I think properly, directed themselves "about the warning which a court must give to itself in these "matters, have considered the evidence of the parties and "accepted the wife's evidence as true." Then he went on: "It "is true that they have gone further; they think that it was "corroborated in that way; but they were entitled to accept her "evidence as true even if they had not thought that this "particular matter afforded corroboration."

Mr. Jackson has said that that will not do, because when the justices have found sodomy and also in their findings have found corroboration where none existed, that must necessarily stultify their decision. I do not agree with that. I think that the decision based on the evidence of the wife, believing her and disbelieving her husband, can stand with a proper direction.

In the Divisional Court there was a difference of opinion as to corroboration in regard to the Vaseline. I take the view that the story about the Vaseline told by the wife, having regard to the false explanation that the husband gave, as the justices found, is capable of being corroboration.

So far as the statement referring to masturbation is concerned, I think there is a difficulty about that, because it is not capable of being related to the sodomy, and one has to be rather careful in considering questions of corroboration, to see to what part of the case the corroboration is capable of being directed. It is quite true that it is capable of being used as corroboration of the act of masturbation, but I do not attach much importance to that in this case. It seems to me that this case is essentially one in which this woman was complaining of what she believed to be completed acts of sodomy, but which the Divisional Court thought more likely to have been attempts at sodomy, not completed acts. That conclusion seems to me the more probable, having regard to the careful analysis of the evidence of the wife which each of the judges gave. The finding of fact of the justices, modified as it is by the Divisional Court, is, I think, quite unassailable. I agree that the appeal should be dismissed.

Vaisey J. I fully concur with every word that has fallen from my Lords, and I can add nothing worth hearing to what they have said. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Craigen, Hicks & Co. for Patrick Bennett, Maddison & Wainwright, Newcastle-on-Tyne; Peacock & Goddard for Donald Harvey & Co., South Shields.*

P. B. D.

[QUEEN'S BENCH DIVISION.]

* SLADE *v.* BATTERSEA AND PUTNEY HOSPITAL MANAGEMENT COMMITTEE.

1955
Feb. 2, 3.

Finnemore J.

[X. 1954 S. No. 1158.]

Invitor and invitee—Invitee or licensee—Hospital—Visitor—Patient dangerously ill—Wife permitted to visit at any time—Fall on slippery floor in process of being polished—Unusual danger—Concealed danger—Liability of hospital.

Licensor and Licensee—Hidden trap—Trap known to licensor.

A wife, with the permission of the hospital authorities, visited her husband, a patient dangerously ill, at 10 o'clock one morning. At that time cleaners were in the ward but there was no indication that floor polishing was going on. In fact, polish had been applied to part of the floor but had not been rubbed off; and when leaving the ward the plaintiff slipped and fell on a part of the floor which was in this unfinished state. In an action for damages for personal injuries in which the plaintiff alleged negligence by the defendants for causing or permitting the floor to be slippery and in failing to warn her of its condition:—

Held, that a visit by a wife at the invitation of the hospital authorities to her dangerously ill husband in the hospital was a matter of material interest to both the wife and the hospital and therefore the plaintiff was an invitee and was entitled to recover damages as the condition of the floor was an unusual danger of which the defendants knew and of which they failed to warn her; that even if the plaintiff was merely a licensee she would be entitled to succeed, as although the floor appeared to be safe, the safety was wholly illusory, and there was a concealed danger from which a licensee was entitled to be protected. Moreover, in the circumstances of the present case, it was immaterial whether the plaintiff was an invitee or a licensee as the defendants had been negligent in failing to warn her of an extraneous danger introduced into the ward after she had entered it.

Observations of Denning L.J. in *Dunster* v. *Abbott* [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572 applied.

ACTION.

The plaintiff's husband was a patient in a hospital controlled by the defendants and, in October, 1953, he was placed on the danger list and the plaintiff was given permission to visit him at any time. Pursuant to that invitation the plaintiff visited her husband one morning at a time when cleaners were in the ward. At the conclusion of her visit the plaintiff, when walking from her husband's bed to the door of the ward, passed two ward maids with mops in their hands but not actually doing any polishing, and proceeded towards the door. When about six to twelve feet from the door she slipped on a part of the floor where liquid polish had been spread but had not been polished, and she fell, fracturing her thigh. She sought damages for personal injuries, alleging that the accident was due to negligence on the part of the defendants. She alleged that the floor, which was a

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polished floor, was slippery by reason of the fact that polish had been applied and not rubbed in, and that the condition of the floor was a concealed danger of which the defendants knew and of which they gave no warning.

The defendants denied liability. They admitted the presence of polish on the floor but alleged that the accident was due to the plaintiff's own negligence in failing to observe the polish and failing to take any sufficient precautions to ensure her own safety.

Felix Denny for the plaintiff.

E. Daly Lewis for the defendants.

The following cases were cited in argument: *Dunster* v. *Abbott* [1]; *Latham* v. *R. Johnson & Nephew* [2]; *Pearson* v. *Lambeth Borough Council* [3]; *Weigall* v. *Westminster Hospital (Governors)* [4]; *Pitt* v. *Jackson* [5]; *Jennings* v. *Cole* [6]; *Stowell* v. *Railway Executive* [7]; *Turner* v. *Arding and Hobbs* [8]; *Bell* v. *Travco Hotels Ltd.* [9]

Finnemore J. stated the facts and continued: It is said in the present case that there was a very obvious cause for the plaintiff's slip, namely that the ward maids had been polishing the floor and had not finished; the polish which they had spread over the floor with their mops had not been either rubbed into the floor or removed from it. Clearly, the plaintiff could, in my opinion, have no complaint if all that happened was that she slipped on a highly polished floor which she knew was highly polished and to which she was accustomed. Her case is that she came suddenly and without warning on a particularly dangerous part of the floor. If any findings of fact are required on this, I am satisfied that the plaintiff slipped on a part of the floor where the polish was in its unfinished state. [His Lordship referred to the evidence and continued:] I am satisfied that this liquid which is spread over the floor is, until it is properly finished off and polished, a slippery substance, and I think it is just the sort of thing to cause a person coming on it unexpectedly to slip. I am satisfied that that is what the plaintiff in fact did. The evidence of her daughter-in-law about the state of her clothing, I think, abundantly shows that it was on this patch of unfinished floor that she fell.

The question is, whether that is negligence on the part of anybody on the hospital staff. I think that the case turns on the question of warning, subject, of course, to contributory

[1] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

[2] [1913] 1 K.B. 398; 29 T.L.R. 124.

[3] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.

[4] (1936) 52 T.L.R. 301; [1936] 1 All E.R. 232.

[5] [1939] 1 All E.R. 129.

[6] [1949] 2 All E.R. 191.

[7] [1949] 2 K.B. 519; 65 T.L.R. 387; [1949] 2 All E.R. 193.

[8] [1949] 2 All E.R. 911.

[9] [1953] 1 Q.B. 473; [1953] 2 W.L.R. 556; [1953] 1 All E.R. 638.

negligence. When the plaintiff went into the ward she saw no polishing actually going on. When she came out, it is true she said she could see that polishing was in progress in the sense that the general process of polishing was going on, but at that time, on what I might call the fairway along which she was going, no work was being done and there was nothing to show her, and she said she did not know, whether the ward maids had just begun or had finished their work. She therefore assumed it was all right, and walked on towards the door along the proper part of the floor across which she would have trodden, and came to disaster. Ought the ward maids or somebody to have warned her?

The defendants pleaded that the plaintiff had been warned to be careful, that she had been warned on previous occasions and in particular that she had been warned about the polish on the actual day in question. It is quite plain now that she was not warned on October 27. It is obvious that the ward maids who were cleaning were not prepared to come into the witness-box and say that they had warned her. Indeed, it is not contradicted now that when the plaintiff fell one of the ward maids who had been doing this work came up to her and said, "I forgot "to tell you the polish was on the floor." That fits in with the evidence that it is a golden rule that polishers will always give a warning. I think the truth is that on this particular day that golden rule was forgotten.

Those are the facts as I find them. Do they constitute a state of affairs where there is liability? First of all, one has to face the question, whether the plaintiff was an invitee or a licensee. I respectfully agree with Denning L.J. in *Dunster* v. *Abbott* [1] that the law in this country on this matter has got into what he calls a morass; and if I can avoid it I do not propose to follow into that morass too deeply. If I were free to say so I should venture, with great respect to many decisions of very high courts, to regret that anybody ever defined "invitee" as being anything but a person who is invited and "licensee" as anything but a person who is allowed. But that is not the law as we know it. The law is that for the purposes of responsibility in regard to occupation of a building, an invitee is a person who is invited on business in which the invitor and the invitee have a common interest; and it has been said that the interest is one which is either pecuniary or material. A great deal of discussion has taken place on this distinction between invitees and licensees because the occupier's scope of duty has been held to be different in the two cases. The well-known words of Willes J. in *Indermaur* v. *Dames* [2] that the invitee "is entitled to expect that "the occupier shall on his part use reasonable care to prevent "damage from unusual danger, which he knows or ought to "know" have been cited over and over again. If the plaintiff

[1] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

[2] (1866) L.R. 1 C.P. 274, 288.

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was an invitee, I am fully satisfied that this was a danger of which the defendants knew and was an unusual one of which the plaintiff did not know. The defendants obviously knew because their servants were engaged in the task of spreading polish on the floor. The plaintiff did not know, because nobody told her. Ought she to have seen it?

The evidence is that this liquid spread on the floor did impart a rather darker tinge to that part of the floor, and, of course, it would tend to appear dull rather than polished. But even in a well lighted ward that is not a thing which an ordinary person walking along the way provided for a person to walk would notice without any warning; and I am satisfied not only that the plaintiff did not notice it but that it was not through any negligence on her part that she failed to notice that very small difference in the appearance of the floor and she had no reason to suppose that there was in front of her a much more slippery surface. I am fully satisfied that when polish is spread on a floor it is far more slippery than it is after one has polished it; in fact, it is a very dangerous thing indeed. No warning was in fact given to Mrs. Slade as in my opinion there should have been. There was an unusual danger because she did not know it was there, and it was a danger perfectly well known to the defendants because their servants were actually engaged in the process. Therefore it would follow, if she was an invitee, that she would plainly be entitled to recover.

The question is whether she was an invitee. Many cases have been referred to and I am obliged to Mr. Daly Lewis for his luminous survey of them. It is tempting to follow him to discuss them all, but I do not think that it is really necessary. In modern times I think it is fair to say, having in mind *Pearson* v. *Lambeth Borough Council*,[3] that within certain reasonable limits we tend rather to widen the definition or description of "invitee." In the 11th edition of Salmond on Torts, page 558, the editor quotes Sir John Salmond himself, saying that he "thought it sufficient if the occupier had a "material interest in the visitor's presence." He [Sir John Salmond] defined an invitee as "a person who enters on the "premises by the permission of the occupier granted in a matter "in which the occupier himself has some pecuniary or material "interest." There are other definitions or descriptions which confine it to a pecuniary interest only. In *Weigall* v. *Westminster Hospital (Governors)*,[4] the mother of a patient visited him, and went from the ward to see the surgeon. She trod on a mat which was placed on a highly polished surface and was held to be entitled to recover as being an invitee who met an unusual danger, that is to say, a mat on a highly polished surface without anything under the mat to prevent it slipping. It is true that

[3] [1950] 2 K.B. 353; 66 (Pt. 1) T.L.R. 561; [1950] 1 All E.R. 682.

[4] (1936) 52 T.L.R. 301; [1936] 1 All E.R. 232.

in that case the patient, a boy, was a paying patient. Asquith L.J. in *Pearson* v. *Lambeth Borough Council* [5] queried whether that really made any difference. Again, I think it may well be that the position today is rather different, because a person who goes to a State Hospital is not a person going to a charitable voluntary hospital as in the old days; he is a person going to a hospital maintained by the State, towards which he himself pays his contributions through National Health Insurance and in other ways; and he might even on the narrower interpretation of "invitee" be brought within the definition. I would be satisfied in the present case to say that in my view a visit by a wife at the invitation of a hospital to her dangerously ill husband in the hospital is a matter of material interest both to her and to the hospital.

If on the other hand that be wrong and the true position be that she was there only by leave and licence as a licensee, I think that she would still be entitled to recover because, in my view on the evidence before me, this was a concealed danger. The word "trap" was often used, but, as Hamilton L.J. pointed out in *Latham* v. *R. Johnson & Nephew Ld.*[6] "A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger." If the floor where the polish was spread was to the plaintiff no different in essence from the rest of the floor and looked safe, it seems to me that it was a safety which was wholly illusory. It was not safe. It was plainly slippery and dangerous for the reasons I have already indicated, and there was nothing, in my opinion, reasonably to bring to her attention that difference; so, even if she were a licensee, I still think that she suffered damage as a result of coming on a concealed danger of the sort against which a licensee as well as an invitee is entitled to be protected. In the absence of any warning and in the absence of anything put in the way or any obvious appearance, I think that this danger was a concealed danger. Mr. Daly Lewis argued that it was obvious; but I do not agree. It would be obvious, I suppose, if one walked down the ward with one's eyes fixed on the ground to see when and where and if the boards changed at all; but that is not what people are supposed to do when they walk along the ward of a hospital. A person looks in front of himself for any obvious obstruction: it does not seem to me that he is called upon to make a particular search of the floor as he goes along. He is entitled to assume that the person who allowed him to walk along that floor and is in charge of it has not left there or put there some danger which is not an obvious danger.

There is a final point which I confess appeals to me because it seems to be common sense; and that is one which was indicated very plainly indeed by Denning L.J. in *Dunster* v. *Abbott*,[7] and, I think, indicated by Somervell L.J. also. After all, does it

[5] [1950] 2 K.B. 353, 366.
[6] [1913] 1 K.B. 398, 415; 29 T.L.R. 124.
[7] [1954] 1 W.L.R. 58, 62.

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matter what the plaintiff was? Everybody agrees that she was properly in the ward: indeed, she had asked permission to go in. After she has entered the ward, taking the premises as she finds them as a licensee must, and whilst she is there a wholly extraneous danger, no part of the property itself or of the structure, is introduced into the ward on the floor. The simple question seems to me to be, was that negligence? That is to say, was it negligent to leave that polish on the floor without giving a warning to a person walking on the floor? In *Dunster* v. *Abbott* [7] which was decided in favour of the defendant on appeal Denning L.J. said: "In this case, however, it does not matter whether the "plaintiff was an invitee or licensee. That distinction is only "material in regard to the static condition of the premises. It "is concerned with dangers which have been present for some "time in the physical structure of the premises. It has no "relevance in regard to current operations, that is, to things "being done on the premises, to dangers which are brought about "by the contemporaneous activities of the occupier or his "servants or of anyone else." I think that is right to be applied to the present case, with perhaps certain qualifications. Denning L.J. continued: "In regard to current operations, the duty of the "occupier—or of the person conducting the operations—is simply "to use reasonable care in all the circumstances. This duty is "owed alike to all persons lawfully on the premises who may "be affected by his activities: and it is the same whether the "person injured is an invitee or a licensee, a volunteer or a "guest. Negligence causing damage gives a cause of action, "and it is not proper nowadays in this regard to draw any dis-"tinction between negligent acts of commission and negligent "omissions." It was held in that case that while there was no complaint about the premises, what the occupier had actually done in regard to providing light was to act with reasonable care and therefore the defendant succeeded and the plaintiff failed.

In the present case the position is that the defendants through their servant did not act with reasonable care, which required a warning to be given to the plaintiff that as she walked towards the door the polish was in the way. This is not a case where nobody was negligent. There was an obvious cause for the slipping. Further, I think that it is not a case of contributory negligence. I do not think that the plaintiff was negligent in the way she walked along the floor or in failing to see the unpolished liquid still on the floor.

[His Lordship then considered the question of damages and continued.] I propose to assess general damages at the sum of £750 and to add to that the agreed sum of special damage.

Judgment for the plaintiff.

Solicitors: *R. I. Lewis & Co.; Sharpe, Pritchard & Co. for J. S. Tapsfield.*

E. M. W.

[7] [1954] 1 W.L.R. 58, 62.

[COURT OF APPEAL.]

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Feb. 1, 2, 3.

Evershed M.R., Jenkins and Morris L.JJ.

* HOPGOOD *v.* BROWN.

[Plaint K. No. 1209.]

Vendor and Purchaser—Conveyance—Parcels—Ill-defined boundary—Inference of straight line—Agreement by adjoining landowners as to position of boundary—Whether successors in title bound—Estoppel — The subsequent conveyance — Parcels as previously described—Construction.

Estoppel—Conduct, by. Easement—Drainage—Licence—Reciprocal—Revocation—Benefit of manhole and outflow.

In 1932, two adjoining plots on a building estate were conveyed to T. by separate conveyances. The description of the parcels was similar in both conveyances and in both there was a reference to a small plan attached to the conveyance for identification of the parcels only. In neither of the conveyances was the position of the dividing boundary indicated precisely. T. subsequently sold both plots and, in 1951, the southern plot was owned by the defendant, the other being owned by a company of which the defendant was a director. The defendant commenced to build on his plot and, pursuant to an agreement between himself and the company, built in such a way that the wall of his garage formed an apparent boundary between the plots which was continued to the back by a wall and fence. This boundary did not run in a straight line parallel with the other side boundaries from the front of the plot to the rear but included a wedge-shaped strip lying to the north of such a straight line. In 1952, the northern plot was conveyed to L., who resold to the plaintiff. In both conveyances no mention was made of the then existing apparent boundary; the area conveyed was described in exactly the terms used in the relevant conveyance of 1932 and there was a reference to the plan attached to that conveyance. The plaintiff claimed that the area conveyed to him was that conveyed to T. in 1932 and that that part of the defendant's garage which stood on the wedge-shaped strip now apparently forming part of the southern plot was an encroachment.

The plaintiff further claimed that a manhole (and connecting drain) put into his land by the defendant to act as a junction for the collection of the separate flows of water from the two plots to flow thence by a single outflow under the defendant's land to the main drain under the road was a nuisance:—

Held that, (1) the dividing line between the two plots as conveyed in 1932 must be inferred to have been a straight line;

(2) (*per* Jenkins L.J. and Morris L.J.) in each subsequent conveyance the use of the same terms and the reference to the one plan showed that the same area was conveyed;

(3) the company as a party to the agreement of 1951 would have been estopped, once the garage had been erected by the defendant, from asserting that the boundary was anywhere other than as agreed, and the plaintiff as successor in title to the company was similarly bound; and that accordingly the plot conveyed to the plaintiff did not include the disputed strip;

Principle in *Caincross* v. *Lorimer* (1860) 3 L.T. 130, cited with approval in *In re William Porter & Co. Ld.* [1937] 2 All E.R. 361, applied;

Taylor v. *Needham* (1810) 2 Taunt. 278 applied;

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(4) that the drainage system conferred on the plaintiff and defendant rights in the nature of reciprocal licences so that the plaintiff could not revoke the defendant's licence to discharge water through his drain to the manhole on the plaintiff's land whilst he, the plaintiff, was continuing to enjoy the benefit of the outflow from that manhole under the defendant's land.

APPEAL from Judge Howard, sitting at Ilford County Court.

The plaintiff, Boyd Hilary Hopgood, and the defendant, Maurice Walter Brown, were the freehold owners of one each of two adjacent plots of land, formerly in common ownership, and being part of an area divided into small building plots. The action was concerned with an alleged encroachment over the boundary between the two plots.

On June 22, 1932, one Allen Ansell conveyed both plots to one Cyril Regent Turner by two separate conveyances. The parcels in the deed relating to the plot ultimately to be owned by the defendant, that is the more southerly of the two plots were: "All that piece of land situate in the parish of Romford in the "county of Essex part of the land known as the Havering Park "Estate conveyed by a conveyance . . . which said piece of land "has the several dimensions following, namely, a frontage to "the . . . proposed Hamlet Road of 40 feet or thereabouts, a "length along its south-west side of 170 feet or thereabouts and "a width at its rear or south-east side of 31 feet or thereabouts, "is adjoined on its north-east side by other land conveyed or "about to be conveyed by the vendor to the purchaser, and com-"prises the whole of the plot numbered 56 and the south-"westerly portion of the plot numbered 55 in the vendor's "development of that portion of the estate and for the purpose "of facilitating identification only is delineated and shown by the "pink colour on the plan drawn on these presents," and a small plan was attached.

The second schedule to the deed contained a number of covenants which the purchaser entered into, referring to such matters as building line and fences. The conveyance relating to the other plot, that is the northerly plot, ultimately to be owned by the plaintiff, contained a description corresponding in all respects to that of the southerly plot, except that the northern boundary of that plot was slightly longer, 173 feet, and the eastern boundary slighter shorter, 30 feet, than the corresponding measurements of the southern and eastern boundaries of the southerly plot. In neither of the conveyances was a measurement given for the dividing boundary between the two plots.

Turner sold both plots to Arthur Charles Walker who, on July 18, 1949, sold the southerly plot to the defendant, Brown, and on the same day sold the northerly plot to Walter and Maurice Brown (Builders) Ld. The defendant had an interest in the building company, but not a controlling interest; he was a director, but the greater part of the shares and the control of the

company was in his father, Walter Brown. At that time both the plots were vacant and unbuilt upon.

In 1951, the defendant desired to build a bungalow and a garage on his plot and plans were prepared. With the plans he approached the company owning the other plot to agree with him the position which, as a result of the building, the boundary between his plot and the company's plot would inevitably take and, secondly, to build for him the bungalow and garage according to his plans. Pursuant to that agreement, the substance of which as found by the county court judge is set out and considered in the judgments, the bungalow and garage were erected in such a position that part of the garage encroached into the northern plot (assuming that the boundary between the two plots followed a straight line substantially parallel with the northern boundary of the northern plot, beginning at a post at the extreme north-west corner of the southern plot). The encroachment varied between two and three feet in width. At the same time a drain was constructed from the southern plot to a manhole on the northern plot and thence back under to the southern plot, and so to the main drain; the intention being that a single outflow could then serve both properties.

On April 29, 1952, the company sold the northern plot, which was still vacant, to Leonard George Lister, the conveyance containing an exact repetition of the dimensions of the plot in the conveyance of 1932, with a similar reference to the numbers on the Park Estate plan, and concluding: " and for the purposes " of facilitating identification only is delineated and shown by " the colour pink on the plan drawn on " the conveyance of 1932.

On November 18, 1952, Lister sold the northern plot to the plaintiff, Boyd Hilary Hopgood, the description of the plot being identical with that in the conveyance to Lister. He also bought a plan of a bungalow from Lister. In due course Hopgood proceeded to build, without apparently being advised as to the exact dimensions of the plot as shown on the surface of the ground. Eventually he discovered that there was insufficient room for a car to pass at the southern side of his newly-erected bungalow to his proposed garage at the rear, because of the defendant's garage.

In the course of building, the manhole put in by the defendant on the north plot was discovered, but it was found that position was not convenient for the plaintiff's bungalow. The builder communicated with the plaintiff and with the defendant because he was proposing to move the manhole, which was obviously connected with an underground drain leading from the defendant's land. The plaintiff told the builder that he refused all responsibility and gave the builder no authority. The builder moved the manhole to a more suitable position and reconnected the drain from the defendant's land, linking up as before with a single outflow which, according to the plaintiff's plan, went under the defendant's land and thence to the main drain or sewer under Hamlet Road.

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In an action for trespass [1] the plaintiff sought a declaration as to the position of the boundary, an injunction requiring the defendant to remove the encroaching part of the garage, and damages, the estimated sum for damages suffered to date being £19. The defendant counterclaimed for a declaration that the boundary excluded from the northern plot the disputed strip. The claim for the injunction was abandoned at the trial. The county court judge dismissed that part of the claim, holding that although the conveyances subsequent to that of 1932 from Ansell to Turner relating to the northern plot, and particularly the conveyance from the company to Lister, were apt to convey and did convey the whole area conveyed in 1932 to Turner, that is the area including the disputed strip, the company and its successors in title, including the plaintiff, were estopped from asserting that the boundary was at any other position than was shown on the ground by the garage wall and fence. The plea of estoppel was not pleaded by the defendant but was taken by the judge himself at the trial.

The plaintiff further claimed that the defendant had trespassed on the plaintiff's land by putting thereon a manhole and drains, though it became clear at the trial that the cause of complaint was not, strictly speaking, a trespass but something in the nature of a nuisance, resulting from the discharge through an underground drain on to the plaintiff's land of water from the defendant's land. On that matter the judge found for the plaintiff. He concluded that the right which the defendant had enjoyed at one time to discharge water from his land into the manhole on the plaintiff's land by the underground drain was the subject of a revocable licence, and that that licence had been revoked in fact. He, therefore, awarded to the plaintiff in respect of that matter one shilling damages, but made no order as to costs either on the claim or on the counterclaim.

The plaintiff appealed and the defendant cross-appealed.

Harry Lester for the plaintiff.
A. E. Holdsworth for the defendant.

In addition to the cases referred to in the judgments the following were cited in argument: *Ramsden* v. *Dyson* [2]; *Plimmer* v. *Mayor of Wellington* [3]; *Shore* v. *Wilson* [4]; *Waterpark* v. *Fennell*.[5]

Evershed M.R. At the beginning of his judgment in *Wallington* v. *Townsend* [1] (a case which, on its facts, is sufficiently near to the present to be useful and to which, therefore, I shall return

[1] The action would have been more correctly described as an action for ejectment, as is stated in the judgment of Evershed M.R.
[2] (1865) L.R. 1 H.L. 129.
[3] (1884) 9 App.Cas. 699.
[4] (1839) 9 Cl. & F. 355.
[5] (1859) 7 H.L.Cas. 650.
[1] 55 T.L.R. 531; [1939] 2 All E.R. 225.

later), Morton J. observed[2]: "The case is a good illustration of "the fact that actions in which the subject-matter is compara- "tively trifling often give rise to the most difficult questions of "fact and of law." The hearing of the present case in the county court lasted, I believe, two days and has taken nearly two days in this court and we are now called upon to deliver judgment in respect of a matter which, to an outsider, might appear to be of a somewhat trifling character. It is certain that this litigation can fairly be said to be the result of misfortune, of want of good advice (I do not say of bad advice, because I know not sufficiently of the facts) given to the plaintiff, and some lack of good temper, which I think is inevitable in such cases.

[His Lordship having referred to the description of the two plots in the conveyances of 1932 continued:] It is obvious, having looked at the plans attached to the conveyances of 1932, that the plots are of regular dimensions, as would inevitably be the case with building lots of this kind. It is not possible to imagine that the boundaries were intended to be otherwise than along straight lines from the frontage to the rear. But the plans are small; there is no description in the conveyances of the area, and it was "for the "purpose of facilitating identification only" that the plots were delineated on the plan. At that time it appears that both these plots were wholly vacant and unbuilt upon. I say "it appears" because it is not entirely clear whether at that stage there was on any part of the land anything to indicate the line of any of its boundaries, but from my understanding of the facts this much is clear: that nothing had been placed along the southern boundary of the northern plot, or along the northern boundary of the southern plot (which is the same thing) to indicate on the surface of the earth where the boundary between the two plots ran; nor, of course, was there any need at that time or for some little time afterwards so to do, since both plots were in the same hands.

[His Lordship referred to the conveyances of July 18, 1949, and continued:] In 1951 the first events occurred from which all that has happened in this litigation has flowed. The defendant, owner of the southern plot, desired to build upon his plot a bungalow and a garage, and for that purpose plans were prepared by him or on his behalf. He proceeded, with those plans, to approach the company in which he was interested, but which he did not control, and invited the company, first of all, to agree with him the position which, as a result of the building, the boundary between his plot and the company's plot would inevitably take, and secondly, to build for him the bungalow and garage according to the plan.

The most satisfactory way for me to deal with this exceedingly important matter of fact is to read two paragraphs from the judgment of the county court judge. "Mr. Brown himself stated in "evidence that he had no intention of encroaching upon the

[2] Ibid. 228.

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"company's boundary and that there was no intention on the "company's part of permitting him to do so. He was supported "on both points by his father who, as I have said, was in a position "to control the company. There was no cross-examination to "suggest that this encroachment was a matter of design. Both "witnesses struck me as completely honest and reliable. Neither "they nor anybody else had apparently ever taken measurements "to show exactly where the dividing line between the two "properties ought to run. I have come to the conclusion of fact "that both Brown and the company acted with complete bona "fides and intended the flank wall of the garage to run along and "for its full length of 15 feet to be the boundary line of their "respective properties." I understood that it was suggested that there was no evidence to support that final conclusion of fact, but I am clear that there was ample evidence to support it: for example, the defendant said in cross-examination: "No question "of company giving me any extra land. If in fact it was built on "adjoining land, this was a mistake. The brick wall was put up "intending it for the boundary between my property and the "company's. It was so understood by me in my capacity as "owner of the south property and as director of the company "owning the north property."

Arising from that last sentence, Mr. Lester submitted that, whatever might have happened in other circumstances the company here was not bound by any of the consequences which might otherwise have flowed from what took place between the defendant and the company. Mr. Lester said that, following the strict language of the answer given by the defendant, the extent of the agreement was merely that the defendant had agreed with himself as director, and that the company as such should not be taken as having accepted the arrangements which the defendant was seeking to make. I am satisfied that that is not so. From the evidence of Mr. Brown senior it is plain that he was fully aware of what his son was proposing and doing; that he, controlling the company, fully authorized the company's participation in what followed and assented to it, and, therefore, he assumed for the company all the consequences that would naturally and properly flow from that arrangement.

It is plain that the garage, part of the building which was proposed and which was in fact executed and the north wall of which was to form the boundary, encroached on the northern plot: that is to say, if a straight line were drawn from the post which was on the site marking the extreme north-west corner, adjacent to Hamlet Road, of the southern plot back to the back line substantially parallel with the southern boundary, then one part of the garage extended over that line by 2 or 3 feet into the north plot. That encroachment has given rise to the present action. Assuming that the boundary were to go along the north side of the garage, it would run from Hamlet Road forming, not a single straight line, but two lines at an extremely obtuse angle, and the

plaintiff claims relief to the extent of the part of the land which would lie between the obtuse angle and the straight line. From the east side of the garage a wall and a post-and-wire fence ran to the back of the plot and the judge found that the mutual intention of the company and the defendant (for I now shall treat them, having regard to what I have earlier said, as two quite independent persons) was that thenceforth the garage wall and the fence should be and constitute the actual boundary between their plots.

At the same time as this building operation occurred, another operation of a somewhat different character also took place. In order, as I understand, to save the expense of having two pipes or drains from the two plots of land, or from any houses built on them, to the road, the water which would flow from the newly erected premises of the defendant was to be brought by an underground drain to a manhole put on the northern plot flowing from thence to the road by a route which recrossed the boundary and went under the defendant's land. It was intended that in due course of time the manhole should also collect water from the north land, the company's land, and there would then be the single outflow to the main drain in the road serving both properties. That was a sensible and economical arrangement.

On April 29, 1952, the company disposed of its still vacant plot to Lister. The evidence given by the defendant (and the judge expressed the view that he was a witness of care and reliability) was that Lister came and inspected the property. The judge said: "I should be perfectly prepared to hold as a "question of fact—if indeed it were relevant—that the company "never intended in the minds of their officers to convey anything "more than what they had enjoyed. Indeed, as I have already "said, they had always considered what I have called the actual "boundary as representing the true boundary. Mr. Lister was "not called, but the defendant gave evidence, which I accept, "that he (Lister) visited the site before he purchased, and that "he saw, or could see, exactly where the actual boundary lay." Unfortunately, it appears that no thought was given at that stage to verifying the position of the boundary, and in the conveyance to Lister the parcels were described as "All that piece of land "situate in the parish of Romford in the county of Essex part "of the land known as the Havering Park Estate and abutting "upon the south-east side of a road known as Hamlet Road "which said piece of land has the several dimensions following, "namely." There then followed an exact repetition of the dimensions mentioned in the conveyance of 1932 of the north plot and with a similar reference to the numbers on the Park Estate plan, and the description concluded again, echoing the language of the earlier deed, "and for the purposes of facilitating "identification only is delineated and shown by the colour pink "on the plan drawn on" the conveyance of 1932 from Ansell to Turner. It is, of course, elementary that the mutual intentions of the parties to a deed cannot override or distort its

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language, though intentions may give rise to the right of one or other of the parties to have that language rectified. I will not, however, express any view of the meaning of that conveyance for the moment. It is obvious that if that conveyance according to its true effect and construction was apt to convey to Lister only the land which in fact lay to the north of the garage wall and the post-and-wire fence, then that was all Lister had when he resold the plot in November, 1952, to the plaintiff. The language of the conveyance to the plaintiff was, so far as is relevant, identical with that which I have already read in the conveyance from the company to Lister. It appears that the plaintiff also bought for a cash consideration some plan of a bungalow, and in due course he proceeded to build his bungalow.

At the beginning of my judgment I expressed some regret that the unhappy position in which these two people now find themselves was in some measure due to want of good advice, and it is at this point, most unhappily (as I think) for the plaintiff, that he was not advised as to the precise dimensions which the surface of the ground appeared to show to be comprised within his plot and the dimensions which, according to the various plans, ought to have been shown. It seems that he had proceeded to a very advanced stage with his bungalow before he realized that the small projection, which I have attempted to describe, made by the defendant's garage, operated so that the passage between the southern part of the plaintiff's bungalow and the boundary was insufficient to enable the plaintiff to get a motor-car through it so as to garage the motor-car at the back of the plot. It was no doubt a substantial disappointment, to say the least, to the plaintiff. He then discovered the divergence from the area as shown on the plan of 1932, on the footing that the southern boundary of his plot was a straight line parallel, or substantially parallel to the northern boundary. It is not quite parallel, for the eastern boundary is shorter than the road frontage, but the regularity of the design, as I have already indicated, is apparent, and the position of the defendant's garage was inconsistent, and shown to the plaintiff to be inconsistent, with the natural inferences from the plan.

The defendant made a laudable and by no means ungenerous attempt to assist the plaintiff which failed, and the present action was begun. It was stated to be an action for trespass, but, as Mr. Holdsworth pointed out, it may be that it would be more correct to describe it as an action for ejectment. [His Lordship referred to the trial in the county court and to the decision there made and went on:]

On the main question, the broad conclusion at which the judge arrived, namely, that the plaintiff failed, appears to me to be in accordance with common sense and the realities of the case and a conclusion that after all that has occurred the boundary should be treated for all practical purposes as being along the straight line shown on the plan, with the result that,

apart from Mr. Lester's concession, as a matter of strict right the plaintiff could require the removal of the garage, or part of it, and of the fence, would appear hardly comprehensible, I should have thought, to anybody but a lawyer. But as Morton J. observed,[3] these apparently simple, even trifling, questions have an unhappy knack of giving rise to most difficult questions. The first question, which has formed a part of the cross-appeal, is whether the judge was right to hold, as he did, that on the true construction of the deeds there was conveyed to Lister, and by Lister to the plaintiff, the whole area defined and also delineated on the conveyance of 1932 of the northern plot. The judge said: "It seems to me that it would be a wrong "method of construction to give to the parcels of the conveyance "of April 29, 1952"—that is the conveyance from the company to Lister—"a different meaning from that of the parcels and "earlier conveyance of June 22, 1932, and that the property "conveyed by the former must have had the same boundaries "as the property conveyed by the latter." I have been very much impressed by the forceful character of the argument in the other direction. A conveyance purports, on the face of it, to be a conveyance of a piece of land, of something real, of part of the surface of the earth and that which underlies it. It is, therefore, as I understand it, legitimate to look at the physical facts, not for the purpose of distorting the language of the deed, but for the better identification of that which the language describes. The present description is of a plot of land fronting on a road called Hamlet Road in Romford. If, at the relevant date in 1952, the locus in quo had been inspected, the apparent southern boundary of the plot then intended to be the subject of the deed was plainly marked on the surface of the earth by that which had been put upon it. But the court is not concerned with the intention of the parties, but with the words of the deed of April, 1952: "All that piece of land situate in the parish "of Romford in the county of Essex part of the land known as "the Havering Park Estate and abutting upon the south-east "side of a road known as Hamlet Road which said piece of land "has the several dimensions following, namely, a frontage to "the said Hamlet Road of 40 feet or thereabouts a length along "its north-east side of 173 feet or thereabouts and a width at "its rear or south-east side of 30 feet or thereabouts and com-"prises the north-easterly portion of plot numbered 55 and the "south-westerly portion of plot numbered 54 on the said Haver-"ing Park Estate." If the description had stopped at that point (subject to the possible effect of the reference to plots on the Havering Park Estate about which we have heard no argument), I confess that I should have thought it would be plain that the thing intended to be described was to be identified as that which on the surface of the earth was, inter alia, indicated and marked

[3] [1939] 2 All E.R. 225, 228.

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by the northern wall of the garage and the post-and-wire fence. There was no exact delineation of the vital boundary, the southern or south-western boundary. The area is not stated and there is nothing, as a matter of words, which I should have thought would have inclined a court to hold that the thing conveyed was to be indentified otherwise than by reference to what was to be found on the site. But, of course, the parcels do not stop there. They proceed " and for the purposes of facilitating " identification only is delineated and shown by the pink colour " on the plan drawn on a conveyance dated . . . ", and then there is a reference to the conveyance of 1932 from Ansell to Turner. I do not doubt that that reference is a strong indication to the reader of the deed of 1952 that the subject of that deed was the same as the subject of the deed of 1932; but the question is whether that inference from the language is so compelling as to govern the matter, to the exclusion of the facts to be discerned from looking at the land. Mr. Holdsworth, in a very forceful and persuasive argument, drew attention in this respect to the difference between the language in this case and that in the conveyance which fell to be construed in *Wallington* v. *Townsend*,[4] to which I have already referred. In that case, the problem was of a similar nature, but the conveyance contained this very different formula, " as the same is more particularly delineated on the plan " annexed hereto and thereon coloured pink." Morton J. stated that the view which he felt compelled to adopt was one which he would not adopt unless the words were so strong that he felt himself judicially incapable of resisting their proper inference, and he thought that those words which I have just read were too strong. " I find myself," he said,[5] " unable to come to any " conclusion other than that, on the true construction of the " contract, the disputed strip is included in the land contracted to " be sold." As will have been observed from what I have just read, that was a case of contract, where it might perhaps have been thought that there was less compulsion than in the case of a conveyance, and I do not minimise the effect that must be given to the circumstance that we are dealing with of the completed deed, a conveyance. But, as I have already indicated, I have found great force and persuasiveness in the argument of Mr. Holdsworth that this somewhat imprecise and certainly very different language from that in *Wallington* v. *Townsend* [6] does not compel the conclusion that as a matter of construction, the area conveyed in 1952 must be the same as the area which was indicated in the deed of 1932 so that the conveyance of 1952 would be regarded as comprehending a strip bounded on the south side by an absolutely straight line.

Although the problem is very difficult, one thing is plain, that the plots shown on the plan of a building estate divided as this one is are intended to be regular and uniform. But I have felt

[4] [1939] 2 All E.R. 225, 236.
[5] Ibid. 236.
[6] [1939] 2 All E.R. 225.

much strength in the submission that, although the words which I have read are plainly apt to describe the original subject-matter of the deed of 1932, they are also equally apt to describe a plot of land which is to some extent (I think it is a matter of degree, and I would, therefore, say a small extent) different from the original as a result of some slight differences on the surface. During the argument I instanced the following example: If, in making up Hamlet Road for public use, a small piece at a corner, or along the front, had been taken from or added to the area originally intended as the north plot, I should have been strongly inclined to suppose that the description which I have read was apt to describe the slightly altered configuration of that which was in substance the same plot. But my two brothers do not take that view. They take the view which the judge expressed that, as a matter of construction, the conveyance to Lister must be taken to have conveyed the same thing, the same property, as had the deed of 1932, and they indicate that a contrary view (tempting though it is, because in line with the manifest intention of both parties) is to yield to distortion of the language in order to try to give effect to intention, a thing which, in itself, is not, of course, legitimate. Having regard to the view which they take, I do not, therefore, propose to express any conclusion of my own on this part of the case.

I turn to the question of estoppel, upon which (as I have earlier said) the judge found in favour of the defendant. I have already disposed of Mr. Lester's point that because the defendant, the owner of the southern plot, was a director of the company which owned the northern plot, the natural consequences which would flow from activities otherwise to be attributed to the company were qualified in some way. Mr. Lester also maintained that the conclusion based on estoppel was erroneous because of the absence of what he said was an essential element in a case of estoppel of this kind, namely, knowledge by the party alleged to be estopped of that party's true right. Mr. Lester referred us to the formulation of the requisites of estoppel in the class of case with which he was dealing by Fry J. in *Willmott* v. *Barber.*[7] In my judgment, that formulation was addressed to and limited to cases where the party is alleged to be estopped by acquiescence, and it is not intended to be a comprehensive formulation of the necessary requisites of any case of estoppel by representation. The doctrine of such estoppel, which is really a rule of evidence, is to be found in many circumstances and is of a much more general character. I adopt as accurate for the purposes of this judgment the statement of the governing principle given in Spencer Bower on Estoppel (1923), at pp. 9 and 10: "From a careful "scrutiny and collation of the various judicial pronouncements "on the subject, of which no single one is, or was perhaps "intended to be, quite adequate . . ."—I think the learned writer

[7] (1880) 15 Ch.D. 96, 105.

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is using the word "adequate" as meaning "exhaustive"—"The following general statement of the doctrine of estoppel by "representation emerges: where one person ('the representor') "has made a representation to another person ('the representee') "in words, or by acts and conduct, or (being under a duty to the "representee to speak or act) by silence or inaction, with the "intention (actual or presumptive), and with the result, of "inducing the representee on the faith of such representation to "alter his position to his detriment, the representor, in any "litigation which may afterwards take place between him and "the representee, is estopped, as against the representee, from "making, or attempting to establish by evidence, any averment "substantially at variance with his former representation, if the "representee at the proper time, and in the proper manner, "objects thereto."

In my judgment, there was, beyond a peradventure, a representation by the company to the defendant which had all the qualities which Mr. Spencer Bower enumerated, and which had, therefore, all its consequences. In effect, and by way of paraphrase only, the defendant was saying to his northern neighbour, the company: "Our boundary shown on the small plan has never "been marked out on the land. I want to build a bungalow and "a garage. I have made plans, and I believe that the boundary "goes as it is shown on my plans. I want to build accordingly. "It may be that I shall take a little bit of your land or that you "will take a little bit of mine, or both, but do you assent to the "boundary being so assumed and fixed?" and the company said: "Yes. What is more, we will assist you to carry out your "purpose and build for you at your cost your house and garage." I think it may well be, if it were necessary and matters had turned out otherwise, that this would be a case of mutual representations of fact made with the intention that they should be acted on, and acted upon in fact; but I am only concerned with the company and, as I have already said, it is clear that the company represented that the position of the boundary was where the defendant had shown that he thought it ought to go. Is it really suggested (for this must, I think, follow from an argument to the contrary) that the company, having assented to what had been proposed, having participated in what followed, and having taken the sum of £2,200 from the defendant for building the garage and his house in the places which he had identified, could tell the defendant next day that they had now measured the plot more accurately, and that he must take down that part of the garage which encroached upon the company's land, and which they had just built at his entire expense? It seems to me that such a suggestion would, indeed, shock common sense and be contrary to the realities of the case.

If that is right, the only other question is whether the disability on the company's part from averring the boundary to be in any place other than that where they, with the defendant,

had put it, is equally binding on the plaintiff. In my judgment, that can also be answered in favour of the defendant; and I accept the passage which Mr. Holdsworth read from the judgment of Mansfield C.J. in *Taylor* v. *Needham*.[8] That was a case of estoppel between lessor and lessee, but the principle is the same. Mansfield C.J. said[9]: "Then the question comes, "whether the assignee of the lease may be allowed to controvert "the title of the lessor, when the lessee, under whom he derives, "could not controvert the title of the lessor; so that the assignee "should have a better right than he from whom he derives it. "Exclusive of all the dicta, it would be a very odd thing in "the law of any country, if A. could take, by any form of "conveyance, a greater or better right than he had who conveys "it to him; it would be contrary to all principle. But it does not "rest merely on the general principle; for if you look into all the "books upon estoppel, you find it laid down, that parties and "privies are estopped, and he who takes an estate under a deed, "is privy in estate, and therefore never can be in a better "situation than he from whom he takes it." My conclusion, therefore, is that Mr. Lester has failed to satisfy me that there are any good grounds for differing from the judge's conclusion.

I now come to the vexed but trivial matter of the manhole. [His Lordship referred to the discovery of and moving of the manhole, and continued:] What happened as regards the outflow is not absolutely clear, but the plan which was prepared by the plaintiff's surveyors shows that the outflow went back under the defendant's land, and the facts justify the inference that the substantial result was as before, that the manhole served the discharge from both plots, and that that discharge was taken from the manhole into an outflow under the defendant's land into the main drain or sewer under Hamlet Road. In the prayer of the claim the plaintiff sought to say that the wrong of which he complained was the putting or building on the plaintiff's land of a manhole and a drain, but it became clear that the real cause of complaint was (technical though it be) something in the nature of a nuisance rather than a trespass, namely, the discharge through an underground drain on to the plaintiff's land of water from the defendant's land, and the judge, who found in the plaintiff's favour on that matter, awarded to him the contemptuous figure of twelve pennies in respect of that wrong.

The judge concluded that, although at the time when these arrangements for underground drainage were originally made something in the nature of an equitable easement came into existence, failure to register that interest had had the result that the defendant's rights were not binding on the plaintiff. The judge went on, however, to say that the effect of the reconnexion with the drain was that the defendant had a licence to go on discharging until the licence was revoked, and that that licence had

[8] (1810) 2 Taunt. 278. [9] Ibid. 282.

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been revoked by a letter which is part of the correspondence. I have, with all respect to the judge, come to a different conclusion. I think that he omitted to take note of the fact (which I have stated and which I have inferred) that from the manhole the outflow taking the water from the plaintiff's and the defendant's land came through an underground channel under the defendant's land into the main drain. There was, therefore, something in the nature of mutual licences; and it seems to me, as a matter of plain justice and of law, that a person who is enjoying one part of such reciprocal licences cannot at the same time purport to revoke the other part which imposes a burden on him. In other words, so long as the defendant was taking the water from the plaintiff's land, or was liable to take it, through his drain under his land, the plaintiff was not entitled to revoke, or to purport to revoke, the licence which the defendant had to discharge into the manhole of the plaintiff. In my judgment, therefore, the sum of one shilling should not have been awarded. There should have been no award, and this part of the plaintiff's claim, like the rest of it, should have been dismissed.

The last matter is that of the cross-appeal, and I regret that, here again, the question with which we have to deal is by no means easy. I am conscious of considerable sympathy for both of the unfortunate parties to this litigation, and I know full well that, whatever be the end of it, the costs which will fall upon one or other or both will be severe and will probably leave them both with a feeling that the battle hardly justified the costs which it involved. I have said that the judge's judgment awarded no costs to either side on the claim or on the counterclaim. [His Lordship referred to the counterclaim.]

The decision went in favour of the defendant, not on the ground that the construction of the deeds was as the defendant claimed that they should be held to be, but on the ground that the plaintiff was estopped from averring to the contrary; and that was a matter not pleaded in the defence. The question of estoppel by representation was raised by the judge himself, but, having been raised, was treated as open, was not objected to by the plaintiff, and indeed he had some time for cogitation, for 14 days (I understand) elapsed between the first day of the hearing and the second. The judge, after hearing further argument, made no order as to costs for reasons which he has expressed in a letter addressed by him to the associate of this court, in which he said: "I rejected Mr. Lester's argument" (namely, that he was entitled to the costs of the action, having recovered a shilling damages) "on the ground that the plaintiff had not succeeded "in the main object for which he had brought the case and had "only recovered purely nominal damages of one shilling. On the "other hand, it seemed to me that the defendant had wrongly "resisted liability upon the subsidiary issue of the manhole. He "had failed upon the arguments put forward on the question of "construction and, although he had succeeded upon the issue of

" estoppel, this matter had never been raised in his written " defence, and the defendant had further failed to obtain any " relief by the counterclaim."

The cross-notice of appeal asked for three things by way of variation of the judgment. It first asked that the judgment in favour of the plaintiff on the manhole point should be reversed and the damages awarded struck out. It also complained of the dismissal of the defendant's counterclaim, and prayed that in the circumstances the judge's decision to award no costs should be reviewed. It will have been observed from what I read that the first matter which the judge took into account, in exercising the discretion which he did, was that the plaintiff had succeeded and that the defendant had wrongfully resisted liability, in respect of the manhole issue, subsidiary though it was. Since, therefore, the first main matter on which the judge relied is, if my view is right, not one which should have been taken into account in the way which the judge records, it seems to me that the discretion must be open and that it is for this court to decide anew (but bearing in mind, of course, what the judge has said) how the discretion should be exercised. I think the point that the estoppel defence was not in terms raised in the pleading should not be forgotten. All the same, the matter proceeded without objection throughout as though this question was open, and upon it the plaintiff, who had to prove his case, eventually failed, and fails still. I add finally, as a material circumstance in the exercise of discretion, that the plaintiff before the judge (no doubt very wisely and properly) ceased to claim any injunction, and it is, I think, manifest that no court, in the circumstances, would have granted an injunction. In all the circumstances, I do not think it right that the defendant should be wholly deprived of his costs at the hearing. It is true that his counterclaim in terms depended upon his view of construction and therefore, so far as his cross-appeal is concerned, that part of it strictly must also fail, but it is an altogether negligible matter and on his cross-appeal he succeeds, both as regards the manhole and (as I have indicated) on the question of costs. Giving the matter the best consideration I can, and bearing in mind all the tribulations of both these parties, I think that the just course would be to direct that the defendant should recover one half of his costs in the court below. So far as this court is concerned, subject to further argument, since the appeal fails and the cross-appeal substantially succeeds, I think Mr. Holdsworth is entitled to his costs of the appeal and of the cross-appeal in this court.

JENKINS L.J. I agree that this appeal fails. The defence as pleaded was to the effect that, on the true construction of the conveyances, the conveyance of November 18, 1952, from Lister to the plaintiff conveyed to the plaintiff only that area of land remaining if the wall which had been erected from the south-western extremity of the plaintiff's frontage back to the garage,

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the northern wall of the garage itself, and eastward of that again the chicken-wire fence, constituted the southern boundary of the plot. Of course, if that line did constitute the boundary there would have been no encroachment. The judge rejected that contention and, in my opinion, he was right in rejecting it.

Having stated the facts his Lordship said: I have no doubt that the conveyance of 1932 must have operated, as the judge held, to convey a plot of land with three sides of the dimensions stated, and the fourth side a straight line from the southern extremity of the plot's frontage to the proposed Hamlet Road to such a point as would give the stipulated width of 30 feet to the rear boundary of the plot. That the southern boundary should be anything other than straight seems to me an impossibility. If it was not straight, the whole matter as regards the parcels would be involved in complete uncertainty. It might be a wavy line, it might be a curved line, and no-one could tell how much land was being conveyed or what its shape or area might be. One, therefore, starts with a conveyance, as I think, of a plot with a straight southern boundary between the points I have mentioned. In every subsequent conveyance the same description in all material respects is used, and there is in each such conveyance a reference back to the same plan. It is true that the plan is referred to as being for the purpose of facilitating identification only, and therefore, it cannot control the parcels in the body of any of the deeds. Nevertheless, the use of the same plan, I think, makes it clear beyond argument, having regard to the repetition of precisely the same dimensions, that what was conveyed on each occasion, so far as the northern land was concerned, was precisely the same plot as was conveyed in 1932. Speaking for myself, I fail to see how the meaning of the language of the conveyance to the plaintiff can be affected by the circumstance that, before the conveyance to Lister, W. & M. Brown (Builders) Ld. and the defendant had made these allegedly encroaching erections. Accordingly, I am unable to take the same view as my Lord on this part of the case; for, to my mind, the judge was clearly right in holding that this contention failed and that, accordingly, the low wall running back from the north-west corner of the defendant's premises, and the northern portion of the garage to a width varying from 2 feet to about 5 feet, did encroach on the plaintiff's land as conveyed to him by Lister.

That, however, does not conclude the matter; for the defendant also relied on the doctrine of estoppel, the suggestion that this doctrine might be relevant here having fallen from the judge in the course of the hearing. I will not take up time by repeating the reasons which my Lord the Master of the Rolls has given for his view on this aspect of the case; for, in my judgment, a clear case of estoppel is made out, having regard to the circumstances in which the wall and the garage were erected. I think probably the most apposite statement of the rule regarding estoppel is the one to which the county court judge referred, which is cited with

approval by Simonds J. in *In re William Porter & Co. Ld.*,[10] the passage cited being from the judgment of Lord Chancellor Campbell in *Cairncross* v. *Lorimer*.[11] I need not take up time by referring to the passage at length again, but I think it is in complete accord with the conclusion that the company was estopped in this case. If the company was estopped, it follows (as the Master of the Rolls has said) that, on the principle stated in *Taylor* v. *Needham*,[12] the plaintiff as successor in title of the company can be in no better position. Accordingly, I agree that the appeal fails.

[His Lordship stated the facts relating to the manhole and went on:] In those circumstances, as my Lord the Master of the Rolls has pointed out, the position is that the original manhole was laid under a reciprocal arrangement whereby the company was to receive the water from the defendant's land and collect it in a manhole on the company's property, the company was to be at liberty to make a further connexion to that manhole, and a connexion between the manhole and the main sewer would be made for the benefit of both parties by means of a pipe running across the defendant's land. I think it is a fair inference on the evidence that, although a fresh manhole was substituted, the existing system of pipes, in conjunction with the new manhole, continued to perform the function contemplated at the time of the original installation and the water from the manhole is still flowing across the defendant's land by means of the outflow pipe laid in his land. That being so, I agree with my Lord that it is not open to the plaintiff to object to the defendant's pipes or to the flow of water through the defendant's pipes on to his land as constituting a trespass, inasmuch as this is part of a reciprocal arrangement of which the plaintiff still has the benefit in the shape of the flow of water allowed to him through the pipe going back on to the defendants' land, across that land, and into the main sewer in the roadway outside.

Accordingly, in my view, the appeal fails and the cross-appeal should be allowed, with the consequences my Lord has indicated.

MORRIS L.J. In my judgment, it has first to be considered what land is referred to and denoted in the conveyance to the plaintiff of the plot which he bought. [Having referred to the description of the parcels in the conveyance of 1952, his Lordship continued:] A perusal of the conveyance so referred to, that is the conveyance from Ansell to Turner, shows that the plot of land was there described in almost identical terms. In the earlier conveyance the reference is to a proposed road intended to be called Hamlet Road. The words of description and limitation which are used thus contain three measurements, namely, those of the frontage to Hamlet Road, the length of the north-east side and

[10] [1937] 2 All E.R. 361.
[11] (1860) 3 L.T. 130.
[12] 2 Taunt. 278.

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the width at the rear. The plan is to be looked at in order to assist in identifying the plot of land. If the plan is so used, there is nothing which suggests that the lines of the boundaries connecting the frontage to Hamlet Road with the rear are other than straight. That they should be so would, in my judgment, be the natural supposition and inference.

[His Lordship stated further facts, and continued:] In view of all those circumstances, I have formed the conclusion that, as a matter of construction, the plot which was conveyed to the plaintiff was the same plot as was described in the conveyance of 1932 and that its boundaries in length followed straight and direct lines. It follows from this view that, unless precluded from so doing, the plaintiff can complain of the presence on his land of some part of the defendant's garage and of the low wall. In considering whether the plaintiff can so complain, it has first to be decided whether the company, Walter & Maurice Brown (Builders) Ld., could, in the period just before they sold the plot to Lister on April 29, 1952, have made complaint. In my judgment, they could not. The company accepted the instructions of the defendant Brown to build for him on his plot. There was then no marked-out boundary between the two plots. The company acted both through the defendant and also through his father, who held the majority of shares in the company. The bungalow and garage of the defendant Brown were built, and the company received payment. There was no intention of ceding any land from the company to the defendant Brown and the latter had no intention of encroaching over his boundary. The defendant's father said in evidence that he intended to build only on the land of the defendant. The defendant said: "The brick wall was put up intending it "for the boundary between my property and the company's. "It was so understood by me in my capacity as owner of the "south property and as director of the company owning the "north property." If the company, acting through its agents, had said in terms to the defendant Brown that they recognized that there were no visible boundaries between the two plots and appreciated that the defendant wished to have an assurance that he could safely proceed to build in accordance with his projected plans without being in danger of being accused by the company of encroaching on their land, and that they were willing to give such an assurance, I cannot conceive that after the defendant had relied on such assurance and had paid the company for building according to plan, the company could have complained that the defendant was trespassing on their land. The company would have been estopped. Though the company did not make express statements in the terms which I have mentioned, they did, in my judgment, by their conduct impliedly represent that the defendant could safely proceed to build as he planned, and the company would, in my judgment, at a later date have been estopped from alleging that the defendant had done wrong and

was trespassing on their land. If this would have been the position of the company, would Lister have been and is the plaintiff better placed? In my judgment, the answer is no. The judgment of Mansfield C.J. in *Taylor* v. *Needham* [13] is, in my judgment, clear authority for this view. I, therefore, consider that, as regards these matters, the appeal against the judgment of the judge fails.

With regard to all the other matters relating to the issue of the manhole and the drains, and the issues in relation to costs, I do not desire to add anything to what my Lords have said, beyond saying that I am in agreement with the conclusions which they have expressed.

Appeal dismissed with costs. Cross-appeal allowed with costs. Judgment for damages set aside; Defendant to recover one-half his costs in the county court on scale 3; defendant's costs of the appeal and the cross-appeal to be taxed, as between solicitor and client, in accordance with the schedule to the Legal Aid and Advice Act.

Solicitors: *Sidney Torrance & Co.; Sackville, Hulkes & Archdale, Hornchurch, Essex.*

[13] 2 Taunt. 278.

[PRIVY COUNCIL.]

* CHIEF J. M. KODILINYE AND ANOTHER . APPELLANTS;
AND
PHILIP AKUNNE ANATOGU AND ANOTHER . RESPONDENTS.

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Feb. 14.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria) — Land — Ownership — Statutory transfer of land to Crown—Subsequent abandonment under statute as amended —Effect—Title to ownership reverting to original owners—Usufructuary and occupancy rights intermediately acquired not affected—To be decided in independent proceedings—Declaration and injunction—Desirability of formal order embodying precise language of relief granted—Niger Lands Transfer Ordinance, 1916, *c.* 86 *(as amended by Ordinances Nos.* 22 *and* 61 *of* 1945), *s.* 14 *(now s.* 15 *of c.* 149 *of the Laws of Nigeria,* 1948 *Rev.).*

In 1882, confirmed by an instrument in 1884, certain land, including that now in dispute known as Ugborimili, situate at Onitsha, Nigeria, was granted by a Native Chief to the National

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD TUCKER, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

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African Co. Ld., which company was subsequently merged in the Royal Niger Co., who succeeded to their title to the suit land. The grant reserved certain farming, fishing and occupancy rights. In 1916 the Niger Lands Transfer Ordinance was passed, vesting in the Governor in trust for His Majesty as from January 1, 1900, certain specified lands belonging to the Niger Co., including the suit land. By Ordinance No. 22 of 1945, the Ordinance of 1916 was amended and the Governor was empowered to abandon all the right, title or interest vested in him by the Ordinance of 1916 in the trust lands. In December, 1948, the Governor made an order abandoning as from January 1, 1949, all right, title or interest in the suit land. Section 14 of the Ordinance of 1916 (as amended by Ordinances Nos. 22 and 61 of 1945) provided that: "Where the Governor "abandons all the right, title or interest vested in him by virtue "of this Ordinance in any vested trust lands or part thereof . . . "then such abandonment shall have effect as if such vested trust "lands or part thereof had never been included in the instru- "ment . . . by which the same were originally transferred to the "company."

The respondents, in a representative action on behalf of the Onitsha tribe or family, alleging that the Native Chief in 1882 had transferred the suit land to the company on behalf of the Onitshas, and that pursuant to the abandonment order of the Governor it reverted to them on January 1, 1949, claimed a declaration of title to the land and an injunction to restrain the appellants, the Obosi tribe or family (a number of whom had, between 1882 and 1945, entered on the suit land and built houses thereon, which had given rise to numerous legal proceedings as to their rights), from "inter- "fering with or disturbing the plaintiffs' ownership and possession "of the said land."

On appeal by the appellants against the orders of the courts below granting the declaration and injunction claimed:—

Held, (1) that there were no grounds for interfering with the concurrent findings of fact that the respondents were the lawful owners to whom the title in the land reverted on the abandonment by the Crown and entitled to the declaration; but (2) that, the only issue in the action being the ownership or radical title to the land, nothing could or should have been decided which would in any way affect the usufructuary rights, if any, of people on the land or any portions thereof, and the injunction would be varied by omitting the words "and possession" from the injunction granted.

Section 14 of the Niger Lands Transfer Ordinance, 1916, as amended, dealt only with the title to ownership of the land and was not to be construed as compelling the court to disregard all events which had happened in the period between 1882 and 1949, in so far as they might affect any rights of use and occupation in respect of such land as might have been acquired or have accrued by acquiescence or otherwise during those years.

It is desirable—whatever the rules of the Supreme Court of Nigeria may permit—that a successful party should obtain a formal order embodying the precise language of the relief granted to him by the judge in cases in which a declaration of title and/or an injunction has been granted.

Judgment of the West African Court of Appeal varied.

Appeal (No. 39 of 1951) from a judgment of the West African Court of Appeal (November 14, 1950), affirming a judgment of the Supreme Court of Nigeria, Onitsha Judicial Division (October 1, 1949).

The following facts are taken from the judgment of the Judicial Committee: This appeal concerned a dispute between two tribes or, more accurately, families as to the title to part of an area of land called Ugborimili which was bounded in the west by the river Niger and lay between the Ndende stream in the north and the river Idemili in the south. Those two tribes or families are hereinafter referred to as the Onitshas and the Obosis. The Onitshas (the respondents to the present appeal) were the plaintiffs in a representative action brought by them against the Obosis (the present appellants) claiming a declaration of title to the disputed land and an injunction.

In 1882 certain land (including that now in dispute) was granted by one Orikagbue to the National African Co. Ld. The grant was evidenced by the production of a certificate dated October 8, 1884, confirming the grant of 1882. That document was Ex. 53 in the case. The National African Co. Ld. was subsequently merged in the Royal Niger Co., who succeeded to their title in the land. On October 26, 1896, a further grant of a portion of the land included in the 1882 grant was made by Orikagbue and four others to the Niger Co. That was Ex. 54. Those grants expressly reserved certain farming, fishing and occupancy rights.

In 1916 the Niger Lands Transfer Ordinance (c. 86) was passed, vesting in the Governor and his successors in office in trust for His Majesty as from January 1, 1900, the lands belonging to the Niger Co. specified in the first schedule thereto. Certain portions of such lands were, however, reserved to the Niger Co. and were referred to in the fourth schedule. Included in the list of agreements in the first schedule were instruments No. 72 and No. 40, which were Exs. 53 and 54 referred to above. The date 1894 in instrument 72 was a mistake for 1884. Between 1882 and 1945 it appeared that a number of persons entered on the land in dispute and built houses thereon. That had given rise to numerous legal proceedings as to their rights or as to the payment of rent or tribute. The Onitshas, through their legal advisers, protested to the Government with regard to their failure to prevent such encroachments since the land had become vested in them in 1916. In 1945, by Ordinance No. 22/1945 the Ordinance of 1916 was amended. Section 4 empowered the Governor by order to abandon all the right, title or interest vested in him by the Ordinance of 1916 in the whole or any part of the lands called the "vested trust lands." Under that authority the Governor made an order (No. 29/1948) dated December 11, 1948, abandoning as from January 1, 1949, all the right, title or interest in a part of the vested trust lands specified in instruments 72 and 40. The portion abandoned was the area south of the green line running east and west on Ex. 10, which was the plan put in evidence and showing the area now in dispute.

Section 14 of chapter 86 (as amended by Ordinances Nos. 22 and 61/1945) provided as follows with regard to the effect of such

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divesting order: "Where the Governor abandons all the right, "title or interest vested in him by virtue of this Ordinance in any "vested trust lands or part thereof in accordance with the pro- "visions of this Ordinance then such abandonment shall have "effect as if such vested trust lands or part thereof had never been "included in the instrument, agreement or document, as the case "may be, by which the same were originally transferred to the "company."

The only issue before the court was who were the lawful owners to whom the title in the lands in dispute reverted on the abandonment by the Crown on January 1, 1949.

The Onitshas based their claim on traditional evidence as to the migration of their tribe from Benin and their conquest of the Ozeh people who were driven out by them. They said that having thus acquired the land, Orikagbue on their behalf transferred it to the National African Co. and the Niger Co. by the instruments Exs. 53 and 54, and that the ownership of the land reverted to them on January 1, 1949.

The trial judge (Manson J.) granted the respondents a declaration of title to the suit land, and also an injunction restraining the appellants "and their people of Obosi from interfering with or "disturbing the plaintiffs' ownership and possession of the said "land." On appeal the West African Court of Appeal (Blackall P., Verity (C.J. Nigeria), and Lewey J.A.) affirmed that decision.

1955. Jan. 12, 13, 17, 18 and 19. *Sir Hartley Shawcross Q.C.*, *Dingle Foot Q.C.* and *R. K. Handoo* for the appellants.

S. Cope Morgan Q.C. and *F. R. McQuown* for the respondents.

Feb. 14. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts as set out above and continued: It is interesting, having regard to the appellants' case as presented to the Board, to see what has been their attitude to this document Ex. 53 at various stages of the proceedings. By their defence and at the trial they denied that Orikagbue was an ancestor of the respondents. They said that he was an Obosi man residing at Onitsha where he was practising as a native doctor and that he contracted for himself and the Obosi people. This issue having been decided against them by the trial judge, who accepted the evidence, inter alios, of Orikagbue's own son that his father had no connexion with the Obosis, and that he and the four other signatories to Ex. 54 were all members of the Ogbo family (i.e., Onitshas), the appellants subsequently contended that Ex. 53 was inadmissible and should never have been received in evidence. This was reason No. 2 in their case. On the hearing of this appeal this contention was abandoned, but at one stage it was suggested that Ex. 53 had been annulled by the later agreement Ex. 54. Ultimately it formed the basis of their submission that it was a vital piece of evidence recognizing their usufructuary title to the land with regard to which the trial judge had so

misdirected himself as to require that the case should be sent back for a new trial.

The trial occupied 11 days, and 36 witnesses were called. The judge (Manson J.) in a careful and lucid judgment decided the issue of fact as to who were the lawful owners of the land in dispute in favour of the respondents (the Onitshas) and granted them the declaration asked for, viz., "a declaration of title to all "that piece or parcel of land known as Ugborimili situate at "Onitsha, in the Onitsha Division." No formal order appears to have been drawn up. This, it seems, is not necessary under the rules of the Supreme Court of Nigeria unless specifically applied for, the minute of the judgment taking the place of the formal order or decree. The area to which this declaration relates is the area shown on Ex. 10 below the green line.

On appeal to the West African Court of Appeal the judgment of the trial judge was upheld, the court merely stating that the evidence fully supported his findings.

On this issue there are accordingly concurrent findings of fact as to which it is conceded there are no grounds which would warrant their review by the Board.

The trial judge, however, not only made the declaration already referred to, but granted an injunction. He said: "I also "grant the injunction sought." The injunction sought was as follows: "An injunction to restrain the defendants and their "people of Obosi from interfering with or disturbing the plaintiffs' "ownership and possession of the said land." The judge went on to say: "The defendants must in no way interfere with the "beneficial enjoyment by the plaintiffs of the above area. The "defendants are occupying many houses and other buildings on "the land. The plaintiffs do not ask for an order of ejectment "of defendants. If they want an order they must apply for it. "In the meanwhile the defendants are liable to pay to the plain-"tiffs rent for the use and occupation of the plaintiffs' land. If "plaintiffs demand rent, the defendants must pay it unless they "remove their buildings and vacate the plots."

Here again, no formal order seems to have been drawn up, but the language used by the judge, coupled with the reference to "possession" in the injunction asked for, might well be interpreted as going far beyond the only issue in the action, viz., the ownership or radical title to the land. Unfortunately, the judge was not asked to modify the form of order or to clarify the position. Nor was this matter ever raised in the Court of Appeal. None the less, their Lordships having had their attention drawn to this point feel compelled to make some observations with regard thereto.

The only issue having been as to ownership nothing could or should have been decided which would in any way affect the usufructuary rights, if any, of individuals or of families or tribes to the land in dispute or any portions thereof, or as to whether any such rights are or are not conditional upon payment of rent or

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tribute. All such matters can only be decided in proceedings in which such issues are properly raised.

The appellants relied on Ex. 53 which states "He (i.e., "Orikagbue) asked that the Abutshi (i.e., Obosi) people might be "allowed to use the land for raising yams, corn, etc., and to fish "from those parts of the bank which were not in the occupation "of the company, . . . he also asked that if any of his sons or "daughters wished for a portion of the land for farming purposes "that they should be allowed and that these requests were acceded "to." They contended that this was evidence of recognition of a previous grant to the Obosi people under which they would at any rate be entitled to occupy the land in dispute, even if the ownership reverted to the Onitshas. They further relied on several passages in the evidence of the plaintiffs' witnesses and in their pleadings to the like effect.

Their Lordships express no view on these matters, which may require consideration in the light of further evidence directed to these issues and to questions of native law and customs if and when they arise in proceedings in which they call for decision. They do, however, consider that it is right that they should express their view as to the proper construction of section 14 of the Niger Lands Transfer Ordinance as amended (which now appears as section 15 of chapter 149 of Laws of Nigeria, 1948 edition) which has been set out above. In their opinion this section only deals with the title to ownership of the land, and is not to be construed as compelling the court to disregard all events which have happened in the period between 1882 and 1949 in so far as they may affect any rights of use and occupation in respect of such land as may have been acquired or have accrued by acquiescence or otherwise during those years.

No case has been made out for a new trial, but their Lordships consider that the form of the injunction and the language used by the judge in connexion therewith require that the order for the injunction should be varied so as to follow the declaration by omitting the words "and possession" in the injunction sought and granted by the judge.

Their Lordships would stress the desirability—whatever the rules may permit—of a successful party obtaining a formal order embodying the precise language of the relief granted to them by the judge in cases in which a declaration of title and/or an injunction has been granted.

For these reasons their Lordships will humbly advise Her Majesty that the order for an injunction granted by the judge be varied by omitting the words "and possession," but save as aforesaid the judgment do stand.

The appellants must bear their own costs of this appeal and pay to the respondents one half of their costs.

Solicitors: *Watkins, Pullcyn & Ellison; Rexworthy, Bonser & Wadkin.*

[COURT OF APPEAL.]

C. A.

1955
Feb. 7, 8.

Evershed M.R., Jenkins and Morris L.JJ.

* HAYMILLS HOUSES LD. *v.* BLAKE.

[Plaint No. K. 1590.]

Landlord and Tenant—Rent Restriction—Possession—Arrears of Rent —Conditional order—Condition not complied with by date fixed —Subsequent order extending time for compliance with condition —Validity—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4 (2).

Under a tenancy agreement of 1948, which contained a proviso for forfeiture for non-payment of rent, the defendant was tenant of premises within the Rent Acts. The landlords on August 28, 1954, issued a plaint claiming possession on the ground of non-payment of rent, arrears of rent amounting to £28 8s. 7d. and costs. The plaint was subsequently amended to include a further claim for arrears of rent. The case was heard on September 29, 1954, at which date the landlords had not been paid in full and an order was then made for possession on or before October 27, 1954, being four weeks from the date of the order, unless the rent in arrears and costs were paid before that date. The tenant having failed to comply with that order, the landlords applied for a warrant of possession. The tenant subsequently paid all moneys due under the order of September 29 and applied for the suspension of the order for possession. On November 29 the county court judge made the following order:—"It is ordered that the time of the order of 29th September, "1954, be extended for a further 28 days. Debt and costs have "been paid; order therefore of 29th September, 1954, be extin- "guished. Possession warrant revoked."

The landlords contended that since the order of September 29, 1954, had become absolute, the county court judge had no jurisdiction, having regard to the provisions of section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, to discharge the order for possession.

It was conceded that the tenant not having complied with the order for payment of arrears of rent within four weeks his rights under section 180 (1) (*b*) of the County Courts Act, 1934, had ceased and the landlord's right of forfeiture for non-payment of rent was effectively exercised and the tenant's rights had become those of a statutory tenant only.

Held, that whether or not an absolute order can be converted into a conditional one so as to give rise to the power of discharge under section 4 (2) of the Act of 1923, on the facts, both the orders of September 29 and November 29 were conditional orders and, accordingly, the county court judge had jurisdiction to discharge the first order.

Per Evershed M.R. It may well be that, if an absolute order for possession is made, then, when it is not yet executed, the court may under section 4 (2) make an order postponing the date of possession on conditions, and, if the conditions are performed, the final words of the subsection may give power to discharge the original order, even though absolute in form.

American Economic Laundry v. *Little* [1951] 1 K.B. 400; [1950] 2 All E.R. 1186; 66 T.L.R. (Pt. 2) 1080 and *Mills* v. *Allen* [1953] 2 Q.B. 341; [1953] 3 W.L.R. 356; [1953] 2 All E.R. 534 considered.

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Haymills Houses Ld. v. Blake.

Appeal from Judge Tudor Rees sitting at Brentford County Court.

By a tenancy agreement dated September 1, 1948, a ground floor flat at No. 78, The Ridings, Ealing, being premises within the Rent Acts, was let by the plaintiffs, Haymills Houses Ld., to the defendant, Roy George Blake. The agreement, determinable by three months' notice to quit, contained a provision for re-entry on non-payment of rent. On August 28, 1954, the landlords served on the tenant a plaint claiming possession and a sum of £20 8s. 7d. for rent in arrears and costs. Subsequently, the plaint was amended to include a claim for the additional sum of £9 17s. 6d., representing further arrears of rent. The case was heard on September 29, 1954, when judgment was given for £39 1s., being the arrears of rent and costs, and it was further ordered that "the defendant do give to the plaintiff possession of "the said land on or before the said 27th day of October, 1954, "unless the said rent in arrear and costs be paid into court before "such 27th day of October, 1954." The tenant paid the arrears of rent before October 27, but not the balance due in respect of costs. The landlords applied for a warrant for possession. The tenant then paid the remaining moneys due under the order of September 29, and applied for an order suspending the order for possession. On November 29 the county court judge made an order in the following terms: "It is ordered that the time of the "order of 29th September, 1954, be extended for a further 28 "days. Debt and costs have been paid; order therefore of "29th September, 1954, be extinguished. Possession warrant "revoked."

The landlords appealed, contending that having regard to the provisions of section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923,[1] the county court judge had no jurisdiction to revoke the order for possession made on September 29 after it had become absolute.

The facts are more fully stated in the judgment of Evershed M.R.

R. O. C. Stable for the landlords.
Alan de Piro for the tenant.

The following cases, in addition to those cited in the judgment of Evershed M.R., were referred to in argument: *Goldthorpe* v.

[1] Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (2): "At "the time of the application for or the "making or giving of any order or "judgment for the recovery of posses- "sion of any such dwelling-house, or "for the ejectment of a tenant there- "from, or in the case of any such "order or judgment which has been "made or given, whether before or "after the passing of this Act, and "not executed at any subsequent "time, the court may adjourn the "application, or stay or suspend exe- "cution on any such order or judg- "ment, or postpone the date of "possession for such period or periods "as it thinks fit, and subject to such "conditions (if any) in regard to pay- "ment by the tenant of arrears of "rent, rent, or mesne profits and "otherwise as the court thinks fit.

Bain[2]; *King* v. *Taylor*[3]; *R. F. Fuggle Ld.* v. *Gadsden*[4]; *Chandless-Chandless* v. *Nicholson*[5]; *Rossiter* v. *Langley*[6]; *Dellenty* v. *Pellow*[7]; *Yates* v. *Morris*.[8]

EVERSHED M.R. This appeal has raised a point of no little difficulty under the terms of what is now section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923. Observations have from time to time fallen from judges about that subsection in a number of cases to which our attention has been drawn during the course of what has been a very careful and helpful argument from counsel.

[His Lordship read section 4 (2) of the Act of 1923, and continued:] It is, I think, clear that the section 4 (2) is not syntactically entirely elegant, but it comprehends two types of cases, of which we are concerned with one. One type of case is that in which the powers of the subsection may be available at the time of the application for making an order for possession. The second type of case is that where an order for possession has been made, but has not been executed; and in that latter type of case, the powers of the subsection are available at any subsequent time, so long, of course, as the order remains unexecuted. The present case is related to the second type.

The property is a flat, No. 78, The Ridings, in London, and it is a dwelling-house within the comprehension of the Rent Acts. The plaintiffs were the landlords of the defendant under a written agreement dated September 1, 1948. The agreement provided that the tenancy of the flat was determinable upon three months' notice. The rent was over £90 per annum. A right of re-entry was reserved to the landlords in case of non-payment of rent.

It has been said by Mr. Stable for the landlords that this tenant has in the past been unsatisfactory in that he has shown a lack of promptitude in payment of rent. Whether that is so or not is a matter with which we have not been concerned; but, if it be true, then, as I ventured to observe during the course of argument, the continuance of that lack of promptitude on the part of the tenant may be found by him to be most disadvantageous if there be future excursions to the county court.

However that may be, on August 28, 1954, a plaint was issued and served upon the tenant claiming possession on the ground of arrears of rent, and the plaint showed that the rent in arrear was

"and, if such conditions are complied "with, the court may, if it thinks fit, "discharge or rescind any such order "or judgment."

[2] [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23.

[3] [1954] 3 W.L.R. 669; [1954] 3 All E.R. 373.

[4] [1948] 2 K.B. 236; [1948] 2 All E.R. 160; 64 T.L.R. 364.

[5] [1942] 2 K.B. 321; [1942] 2 All E.R. 315.

[6] [1925] 1 K.B. 741; 41 T.L.R. 304.

[7] [1951] 2 K.B. 858; [1951] 2 T.L.R. 733; [1951] 2 All E.R. 716.

[8] [1951] 1 K.B. 77; [1950] 2 All E.R. 577; 66 T.L.R. (Pt. 2) 707.

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£20 8s. 7d.; a sum of £2 10s. for costs was added, making a monetary claim of £22 18s. 7d. The plaintiffs claimed in accordance with the terms of the agreement to exercise their right of re-entry as upon a forfeiture for non-payment of rent, and in obedience to section 180 of the County Courts Act, 1934, there appeared on the face of the plaint the following: "If you pay "the rent in arrear and costs into court five clear days before "the date of hearing the action will cease."

Before the case came on for hearing the particulars of claim were amended by adding a claim for further arrears of rent which had accrued since the issue of the plaint, and Mr. de Piro for the tenant has said that that amendment was, in strictness, out of order. The effect, however, was to increase the total sum which was due or alleged to be due for rent by about £10.

When the case came on for hearing on September 29 the tenant had not availed himself of the suggestion made on the plaint of payment into court within five days of the return date, but he had sent to the landlords a cheque for the sum which was alleged to be due for rent and costs on the plaint in its original form, namely, £22 18s. 7d. At the date of the hearing that cheque had not been cleared and the landlords therefore had not received the money. I have already said that the plaint had been amended by adding a further claim for £9 17s. 6d. The landlords were represented at the hearing, but the tenant abstained from attending. It appears that the court had received from the tenant a further cheque for £9 17s. 6d., the balance alleged to be due on the amended claim, and that cheque, which was in fact post-dated, was handed down at the hearing to the landlords or their representatives.

In those circumstances the order made by the court on September 29 was as follows: "It is adjudged that the plaintiff "is entitled to recover against the defendant possession of the "land mentioned in the particulars annexed to the summons in "this action, that is to say, Lower Flat 78 The Ridings, W.5, "the rent of the said land amounting to £30 6s. 1d., being in "arrear and the plaintiff having a right of re-entry or forfeiture "in respect thereof, and it is adjudged that the plaintiff do "recover against the defendant the sum of £30 6s. 1d. for the "arrears of rent aforesaid," that was the original £20 odd plus the added £9 17s. 6d., "and the sum of £8 15s. for costs, "amounting together to the sum of £39 1s. And it is ordered "that the defendant do pay the said sum of £39 1s. to "the registrar of this court, on or before the 27th day "of October, 1954, and it is ordered that the defendant do give "to the plaintiff possession of the said land on or before the "said 27th day of October, 1954, unless the said rent in arrear "and costs be paid into court before such 27th day of October, "1954."

It will be observed, therefore, that the order which the court made was what has been many times called a conditional order

for possession, a type of order commonly made in these cases and, by the description which I have given to it, distinguishable from what is called an absolute order for possession, namely, an order upon the tenant to give up possession on some fixed date without any condition attached thereto performance of which would make the order inoperative.

The tenant had given to the landlords two cheques, the total of which on their face was £32 16s. 1d., a sum less by £6 odd than the total amount mentioned in the order. The two cheques appear to have been met; but when October 27, 1954, arrived (that being the date fixed in the order for possession unless in the meantime the sums stated in the order had been paid), nothing further in fact had been paid. The result was that, according to its terms, the order for possession was liable forthwith to operate.

Section 180 of the County Courts Act, 1934—a section devoted to forfeiture for non-payment of rent—provides: "(1) Where a "lessor is proceeding by action in a county court (being an "action in which a county court has jurisdiction) to enforce "against a lessee a right of re-entry or forfeiture in respect of "any land for non-payment of rent, the following provisions shall "have effect." Paragraph (*a*) deals with the case where the lessee pays into court not less than five days before the return date the rent in arrears and the costs; and the subsection provides that, if the lessee so does, then the action shall cease and the lessee shall hold the land according to the lease without any new lease; in other words, the exercise of the right of forfeiture is rendered, in the event, ineffective, and the lease remains subsisting. This lessee did not take that opportunity.

Subsection (1) continues: "(*b*) If the action does not cease as "aforesaid"—that is, under (*a*)—"and the court at the trial is "satisfied that the lessor is entitled to enforce the right of "re-entry or forfeiture, the court shall order possession of the "land to be given to the lessor at the expiration of such period, "not being less than four weeks from the date of the order, as "the court thinks fit, unless within that period"—that is, four weeks or a greater period from the date of the order—"the "lessee pays into court all the rent in arrear and the costs of the "action; (*c*) if within the period specified in the order, the lessee "pays into court all the rent in arrear and the costs of the action, "he shall hold the land according to the lease without any new "lease, but if the lessee does not, within the said period, pay "into court all the rent in arrear and the costs of the action, "the order shall be enforced in the prescribed manner, and so "long as the order remains unreversed, the lessee shall be barred "from all relief." The tenant did not avail himself of that second alternative either, for he had not on October 27, paid into court the sum ordered to be paid by way of rent arrears and

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costs. The date October 27 was plainly fixed in the light of paragraph (*b*), for it was a date 28 days from the date of the order.

Mr. de Piro has contended that the words "so long as the "order remains unreversed" carry implicit in them a power in the county court judge himself, upon some later application, to reverse or rescind or extinguish his original order, so as to give rise to a revival, so to speak, of the contractual tenancy, notwithstanding failure on the lessee's part to avail himself of the provisions of paragraphs (*b*) and (*c*).

I do not find it necessary to express any view upon that matter. In the events which have happened Mr. de Piro has plainly conceded that the contractual tenancy must now be treated as gone. The right of forfeiture for non-payment of rent was in the circumstances effectively exercised; but this is a rent restriction case and, therefore, apart from and in succession to his contractual rights, the tenant has the rights conferred upon him by the Rent Acts, compendiously referred to as the rights of a statutory tenant. Accepting, as I do, Mr. de Piro's concession on this matter, the question henceforth is: What is the position of the tenant? Is he now bound to go out at once, as Mr. Stable has contended, or can he remain on, but in the latter case with only the rights of occupation conferred upon a statutory tenant?

Many points were adumbrated during the course of argument and at this stage I would like to dispose of one or two more. Mr. de Piro contended that the amendment made by the plaintiffs in their plaint was out of order, and that it was not competent for the landlords to add to the claim of £20 odd for arrears of rent due when the proceedings started, further arrears of rent which later fell due. Whether that was a matter which might have been the subject of a valid objection, it was not in fact objected to. The tenant allowed the matter to be dealt with by the county court judge on September 29, and the order which the county court judge made on that date, and which required payment of the enlarged figure of £39 1s., went unappealed. It therefore seems to me too late for Mr. de Piro to take any point based on the possible vice of the amendment.

Mr. Stable, in turn, by way I think of an argumentum in terrorem, suggested, particularly in the light of certain observations from judges in this court, that since the original order had become absolute, in the sense that the condition imposed in relation to it had not been fulfilled, an interesting question might arise in the unhappy event of the death of the tenant, leaving some person who might claim to be, quoad the Rent Acts, his successor by virtue of the definition of section 12 (1) (*g*) of the Act of 1920. Mr. Stable referred to some observations of my brother Jenkins [1] indicating that, where an absolute order for

[1] In *American Economic Laundry Ld.* v. *Little* [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186.

possession has been made, a person who might loosely be described as a statutory tenant had at least not the quality necessary to pass to such a successor any corresponding right of occupation. I again find it unnecessary to try to forecast what might be said and what the result might be in the event of the death of the tenant. For the purposes of this appeal, it seems to me, in view of Mr. de Piro's concession, that the tenant's right of occupation is that of a statutory tenant, but I am not proposing to define more precisely the exact scope of the rights under the statute which, in the circumstances, the tenant and members of his family might hereafter be held entitled to enjoy.

I return to the narrative of this case: The tenant, preferring to remain inops consilii, and persisting in his reluctance to pay more quickly than absolute compulsion required, took no further step after October 27 to pay the balance of the sum of £39 odd and a warrant for possession was applied for. This action did stir the tenant into a measure of activity, for he applied in person on November 6, 1954, to the judge to suspend the possession order, and on the same day he took the precaution of paying the added sum of £7 2s. (that is, the balance of the £39 odd swollen by the charges of the warrant) into court or to the plaintiffs. Nevertheless, on November 12, 1954, the tenant personally applying to the county court, failed in his application for a suspension of the order. At that point of time he wisely thought it would be desirable to take professional advice. The order still being unexecuted, on November 24, 1954, the solicitor, whose aid the defendant had somewhat belatedly sought, applied on his behalf as follows: "Take notice that the above-"named defendant intends to apply to the judge," and then details of the place are given "on Monday, the 29th November, ". . . for suspension of the possession warrant issued in this "action under an order of the court dated the 1st day of October, "1954"—that is the same order as the order of September 29, the later date being the date it actually bore—"and further for "a suspension of the operation of the said order for possession of "the premises in question on the ground that the defendant had "discharged the whole of the arrears and the costs of the action "in respect of which the defendant was held to be liable for "forfeiture of his tenancy of the said premises."

It is the fact that on that day the tenant's two cheques, plus the sum of £7 2s., had made up the full sum for which he was then liable for arrears in rent, costs and solicitors' charges. The matter coming before the county court judge on November 29, and his attention being directed to the terms of section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, he made the following order: "It is ordered that the time of the "order of 29th September, 1954, be extended for a further 28 "days. Debt and costs have been paid; order therefore of 29th "September, 1954, be extinguished. Possession warrant revoked. "Costs of today £2 2s. to plaintiff."

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I have ventured to refer to the inelegance of the subsection which we are called upon to construe, and I hope I shall be forgiven if I use similar language in regard to this order, which seems to me on certain vital matters to be in addition somewhat obscure. For example, were the words "ordered that the time "of the order of 29th September be extended" meant to relate merely to the date on which possession should be given, leaving the date for performance of the condition as it originally stood? Or did it mean to substitute in all material places in the original order for October 27 another date described as arriving at the end of "a further 28 days"? And it is also not entirely clear to me, at first sight at any rate, whether the further 28 days were intended to run from October 27 or from November 29. But, read in its context, I have come clearly to the conclusion that what the county court judge intended to do was to make an order to the following effect (and for future reference may I express the hope that orders should broadly in similar circumstances take the form I am now going to state?)—I think that the proper way of expressing it would have been to say: "In "exercise of the powers under section 4 (2) the date of possession "in the earlier order, namely October 27, 1954, be postponed for "28 days from the date of this order, namely until," and then I suppose the date would have been December 27. Having done that, the order should then have gone on to say (for so I think the judge intended): "upon the condition that on or before such "last-mentioned date the defendant shall pay or shall have paid "the sum of £39 1s. mentioned in the order of September 29, "together with the further sum of £x for costs since incurred, "including £2 2s. for the costs of today's hearing."

I think that, if the order had taken that form, it would have been in strict accordance with the power in section 4 (2) to postpone the date of possession for a period which the court thought fit, subject to a condition in regard to the payment of arrears of rent and otherwise as the court thought fit. I think it would then have been competent for the judge, again within the terms of the subsection, to have gone on as follows: "And it further "appearing that the defendant has on or before this date paid "the whole of the sums above mentioned, then it is further "ordered that the order of September 29, 1954, be discharged "from this date." I do not think that the word "extinguished" was one appropriate to be used. That, I think, was the intention, and an order in that form would have been in proper compliance with the powers set out in section 4 (2). The result would have been the same as that which the tenant in the present case, and the landlords also, have apprehended that the order of November 29 did produce.

I will return and read again so much of section 4 (2) as relates to the second or alternative class of case, of which the present is one: "in the case of any such order"—that is, an order for the recovery of possession of a dwelling-house, etc.—

" which has been made . . . and not executed at any subsequent " time, the court may . . . stay or suspend execution on any such " order or judgment, or postpone the date of possession for such " period or periods as it thinks fit, and subject to such " conditions (if any) in regard to payment by the tenant of arrears " of rent, rent, or mesne profits and otherwise as the court " thinks fit, and, if such conditions are complied with, the court " may, if it thinks fit, discharge or rescind any such order or " judgment." Notwithstanding the inelegance, which I think must be confessed to exist in this language, I cannot myself see any answer to the proposition that the final words of the subsection empower the county court, given the preceding circumstances, to discharge or rescind the original order.

It was very strongly argued by Mr. Stable that, if an unconditional order for possession is made, there is no power in any circumstances for the court afterwards to discharge it or rescind it. The making of the first order has, so Mr. Stable argues, such a quality of finality as does not permit of that power of revision. It was in support of that view that certain observations from other cases were cited, observations of my brethren in this court and of Somervell L.J. and of myself, directed, however, to differing circumstances and in other contexts. I shall presently refer to two only of those observations, for I do not think that any of the others cited has any real relevance to the problem with which we are concerned, or in any way disables the conclusion which I reach upon the application of this subsection to the facts of this case. I agree with Mr. Stable, and it is, I think, necessarily inherent in the language of the subsection, that an order discharging a previous order for possession can only be made where there has been a subsequent order in accordance with the terms of the subsection itself. So far as now relevant, the power of discharge arises where the date of possession in what I will call the first order has been postponed subject to conditions, and those latter conditions have been complied with. I emphasize those last words. The power to discharge depends upon compliance with conditions imposed by what I will call the second order.

As I have interpreted the order of November 29, 1954, which I will call here the second order, that order did postpone the date of possession on conditions, the conditions being, in part, the performance of the obligation to pay the same sum as the first order specified and, in part, the payment of certain further sums. Those conditions were fulfilled and, therefore, as I think, the power did vest in the county court judge in the exercise of his discretion to discharge the first order.

I propose to confine myself in this judgment to that set of facts and to such a limited interpretation of this subsection as is necessary to deal with this case. I do so more particularly because of the two observations from other cases to which I wish to refer. The first was the case in this court of *American*

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Economic Laundry Ld. v. *Little*,[1] which came before Somervell, Jenkins and Birkett L.JJ. It was a case quite different from the present, a case in which a final order had been made against the tenant of certain premises and he, the tenant, then applied for and obtained a suspension of the execution of the order, but during the period of the suspension the tenant died. The question was: What was the position of his daughter, who claimed to have succeeded under the definition in section 12 (1) (*g*) of the Act of 1920? The form of the order for possession, and this is the only real relevance of this case, had been an absolute order for possession. It was not one made subject to condition, in the sense, for example, that the possession order would not go if the tenant paid certain sums or performed certain other obligations within a stated time. The distinction between absolute and conditional orders having been raised, Somervell L.J. said[2]: "The difference between those two kinds of order is "illustrated by these concluding words of the subsection: 'if "'such conditions,' that is to say, conditions to which an order "is made subject' are complied with, the court may, if it thinks "'fit, discharge' the order. That cannot be done when an "absolute order has been made; it can only be done if the order "is made conditional."

Mr. Stable contended that, when Somervell L.J. spoke of conditional orders, he was meaning that the power of discharge following the making of conditional orders only arose if all the conditions according to their strict terms had been performed ab initio, that is to say, not only the conditions in the second order, but the conditions in the first also.

I am unable to accept that. If the conditions in the first had been performed according to their terms, of course no second order would ever have been made; but the language does also lend support to the general proposition for which Mr. Stable argued, namely, that the power of discharge, simpliciter, does not apply to an absolute order for possession.

I pass to the second observation, which is one of my own in *Mills* v. *Allen*,[3] a case of great complexity, in which the main question involved was the validity of a certain justices' warrant. The case came before my brethren Birkett and Romer L.JJ., and myself, and there was some discussion as to the form of order. In the course of my judgment I expressed the view that I might perhaps assist in the future administration of this difficult branch of the law if I made some observations about the form of order. I referred to the *American Economic Laundry* case[4] and to certain other cases—I am reported as saying: "I begin by "observing that, though the original order be absolute, neverthe- "less, as I read section 4 (2) of the Act of 1923, it may not "only be discharged on application, but it may, in effect, be

[1] [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1951] 2 All E.R. 1186.
[2] [1951] 1 K.B. 400, 406.
[3] [1953] 2 Q.B. 341; [1953] 3 W.L.R. 356; [1953] 2 All E.R. 534.
[4] [1951] 1 K.B. 400.

"converted thereafter into a conditional order, for the language "at the end of the subsection seems to contemplate that "possibility."

That general observation may now require to be a little expounded. I still think it may well be that if an absolute order for possession is made, then, when it is not yet executed, the court may under the section make an order postponing the date of possession on conditions, and, if it did that, then, if the conditions were performed, it may well be that the final words of the subsection would give power to discharge the original order, even though absolute in form. If that is right, then it would justify the language I there used: that an absolute order may be in effect converted into a conditional one, so as to give rise to the power of discharge. But I am not saying anything which would conflict with Somervell L.J.'s expression of opinion that an absolute order, as such, would not be liable to be discharged under the powers of the final terms of the subsection; I prefer not to express further than I have already tried to intimate conclusions as to the general operation of this section, but to confine myself, for the present at any rate, to the particular facts of this particular case, which is one in which there followed one after the other, as I understand them, two so-called conditional orders.

Interpreting the order of November 29 as I have done, it will be appreciated that in my judgment the county court judge had jurisdiction to do what he did and that, therefore, the appeal based on the invalidity, through want of jurisdiction, of the order of November 29 fails.

Mr. Stable suggested that the making of an order in the form which I have explained would not have been a proper exercise of discretion having regard to the previous performances, as regards rent payments, of this tenant. Quite plainly that matter was not raised or argued before the county court judge. It is no doubt easy to be wise after the event; but it was not raised; and according to well settled principles it is, in my judgment, not now open to Mr. Stable. True it is that the application of the tenant's solicitor was in terms one for suspension rather than postponing the date of possession and for ultimate discharge, but still the matter obviously was dealt with in accordance with the general scope of the jurisdiction. And if matters of that sort are gone into it will be also recalled that by amendment of the particulars of claim the landlords may have gained an advantage over the tenant for the purposes of the proceedings which might in strictness be open to some challenge. These matters, I think, are however irrelevant and not now open on one side or the other.

This appeal fails, but I repeat that if there be truth in what Mr. Stable has said, the tenant would be well advised to take advice, as he now has taken it, and to observe a greater promptitude in the performance of his obligations.

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I conclude only with this. If it be said, as was suggested in the argument, that as I have construed it the power to discharge a previous order is linked to a particular class of case only, namely, cases where conditions have been imposed which have been fulfilled, then that seems to me sensible enough; for obviously the kind of case with which section 4 (2) is dealing (and it would seem to be right that it should be limited to that type of case) is the kind of case where the default on the part of the lessee is one which is fairly capable of remedy, of which the simplest case is such a case as the present, namely, failure to pay promptly the rent that is due.

For the reasons which I have given in a somewhat complicated matter, I think that the appeal fails. I would like to repay my indebtedness to learned counsel for their most lucid exposition of the problem presented.

JENKINS L.J. I agree and have nothing to add.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Redfern, Barron & Morton; Edward Mackie & Co.*

B. A. B.

[COURT OF APPEAL.]

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Lord Goddard C.J., Singleton and Romer L.JJ.

* ORMAN BROTHERS LD. *v.* GREENBAUM.

[1954 O. No. 1741.]

Landlord and Tenant—Act of 1954—*Notice to quit—Validity—Notice given on August* 31, 1954, *expiring October* 4—*Regulations prescribing form of notice under Act brought into operation on August* 27—*Act coming into force October* 1—*Notice not in prescribed form—Landlord and Tenant (Notices) Regulations,* 1954 (*S.I.* 1954 *No.* 1107)—*Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23, 24 (1), (3) (*b*), 25, 66, 68 (2); *Sch.* 9.
Statute—Retroactive effect.

By section 24 (1) of the Landlord and Tenant Act, 1954, "A "tenancy to which this Part of this Act applies shall not come "to an end unless terminated in accordance with the provisions of "this Part of this Act"; and by subsection (3) of that section: "Notwithstanding anything in subsection (1) of this section . . . "(*b*) where, at any time when a tenancy is not one to which this "Part of this Act applies, the landlord gives notice to quit, the "operation of the notice shall not be affected by reason that the "tenancy becomes one to which this Part of this Act applies "after the giving of the notice." The Act received the royal assent on July 30 and came into force on October 1; but regulations prescribing forms of notices for the purposes of the Act were brought into operation on August 27, in the exercise of powers to make and bring into operation such regulations "at any "time after the passing and before the commencement of" the Act.

Three days later, on August 31, landlords gave notice to quit, expiring on October 4, to a tenant of business premises to which the Act applied. The notice was not in the form prescribed by the regulations:—

Held, that under the provisions of the Act and the Ninth Schedule thereto, a notice to quit, issued after the Act had been passed and after the regulations had come into operation, and purporting to take effect after the Act had come into force, must be in the form prescribed under the Act; and that as the landlord's notice was not in that form, the tenancy, by virtue of section 24 (1), had not come to an end; nor was the notice saved by the provisions of subsection (3) (*b*) of section 24, since that subsection applied only to tenancies where there had been a change of user of the premises between the serving of the notice and its taking effect, and the present tenancy was not of that character.

Decision of Devlin J. ([1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731) affirmed.

APPEAL from Devlin J.

By an agreement in writing dated December 7, 1953, between landlords, Orman Brothers Ld., and a tenant, Woolf Barnett Greenbaum, the landlords let to the tenant the top and second floor of factory premises at 167–173 Goswell Road, Finsbury, for one year certain from March 9, 1953, at a rent of £20 a week. The tenancy expired on March 9, 1954, after which the tenant continued in possession as a four-weekly tenant. By a notice in writing dated August 31, 1954, the landlords gave the tenant notice to quit the premises on October 4, 1954.

On July 30, 1954, the Landlord and Tenant Act, 1954, received the royal assent, and by section 70 (2) came into force on October 1. On August 19, the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954, No. 1107) were made and were brought into operation on August 27, in the exercise of the powers conferred on the Lord Chancellor by section 66 and the Ninth Schedule to the Act to make such regulations "at any "time after the passing and before the commencement of this "Act so as to bring the regulations into operation at any time "after they are made." The tenancy was a tenancy of business premises to which, it was agreed, the provisions of the Act of 1954 applied.

In an action for possession by the landlords, the tenant contended that as the tenancy was one to which the Act of 1954 applied, and the notice to quit was not in the form prescribed under that Act, the tenancy, by virtue of section 24 (1),[1] was not

[1] Landlord and Tenant Act, 1954, s. 24 (1): "A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions "of this Part of this Act."

S. 24 (3): "Notwithstanding any-"thing in subsection (1) of this sec-"tion . . . (*b*) where, at a time when "a tenancy is not one to which this "Part of this Act applies, the land-lord gives notice to quit, the "operation of the notice shall not be "affected by reason that the tenancy "becomes one to which this Part of "this Act applies after the giving of "the notice."

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terminated by the notice. The landlords contended that, as the notice had been given before the Act came into force on October 1, the Act was not retrospective so as to invalidate the notice; alternatively, that, even if section 24 (1) applied, the notice was still a good notice by virtue of section 24 (3) (*b*).[1]

Devlin J. on December 3, 1954,[2] held that as on October 1 the notice to quit did not comply with the requirements of the Act, the tenancy had not come to an end; and that the notice was not saved by the provisions of section 24 (3) (*b*).

The landlords appealed.

Roy Wilson Q.C. and *Montague Waters* for the landlords.
Charles Lawson for the tenant.

LORD GODDARD C.J. This is an appeal from a judgment of Devlin J., who has held that a notice to quit given by a landlord on August 31, 1954, to terminate the lease of business premises on October 4 is rendered ineffective by the Landlord and Tenant Act, 1954.

The judgment of the judge, in my opinion, is entirely right and impeccable, and I should be quite content to adopt it as my own, but out of deference to the argument which Mr. Wilson has addressed to this court I will add a few words. The main point which arises on the appeal is this. The Landlord and Tenant Act, 1954, received the royal assent on July 30, 1954, and by the provisions of section 70 the Act was to come into force on October 1, 1954. Therefore it appears at first sight an attractive argument to say in those circumstances that the notice to quit which was served in this case was a good notice at common law and apart from the provisions of the Act; but Devlin J. held that that argument was not sound.

Section 23 of the Landlord and Tenant Act, 1954, provides: "(1) Subject to the provisions of this Act, this Part of this Act "applies to any tenancy where the property comprised in the "tenancy is or includes premises which are occupied by the "tenant and are so occupied for the purposes of a business "carried on by him or for those and other purposes." By section 24: "(1) A tenancy to which this Part of this Act applies "shall not come to an end unless terminated in accordance with "the provisions of this Part of this Act. . . ."

The first thing I would say is that "A tenancy to which this "Part of this Act applies" clearly means only a tenancy in respect of a business carried on for professional or other purposes mentioned in section 23, and has nothing to do with the commencement of the Act. It concerns the same sort of premises as those mentioned in section 23; that is to say, premises to which "this Part of this Act" applies.

Section 25 provides: "(1) The landlord may terminate a "tenancy to which this Part of this Act applies by a notice given

[1] See note on p. 251. [2] [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731.

" to the tenant in the prescribed form specifying the date at " which the tenancy is to come to an end (hereinafter referred " to as ' the date of termination ')."

The effect of this section, I do not think it can be denied for a moment, is that when the Act is in operation, the landlord can only terminate a lease of property to which this part of the Act applies by giving notice in the prescribed form. The object of the Act, as is shown in its long title, is, among other things, to provide security of tenure for occupying tenants under certain leases of residential property at low rents, and for occupying sub-tenants of tenants under such leases, and to enable tenants occupying property for business, professional or certain other purposes, to obtain new tenancies in certain cases; and the notice to quit which has to be given by a landlord is a somewhat lengthy and formidable document telling the tenant whether the landlord is willing to negotiate a new lease or whether he must go to the court, and setting out, no doubt succinctly, the provisions of the Act.

Therefore the position is that the Act was passed on July 30 and was to come into force on October 1; and when the Act is in force there can be no doubt that the landlord must give a notice in the prescribed form. I do not think anyone doubts that the words " A tenancy to which this Part of this Act applies shall not " come to an end unless terminated in accordance with the " provisions of this Part of this Act " means " shall not come to " an end unless it is brought to an end by the method laid down " by the Act "; that is to say, by notice to quit in the prescribed form.

Section 66 of the Act is in these terms: " (1) Any form of " notice required by this Act to be prescribed shall be prescribed " by regulations made by the Lord Chancellor by statutory " instrument."

If the matter stood there, there is no doubt that under section 37 of the Interpretation Act, 1889, which applies to all Acts unless the contrary intention is shown or unless it is expressly excluded, the Lord Chancellor, who is the rule-making authority, could have made any rules or regulations which were necessary for the working of the Act when it came into force. Section 37 states: " Where an Act passed after the commencement of this " Act is not to come into operation immediately on the passing " thereof, and confers power to make any appointment, to make, " grant, or issue any instrument, that is to say, any Order in " Council, order, warrant, scheme, letters patent, rules, regula- " tions, or byelaws, to give notices, to prescribe forms, or to do " any other thing for the purposes of the Act, that power may, " unless the contrary intention appears, be exercised at any time " after the passing of the Act, so far as may be necessary or " expedient for the purpose of bringing the Act into operation " at the date of the commencement thereof, subject to this " restriction, that any instrument made under the power shall not,

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" unless the contrary intention appears in the Act, or the contrary " is necessary for bringing the Act into operation, come into " operation until the Act comes into operation."

That is perfectly clear. The object of the Interpretation Act is that provision very often has to be made for the working of an Act which is to come into operation on a certain date, and the rules or regulations have to come into force at once directly the Act does, and therefore the rules and regulations can be made before the Act comes into force; but ordinarily under the provisions of the Interpretation Act those rules will not come into force, unless the contrary appears, before the Act itself comes into force. In this case, however, it is quite clear that the contrary does appear, because in the Ninth Schedule to the Act of 1954 there is a provision that: " 1. The power under section " sixty-six of this Act to make regulations prescribing forms of " notices for the purposes of this Act may be exercised at any " time after the passing and before the commencement of this " Act so as to bring the regulations into operation at any time " after . . . they are made; and where the date, or the end of a " period, specified by a notice which is given in a form so pre- " scribed falls after the time at which this Act comes into " operation the notice shall not be invalid by reason only that it " was served before that time." There an express power is given to the Lord Chancellor to make regulations under this Act, which shall come into force whenever he chooses and before the Act itself comes into force.

I desire to say that we are here considering a notice to quit given after the regulations came into force—because the regulations came into force on August 27—which became effective on a day after the Act came into force. It is not a notice to quit given before the regulations came into force, nor is this a case in which the notice to quit was given for a day before the Act came into force. It is a case where the regulations had come into force three days before the notice to quit was given, and where the date of expiry of the notice to quit was October 4, that is, three days after the Act came into operation.

When one bears that in mind, it is really unarguable that the landlord had not to use the statutory form, because the provisions of the Act are, first of all, that the Lord Chancellor can by regulation prescribe when a particular form is to become effective; that is to say, he can prescribe the date on which the regulation is to come into operation. The regulation came into force on August 27, and by that time a particular form of notice to quit had been prescribed. That notice having been prescribed, section 25 provides: " (1) The landlord may terminate a tenancy " to which this Part of this Act applies by a notice given to the " tenant in the prescribed form," and by section 24: " (1) A " tenancy to which this Part of this Act applies shall not come " to an end unless terminated in accordance with the provisions " of this Part of this Act . . ." So the tenancy does not come

to an end unless it has been terminated in the way laid down in the Act, and that is by means of giving the prescribed form of notice. If it had not been for the words of the Ninth Schedule as to the Lord Chancellor's regulations coming into force at the time they are made and before the Act comes into force, the matter would have been unarguable the other way, and Mr. Wilson's point would be quite right; but I think I have already said enough to show that I cannot read the words in section 24, "A tenancy to which this Part of this Act applies," as meaning that the Act is not to apply to any tenancy before the Act comes into operation. "A tenancy to which this Part of this Act "applies" I think only refers to the class of tenancy, that is to say, the tenancies mentioned in Part II, which may for convenience be called business premises.

The only other point on which it is necessary to say a word is this: Mr. Wilson's submission was that if we were against him on the point which I have just decided, the position is saved for him by section 24 (3). [His Lordship read section 24 (3), and continued:] The judge thought that that subsection quite clearly meant that if the tenancy was, say, of a private house to which Part II did not apply at all, and notice to quit that house was given, such notice would remain good and effective although before it became effective the house had been turned into a shop, and therefore would otherwise be the subject of Part II of the Act. That view is one with which I entirely agree. I think that Devlin J.'s judgment was perfectly right, and that this appeal fails.

SINGLETON L.J. I agree.

ROMER L.J. I agree. Section 68 (2) of the Act provides: "The transitional provisions set out in the Ninth Schedule to "this Act shall have effect." Then the second part of paragraph 1 of the Ninth Schedule provides: " . . . where the date, "or the end of a period, specified by a notice which is given in a "form so prescribed"—that means prescribed by rules made by the Lord Chancellor—"falls after the time at which this Act "comes into operation"—that is, October 1—"the notice shall "not be invalid by reason only that it was served before that "time."

It appears to me an almost irresistible inference from that that the legislature, in stating that provided that a notice which is given before October 1 is in the prescribed form it shall not be invalid by reason only that it was served before that time, is indicating that any notice which is served before that time and which is not in the prescribed form is invalid, and it seems to me that that presents an obstacle to Mr. Wilson's argument which is wellnigh insuperable.

The next point is, that unless Parliament intended that the regulations which could be made and brought into operation

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Romer L.J.

before the commencement of the Act were to have immediate obligatory force and effect, I find the greatest difficulty in seeing what the object of providing for these regulations was, because if the whole object was merely to show the landlord beforehand what the form of notice would be after the Act came into operation, the regulations could have been made under section 37 of the Interpretation Act; and I think Mr. Wilson's explanation, or attempted explanation, of the point by referring to the Landlord and Tenant Act, 1927, and the Leasehold Property (Temporary Provisions) Act, 1951, is not a satisfactory or adequate explanation. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *E. Kleinman; Tringhams.*

M. M. H.

[PROBATE, ETC., DIVISION.]

1955
Jan. 17.
Davies J.

* CARAS *v.* CARAS.

[Practice Note.]

Husband and Wife—Maintenance—High Court—Jurisdiction—Parties resident in same house—Neglect to maintain—Matrimonial Causes Act, 1950 (14 *Geo.* 5, *c.* 25), *s.* 23.

Originating summons.

After a dispute between the parties in November, 1952, a husband and wife continued to live in the same house but slept apart and never resumed a normal relationship. In September, 1953, the husband reduced the wife's housekeeping allowance from £11 to £7 a week, and in October, 1953, removed the wife from her position as joint director with him in a company from which the husband received £2,000 a year and the wife £500 a year as directors. The husband continued to pay for the outgoings of the house in which the parties were still living when the wife issued a summons under section 23 of the Matrimonial Causes Act, 1950,[1] on the ground of wilful neglect to provide reasonable maintenance,

[1] Matrimonial Causes Act, 1950, s. 23 (1): "Where a husband has "been guilty of wilful neglect to "provide reasonable maintenance for "his wife or the infant children of "the marriage, the court, if it would "have jurisdiction to entertain proceedings by the wife for judicial "separation, may, on the application "of the wife, order the husband to "make to her such periodical payments "as may be just; and the order may "be enforced in the same manner as "an order for alimony in proceedings "for judicial separation."

(2) "Where the court makes an "order under this section . . . it "may . . . order that the husband "shall . . . secure to the wife the "periodical payments . . ."

and in which the parties continued to live up to the date of the hearing.

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P. H. M. Oppenheimer for the wife.
M. P. Picard for the husband.

DAVIES J., after consideration of the facts and financial circumstances, made an order for periodical payments by the husband to the wife of £11 a week, less tax, upon the basis that the wife was going to continue to live in the house, and that the husband was going to continue to discharge all the outgoings, saying that if the wife were turned out of the house, or if the husband did not pay the bills, then she would have to take such further steps as were available to her.

Solicitors: *Headley, Dalzell & Dickinson; Amphlett & Co.*

J. B. G.

[COURT OF APPEAL.]

*RANDALL *v.* TARRANT.

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1955
Feb. 4.

[Plaint No. K. 918.]

Evershed M.R., Jenkins and Morris L.JJ.

Road Traffic—Negligence—Collision—Inference from facts—Stationary vehicle—Narrow clearance—Standard of care demanded of driver of moving vehicle—"All possible care."

Nuisance—Highway—Obstruction—Parking—Driver a trespasser on adjoining land—Whether legality of parking tainted.

The defendant drove a tractor, which was towing a baler, along a public highway in daylight and collided with a stationary car belonging to the plaintiff. The car had been parked close to the near side hedge and the plaintiff and his son had gone into a field belonging to the defendant at the side of the road, leaving two people in the car. The clearance between the car and the baler at its widest point was only about 6 to 9 inches. The defendant's servant was sitting on the baler and he shouted to his master that he thought that there was sufficient room to pass but he did not dismount to confirm his belief and the defendant drove on, merely slackening speed to about two miles an hour, and attempted to pass:—

Held, that the defendant was negligent. A driver on a highway who sees a stationary vehicle has to take all possible care to avoid a collision. If there is insufficient room to pass, he is negligent if he attempts to do so. If, however, there is enough room but a collision occurs, then prima facie he is again negligent, the onus being on him to show that he has taken all the steps which a reasonable man would take in the circumstances, that is, all possible care to avoid a collision.

(2) That the parking of the car was not, on the facts, so intimately bound up with an act of trespass on the defendant's field as to make the car itself either the symbol of a trespass or the instrument of a nuisance.

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APPEAL from Judge Elder-Jones sitting at Windsor County Court.

On August 3, 1953, which was August bank holiday in that year, the plaintiff, H. H. Randall, accompanied by his wife, another lady, his son and a dog drove a car from their home to the neighbourhood of Windsor. At about 7 p.m. they came to a lane about 15 feet wide leading only to a farm of which the defendant, R. H. Tarrant, was the tenant in possession. The lane, which was a public highway, was bounded on both sides by fields forming part of the farm.

The plaintiff drove his car a short distance up the narrow highway, drew it into the near side and got out, accompanied by his son and the dog. He left his wife and the other passenger in the car. While the car was stationary in the highway the defendant, who had been hay-making, drove out of one of his fields into the lane on a tractor which was towing a baler, measuring 9 feet at its widest point, that is across a string box at the back. Having regard to the width of the lane the margin which was allowed for the defendant to pass the plaintiff's stationary car without impact was only 6 inches to 9 inches, a margin which the county court judge described as a "dangerous margin of safety"; adding the following note: "By the rather "obscure expression 'dangerous margin of safety' I intended "to convey that with only 6 inches to 9 inches maximum clear- "ance available between his own string box and the car's wing "the defendant towing the baler with a tractor could not pass the car without considerable risk of touching it." The defendant reduced his speed to about 2 miles an hour and being reassured by his servant, one Bride, who was sitting on the baler, that there was sufficient room to pass, he attempted to drive through the gap. The tractor went safely past and so did the front part of the baler; but the string box at the back struck the offside wing of the car and damaged it. At the material time the plaintiff and his son were trespassers in the hayfield at the side of the lane.

The plaintiff brought an action against the defendant alleging negligence and claiming damages.

The county court judge held that the defendant was not guilty of negligence and dismissed the action. He held that if the plaintiff had been entitled to succeed the damages, including special damage, should be assessed at £21 1s. 6d.

The plaintiff appealed.

John Stocker for the plaintiff.
Geoffrey Lane for the defendant.

In addition to the cases referred to in the judgments, the following was cited in argument: *Edwards* v. *Railway Executive*.[1]

[1] [1952] A.C. 737; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430.

EVERSHED M.R. This case is by no means easy and has raised questions of some interest. When Mr. Stocker first began to open the appeal I thought that he was faced with a short but fatal answer to the appeal; for this was an action for damages for negligence and there is here a finding by the judge that the defendant was not negligent. Prima facie that would be a finding of fact from which, in a county court case, there could be no appeal to this court; but after further attention to the argument of Mr. Stocker, and after hearing argument also from Mr. Lane, I have now reached a conclusion contrary to that which I was first inclined to entertain. [His Lordship stated the facts and continued:] There was an acute conflict of evidence upon one matter. The plaintiff and his son alleged that they were in the road at the time when the accident occurred and that they saw what happened. They were perhaps not unnaturally somewhat annoyed and, if I may guess somewhat from the conversation which later took place, the defendant, also perhaps not unnaturally, became annoyed too. But the judge plainly disbelieved the plaintiff and the plaintiff's son. In particular, he wholly discredited the somewhat extravagant estimate which the son gave of the speed of this tractor pulling a baler in a narrow lane, which the son said was going at no less than 25 miles an hour.

Another matter upon which they were disbelieved has a bearing on a point of great interest taken by Mr. Lane. The judge said (I quote from the note of his judgment which, as amended, has been agreed between the two sides): "I am led to "believe plaintiff and son did not see the accident and were, in "fact, the other side of the hedge." The significance of that finding is this. On the other side of the hedge was the defendant's field on which was standing hay. The plaintiff and his son went at some stage clearly into the field, for they were warned to go off it by a policeman. They were in truth trespassers. According to the defendant, the plaintiff and his son at the time of the accident were still in the field trespassing. The judge accepted in this matter, and indeed in other matters of conflict, the evidence of the defendant in preference to that of the plaintiff and his son.

The case appears, therefore, to be of this character. A man driving a tractor with a large agricultural implement in tow on a public highway in daylight sees stationary on that highway a motor-car. As the highway is narrow the inevitable question which arises is whether there is or is not room to pass. If there was no room to pass, a man who attempts so to do without pausing to make further investigation, prima facie must be negligent if, as would be inevitably the result, a collision occurs. Mr. Lane did not contest that proposition. But here there was room to pass. There were some 6 inches to 9 inches to spare between the two vehicles at the greatest width of the baler; but in regard to that the judge used this pregnant phrase: "It was a

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" dangerous margin of safety," adding a note which I take to mean that the road being so narrow and the baler so wide, to pass in such circumstances was an enterprise attended with risk. Obviously great care was needed if a collision was to be avoided.

In those circumstances what is the evidence of the care taken? Accepting, as the judge did, the evidence of the defendant and his servant, Sidney Bride, it appears that as the defendant approached the plaintiff's motor-car he reduced his speed to the very low rate of 2 miles an hour or thereabouts. Bride was seated somewhere at the back of the trailed baler and he shouted to the defendant: " I think we can get through " guvnor." Acting on that cheerful prophecy, the defendant proceeded on his way; but unfortunately the prophecy was falsified and the string box struck the car. The defendant said, and was believed by the judge, that he did not see that at the time two passengers were in the car. The conclusion which the judge reached on that matter and on that evidence was: " Defendant reduced speed to safety consistent with long vehicle " behind him and signals from man behind him and was directed " by man and was not guilty of negligence in attempting to pass " and proceed on his lawful occasion. It is too much to say he " should be precluded from moving as he had a small margin " of safety. He saw nobody in the car and he had to make up " his mind to give up or to go on and attempt to do it. He was " justified in making the attempt with all possible care and with- " out excessive speed. Not insurer of plaintiff's car against " possibility of its being struck."

Mr. Lane said, with force, that there was evidence which justified the vital conclusion that the defendant was justified in making the attempt " with all possible care." But in my judgment there was not. A driver going along a highway who sees a stationary vehicle or other object on the highway plainly has to take " all possible care " to avoid a collision and, if there is in fact room to pass but nevertheless a collision occurs, then it seems to me that, prima facie, he has failed to discharge the duty which those circumstances have laid upon him. I am unable to conclude that merely by reducing the speed and thereafter relying on the prognostication of the servant behind him, the defendant was taking all the care which he should have done. It is, I hope, not illegitimate to have in mind the kind of operation in which so many of us are sometimes engaged when driving a motor-car in or out of a place where there is very little room between other cars. It is common knowledge that if the driver has a friend or other person available to help, that other person often watches and tells the driver, as he slowly proceeds, if it is apparent that there is not sufficient room to pass. Quite apart from the fact that greater care would have disclosed the presence of the two ladies in the car, there is, in my judgment, no evidence here to support the view that " all possible care " was in fact taken. It is true, as Mr. Lane suggested, that the

impact might have been caused by roughness on the surface of the road throwing the trailer slightly off its proper line and thus casting it, so to speak, on to the motor-car. If there had been any evidence that that was so, it might well have been that the accident would be properly attributed to something that reasonable care in all the circumstances could not have foreseen; but to suggest that that was the cause is merely to speculate. Prima facie, given the circumstances of a stationary motor-car on a highway and another car approaching with room to pass, the onus is on the driver of the motor vehicle if an accident occurs to show that " all possible care " was taken: for if there is room to pass, yet a collision has occurred and the moving vehicle has struck the stationary vehicle, how did it come to do so?

I have read the judge's phrase " all possible care," but I do not, of course, forget that in judging of negligence the standard is that of reasonableness. Given the circumstances which I have tried to state, the test is whether the driver took all the careful steps which a reasonable man in those circumstances should have taken. I think that in such circumstances the reasonable man would indeed take what may be called in ordinary language " all possible care," at any rate a greater degree of care than is shown by the facts of the present case which amounted to no more than driving at a very slow speed in reliance upon the shouted assurance of Mr. Bride seated somewhere on the baler. Upon that matter, therefore, I conclude that the defendant is not shown to have taken all the steps which reasonably ought to have been taken in the circumstances.

Mr. Lane also took another point. The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimize such a use. Mr. Lane referred to the well-known case of *Hickman* v. *Maisey*,[1] in which the defendant, who was the proprietor of a publication which gave to its public accounts of the doings of racehorses in training, walked up and down a highway making notes of the performance of the horses in training for the better information of his paper. It was held that that was not a legitimate use of the highway as such by a member of the public and, since the racehorses' trainer was in lawful possession of the land adjoining the highway, the defendant was thereby trespassing.

Mr. Lane sought to contend that that case was analogous to the present one. He said that, on the facts, it was found that the plaintiff and his son at the critical point of time were trespassing

[1] [1900] 1 Q.B. 752; 16 T.L.R. 274.

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on the defendant's field. In so far as they were trespassers on the field, the motor-car left standing by them on the highway was, equally, trespassing: it constituted a part of their trespass. In other words, it was no longer a legitimate use of the highway by the plaintiff to put the car there and then to trespass into the defendant's fields. Alternatively, Mr. Lane said that the motor-car standing thus on the highway was prima facie an obstruction and, therefore, a nuisance; and the obstruction could not be justified since its manifest object or the activity with which it was shown to be essentially connected was the wrongful activity of the plaintiff and his son in trespassing on the field. Mr. Lane said that, given those premises, the standard of care required from the defendant was for all practical purposes discharged. He owed to such a wrongdoer or his motor-car no duty of care such as the user of a highway in ordinary circumstances is entitled to demand; his obligation was limited to that which Lord Hailsham expressed in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*[2]: "An occupier is in such a case"—that is, where a trespasser comes on to the premises—"liable only where the "injury is due to some wilful act involving something more than "an absence of reasonable care. There must be some act done "with the deliberate intention of doing harm to the trespasser, or "at least some act done with reckless disregard of the presence "of the trespasser." I agree with Mr. Lane that, if the premises are established and that is a correct statement of the consequent extent of liability on the defendant, the defendant beyond doubt amply satisfied what was required of him. No similar case has been so far before the courts, according to the reports, or at least so far as the investigations of counsel have discovered. On some future occasion it may be necessary to consider the application of those principles. But in the present case I am satisfied that the facts do not justify the premise of the argument. The mere circumstance that, as the judge found, the plaintiff and his son were on the wrong side of the hedge at the time when the impact occurred, does not seem to me to involve the conclusion that, in leaving the motor-car where he did on the road the plaintiff either was, in respect of the motor-car, a trespasser throughout, or was by the motor-car's presence committing a nuisance on the highway. It does not require much imagination to picture the kind of circumstance that so often arises, particularly on a bank holiday, where a driver of a motor-car, having driven for some time, pauses to rest. He may or may not, thereafter, trespass on somebody's land. But it seems to me to be going in this case altogether too far to hold that the parking of the car was so bound up with the act of trespass which was ultimately proved as to make the car itself either the symbol of a trespass or the instrument of a nuisance. I am, therefore,

[2] [1929] A.C. 358, 365; 45 T.L.R. 267.

unable to accept that argument in support of the judge's conclusion.

I desire to make one other reference to a case which was heard in this court, *Foster* v. *Bush House Ld.*[3] As I am reported to have said, the case was a most difficult one. It was a case in which a waitress unfortunately stumbled or tripped against the leg of a chair on which a diner was sitting and thereby decanted some soup on to the lady or her dress. The judge in that case held that negligence had not been established. I remember the great difficulty which the Court of Appeal entertained and I think I am right in saying that one or more of us expressed the view that if we were trying the case at first instance we felt strongly disposed to think that we should have come to a different conclusion. But a waitress in a busy restaurant has to work quickly, carrying food; she is apt to be called for by other customers, which inevitably distracts her attention to some extent from where she is going. That case, therefore, seems to me to be different from that of a man driving a tractor in daylight in a lane where he sees plainly a stationary motor-car. If, as I assume, the court rightly held in the *Foster* case [3] that there was evidence to support the judge's finding acquitting the waitress of want of reasonable care, it does not seem to me to follow that the facts in this case equally had the effect of justifying a conclusion of no negligence in favour of the defendant.

Although I appreciate the great difficulty of the present case, I have, on the whole, come to the conclusion that the evidence of the defendant did not discharge the prima facie conclusion from the collision in the circumstances of the case, namely, the conclusion that he had not taken all reasonable care. I, therefore, think that the plaintiff should have recovered judgment for £21 1s. 6d. and I would allow the appeal.

JENKINS L.J. I agree. In my opinion it follows from the facts as found by the judge that as a matter of law the defendant in this case should have been held guilty of negligence. [His Lordship referred to the facts, and continued:] I think it must have been obvious to the defendant, when he attempted to pass the car, that he was undertaking an operation fraught with considerable risk. In his evidence he said: "When I saw "the car, which was unattended, I just thought we could not "get through; then I thought we could. My man was on the "baler and he shouted: 'I think we can get through, guvnor.'" The defendant said that the car was unattended. In that he was in error. The plaintiff and his son had left the car, but the plaintiff's wife and another passenger were in the car. The wife was sitting in the driver's seat. In those circumstances it seems to me that there is force in the dilemma put against the defendant. Either there was room to pass or there was

[3] (1952) 96 S.J. 763.

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not. If there was room to pass then the fact that he damaged the plaintiff's vehicle in passing was, prima facie, evidence of negligence. If there was no room to pass, then he was negligent in attempting to do so when there was no room. If the plaintiff's vehicle had in fact been unattended, it may very well be that the defendant would have been justified, having assured himself that it was unattended, in going on his way with all the care he could. It might be unreasonable to expect him to hold up his operations until such time as the owner of the car chose to return. But he took no steps to satisfy himself that the car was unattended. If he had taken the simple precaution of stopping his vehicle, going forward and seeing whether there was anyone inside the car, the car could have been driven away to a place which would have allowed the tractor and the baler towed by it sufficient room to pass and the accident would never have happened. Accordingly, I agree with Evershed M.R. that the defendant should be found guilty of negligence.

As to the defence based on trespass, I need only say that I agree that the evidence before the court has not established that the plaintiff by his motor-car was trespassing on the road, or that the car standing on the road was a nuisance. Accordingly, it is unnecessary to express any view of the consequences which might have ensued if the presence of the car had been shown to be wrongful in either of these two ways. I agree that this appeal should be allowed.

Morris L.J. I also agree. It seems to me that if there was no room for the defendant to have passed then he ought not to have proceeded. If there was room to enable him to pass and to get through in safety, then it seems to me that he should have got through in safety and that a failure to do so convicts him of negligence. For on the facts of this case I can find no material for saying that, in what was, after all, a very ordinary and often-experienced situation, any entirely unexpected circumstance came into play. In my judgment the evidence showed that there was negligence in the defendant. There was a failure to take any of the possible courses open to him which a reasonable man could have adopted. He could have stopped. He could have gone to the car. If he had done so he would have found the two ladies in it, one of them being at the driving seat. If he had wanted the car moved, either the lady was able to move it or her menfolk were within very easy call and they could have moved the car. If it had not been thought necessary to move the car then the defendant could have put his servant on the road and, with the guidance of his servant so placed, he could have proceeded at such a speed and in such a manner as to avoid touching the stationary vehicle. With the exercise of reasonable care I am confident that no impact in this case need have occurred.

In my judgment, in the light of the facts as found and the facts admitted, it is not right to say that the defendant took all reasonable steps but, on the contrary, it is shown that he was negligent and that it was his negligence which resulted in the damage caused to the plaintiff's car.

Appeal allowed; Plaintiff awarded £21 1s. 6d. *damages, costs of appeal and half costs in county court on scale* 3.

Solicitors: *John Holt, Hearts of Oak Buildings, Euston Road, N.W.*1; *Horwood & James, Aylesbury.*

E. D.

[PROBATE, ETC., DIVISION.]

* THE RENE (OWNERS) *v.* THE ALENQUER (OWNERS).

THE ALENQUER.

THE ALENQUER (OWNERS, MASTER AND CREW) *v.* THE RENE, HER CARGO AND FREIGHT (OWNERS).

THE RENE.

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Jan. 26;
Feb. 1, 2, 3.

Willmer J.

Shipping—Collision—Salvors' vessel in collision with salved property—Standard of care—Principles applicable.

Shipping — Salvage — Services at request — Vessel answering S.O.S. and distress signals—Misconduct of salvors—Negligent navigation—Forfeiture of award.

The *Rene* with engines broken down was in imminent danger of drifting onto the Fàrilhoes Rocks, off the coast of Portugal. Distress signals were sent up from the *Rene*, and the *Alenquer*, in answer to these signals and to an S.O.S. flashed to her, deviated from her voyage to assist the *Rene*. On the vessels nearing each other, the master of the *Rene* requested to be taken in tow. The *Alenquer* collided with the *Rene* during an attempt at close quarters to establish a towing connexion by heaving line, and the *Rene* suffered extensive damage. Thereafter at the request of the master of the *Rene*, the *Alenquer* stood by until the *Rene* had drifted out of all immediate danger. The *Rene* was eventually towed safely to Lisbon by a tug.

Willmer J. found that the *Alenquer* had come to the *Rene* to render such services as were possible and later at request had stood by the *Rene*; that the services rendered had conferred no actual benefit on the *Rene*; and that the collision was occasioned by the action of the *Alenquer*, adopting an unseamanlike manoeuvre when attempting to make fast to the *Rene* and coming astern while in close proximity to the *Rene*:—

Held, (1) that the *Alenquer* came to the *Rene* on a salvage basis and, having done what she was requested to do, would ordinarily be entitled to a salvage award; but (2) that, although the court should err, if anything, on the side of leniency towards salvors, the

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THE ALENQUER.

misconduct of the *Alenquer* exceeded that permissible to a salvor and she was liable for the damage occasioned by the collision; and (3) that the *Alenquer* had rendered services worthy of only a slight award and in the circumstances that award was forfeited.

The Dart (1899) 8 Asp.M.L.C. 481 and *The Stiklestad* [1926] P. 205; 42 T.L.R. 118 applied.

Per curiam. Where a service is a substantial one, such as would be likely to warrant a very substantial award, the fact that in the course of rendering such a service a salvor is to blame for a relatively trivial collision, causing only minor damage, would not be a sufficient reason for depriving him altogether of any award.

ACTIONS.

The owners, master and crew of the *Alenquer*, a motor-vessel of 5,311 tons gross, 435 feet in length, 58·8 feet in beam and valued at £475,594 claimed a salvage award from the owners of the *Rene*, her cargo and freight. The *Rene* was a motor-vessel of 1,276 tons gross, 247 feet in length, 37 feet in beam valued at £173,607 and her cargo and freight were valued at £31,000. The owners of the *Rene* in a separate action against the owners of the *Alenquer* claimed for damage occasioned to the *Rene* by a collision with the *Alenquer* during the salvage services. The owners of the *Alenquer* counterclaimed for the damage occasioned to their vessel by reason of the collision. Both actions were tried together by order of the court.

The engines of the *Rene* broke down off the coast of Portugal during the course of a voyage from Antwerp to Naples. By means of radio-telephone the master of the *Rene* was able to contact the ship's agents in Lisbon and it was arranged that the tug *Estoril* would come to the assistance of the *Rene*. The *Rene* was drifting in the regular track of shipping passing north and south along the Portuguese coast, but in a southerly direction towards the Farilhoes Rocks at a rate of about 2 knots. The wind was of an appreciable force and at this rate of drift the *Rene* would have reached these rocks at about 4 o'clock in the morning of August 22, 1952. The *Rene* was able to communicate with passing vessels by means of visual signals. On the night of August 21, since there was no sign of the tug *Estoril*, and the situation had become dangerous, distress signals were given. The *Alenquer*, which was in the same ownership as the *Estoril*, was in the vicinity and had been warned of the situation of the *Rene*. Those on board the *Alenquer* were on the lookout for the *Rene* and, on sighting the distress signals, the *Alenquer* deviated to come to the assistance of the *Rene*. Later an S O S signal was flashed from the *Rene* to the *Alenquer* and when the vessels closed the master of the *Rene* requested to be taken in tow. Attempts were made throughout the night to pass a towing hawser by means of buoys and rockets. These attempts were unsuccessful and in the morning the *Rene* had drifted clear of the Farilhoes Rocks, but was still in the vicinity of these rocks. An attempt was then made to bring the vessels into

close proximity to pass a line to the *Rene*. During this attempt the *Alenquer* collided with the *Rene*. The master of the *Rene* signalled to the *Alenquer* to abandon any further attempts at towage. At the request of the master of the *Rene* the *Alenquer* stood by the *Rene* and a message was sent to the shore detailing the position of the vessels. Later when the *Rene* had drifted out of all immediate danger the *Alenquer* left and continued on her voyage. Subsequently she returned on instructions from her owners and made an abortive search for the *Rene*, which was finally abandoned on further instructions when the tug *Estoril* had the *Rene* in tow. The *Rene* eventually was safely towed to Lisbon. The damage to the *Alenquer* was £981 12s. 11d. and that to the *Rene* was considerably more extensive.

In the collision action the owners of the *Rene* contended that the *Alenquer* was negligently navigated, in that an attempt to make fast was made in an unseamanlike manner, and, when in a position of close proximity to the *Rene*, the engines of the *Alenquer* were put astern or were not put ahead in due time. The owners of the *Alenquer* denied these charges and counterclaimed against the owners of the *Rene* alleging failure to put out fenders. In the salvage action the owners of the *Alenquer* claimed an award for "engaged services" rendered to the *Rene*. These services were alleged to consist of standing by the *Rene*, sending a wireless message of her position and making a search for her. The owners of the *Rene* denied salvage.

J. B. Hewson and *R. F. Stone* for the owners of the *Rene*.

J. Roland Adams Q.C. and *P. T. Bucknill* for the owners of the *Alenquer*.

A nautical assessor sat with the judge.

The following cases and authority were cited in argument: Kennedy's Law of Civil Salvage, 3rd ed., pp. 33, 159, 162, 163, 177 and 178; *The Thetis* [1]; *The C. S. Butler* [2]; *The Stiklestad* [3]; *The Dart* [4]; *The Dwina*.[5]

WILLMER J. stated the facts and found that the *Alenquer* had not conferred any benefit on the *Rene* by her towage attempts, by standing by, or by sending the wireless message of her position, since there was no evidence of the *Estoril* having received and acted on the message. He continued: That makes it necessary for me to consider whether the *Alenquer* comes within the exceptional class of cases where salvage is awarded for "engaged services." This is a case in which at any rate some of the necessary conditions are, on anybody's

[1] (1869) L.R. 2 A. & E. 365; 3 Mar.L.C. 357.
[2] (1874) 2 Asp.M.L.C. 237; L.R. 4 A. & E. 178.
[3] [1926] P. 205; 42 T.L.R. 118.
[4] (1899) 8 Asp.M.L.C. 481.
[5] [1892] P. 58; 7 Asp.M.L.C. 173.

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case, satisfied. The *Rene* was in fact ultimately saved and taken to a place of safety. Undoubtedly there was some request made by the *Rene* to the *Alenquer*, and I think it may be important to consider exactly what that request was. It may perhaps be useful to refer first to what I think is the locus classicus on the subject of "engaged services" to see how the facts of the present case come within the principles enunciated. I refer to the remarks of Phillimore J. in *The Dart*.[1] There the matter is summed up in three sentences: "If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect. "If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. "If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices, but does no good at all, then it seems to me he is not entitled to salvage." My finding that the *Alenquer* in fact conferred no benefit on the *Rene* rules out the application of the proposition in the second sentence of that extract. The contest between the parties comes down to whether this case is governed by the first sentence or whether it is governed by the third sentence.

For the *Rene*, it is alleged that on the evidence the only engagement of the *Alenquer* was an engagement to tow her to Lisbon, or at least to tow her out of immediate danger. If that were the only engagement entered into, it is clear on both sides' case that that engagement was never carried out. On that basis the *Rene* says that this case falls within the third of Phillimore J.'s propositions, and that, in those circumstances, the *Alenquer*, not having conferred any benefit on the *Rene* and not having carried out the services which she was engaged to perform, is not entitled to salvage. The *Alenquer*, on the other hand, submits that she comes within the first of the propositions of Phillimore J., and that submission is arrived at by playing down, if I may use that expression, the evidence with regard to the request to tow the *Rene* to Lisbon. Emphasis is rather placed by the *Alenquer* on the fact that the *Rene* sent an S O S message, and that the *Alenquer* came up in response to that message. As I understand the argument for the *Alenquer* it is to be implied from those facts that the *Alenquer* came up to the *Rene* at the request of the *Rene*, to render her such assistance as she was able to render her. If that be the right approach to the matter, then the subsequent request to tow the *Rene* to Lisbon, or to tow her out of immediate danger, was merely something which arose incidentally in the course of carrying out the prior engagement to come and render such assistance to the *Rene* as she could. In support of their proposition, those representing the *Alenquer*

[1] (1899) 8 Asp.M.L.C. 481, 483.

cited to me *The Stiklestad*,[2] in which an award of salvage, albeit a small one, was made by Bateson J. to a ship which in mid-Atlantic had deviated some substantial distance in order to answer an S O S call from another ship in distress, and had in fact made quite a serious, although abortive, attempt to take that vessel in tow. The vessel in distress was subsequently salved with the assistance of another vessel, and, in those circumstances, the question arose whether the first ship that came up, the *Dampfen*, was entitled to remuneration as for engaged services. Bateson J. held that she was entitled to a salvage award on the basis that the original exchange of messages between the two vessels amounted to an engagement of the *Dampfen* substantially on the following terms: "Come to my "assistance on a salvage basis." In those circumstances, the *Dampfen* having gone to the assistance of the *Stiklestad* on a salvage basis and the *Stiklestad* having ultimately been saved, the judge held that a good claim for salvage was made out. At the conclusion of his judgment he was careful, however, to point out that it did not follow from this decision that every time any ship sends out an S O S message every other ship on the sea would be entitled to go to that ship and say: "Now I want to "be paid a salvage award." It is contended that, on the facts, the present case is on all fours with *The Stiklestad*,[3] because here there was a message transmitted by the *Rene* directly to the *Alenquer* specifically requesting the assistance of the *Alenquer*. Because the *Alenquer* came up to the *Rene* and stood by her in response to that signal, it is claimed that she is entitled to be paid, and paid on a salvage basis.

It seems to me that some corroboration of this interpretation of what took place is to be obtained from the circumstance that, after the abortive towing attempts had been discontinued, the master of the *Rene* did send a specific request to the *Alenquer* to stand by her. The master of the *Rene* described in evidence the sending of that signal. The fact that it was sent is also confirmed by the log-books of the *Rene*, by the master's report, and by the protest which he made. Oddly enough, however, no reference is made to it either in the evidence of the master of the *Alenquer* or in any of the documents of the *Alenquer*. It seems to me, however, that I cannot ignore the evidence from the *Rene*, which really amounts to an admission against her own interest. It does seem to be the fact that for some time at any rate, although not for very long, the *Alenquer* did continue to stand by the *Rene*; and I think it is clear on both sides' stories that the *Alenquer* did not leave until the *Rene* was quite clearly out of danger. Therefore, accepting the evidence that this subsequent signal requesting the *Alenquer* to stand by the *Rene* was sent, I think that does afford some confirmation of the view that the original transaction amounted in substance to a request to

[2] [1926] P. 205.

[3] Ibid.

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the *Alenquer* to come to the assistance of the *Rene* on a salvage basis, and at least to stand by her, if nothing else. If that is so, then the *Alenquer* would be entitled to some salvage award on the basis that she deviated from her course and in fact stood by the *Rene* at request for a period of some hours. I do not think the fact that during the time the *Alenquer* was standing by the *Rene* she made a number of abortive attempts to take the *Rene* in tow, following a further request made by the master of the *Rene*, affects my conclusion with regard to the original engagement. In the circumstances, I accept the contention that the *Alenquer* brings herself within the first proposition laid down by Phillimore J., and I come to the conclusion that, other things being equal, she would qualify to obtain a salvage award on the basis of performing services which she was engaged to perform.

[His Lordship then considered the merits of the parties in respect of the collision action, found the *Rene* free from blame and summarized the allegations against the *Alenquer*, namely that she approached the *Rene* stern first on her lee side in an unseamanlike manner, and, being in dangerous proximity to the *Rene*, put her engines astern, or failed to put her engines ahead in time. He continued:] Before I consider what the facts are in relation to these allegations—and I need hardly say that the material facts, and particularly the allegation that the *Alenquer* went astern, are very much in dispute—I must consider on what principle allegations of this sort are to be approached when they are made in connexion with a claim for salvage. I think I must in the first instance bear in mind the fact that the *Rene* had specifically requested the *Alenquer* to take her in tow; that request, at any rate after the failure of the attempts to make fast by means of floating buoys and rocket apparatus, virtually necessitated the *Alenquer* manoeuvering at close quarters with the *Rene*. To that extent it must be said that the *Rene* voluntarily accepted some risk. I am not saying that the maxim volenti non fit injuria covers the case, for it cannot be suggested that the *Rene* voluntarily accepted the risk of the *Alenquer* behaving in a negligent manner. But clearly she must be taken to have accepted the risks necessarily attendant upon the *Alenquer*, a much larger ship than the *Rene*, manoeuvring at close quarters, and manoeuvring in a way which would not be tolerated for a moment and could not possibly be justified in the ordinary course of navigation. I say that having in mind those cases which come before this court where collisions are brought about by what is called "close shaving," which is generally regarded as negligent navigation. But that sort of risk, while quite unjustifiable in ordinary navigation, is precisely the sort of risk which a vessel requesting a tow must necessarily accept.

Then one must, I think, have regard to the urgency of the situation. When one is judging the navigation of a salving ship one must do it against the background of the circumstances as

they existed. Here the *Alenquer* was attending on a ship which had been adrift for nearly 48 hours, drifting to leeward, and getting ever closer and closer to the Farilhoes rocks. She had spent the night making abortive attempts to get the *Rene* in tow, first with the aid of floating buoys, and, secondly, by firing rockets. The evidence, it is true, shows that by daylight the *Rene* was drifting clear of the Farilhoes rocks; indeed, the master of the *Alenquer* himself admitted that that danger had already passed at the time when the collision happened. But I do not think that that admission should be pressed too far against the *Alenquer*, because the vessels were still in very close proximity with the Farilhoes rocks—a proximity which I think can fairly be described as dangerous. The situation even then could very well have become alarming in the event of a sudden change of wind. That, I hope, gives a not unfair picture of the circumstances in which the manoeuvre of the *Alenquer* came to be undertaken. The situation was still fraught with danger, although the immediate peril, which had looked so threatening throughout the night, had, at any rate for the time being, passed.

Furthermore, it seems to me that I have to pay regard to the general principles of policy in relation to salvage which have been laid down over the years by this court. Those general principles require that this court in judging the conduct of salvors should err, if anything, on the side of leniency towards salvors insofar as their behaviour is criticised. As was pointed out very forcibly by Mr. Adams in his argument on behalf of the *Alenquer*, it would be a disaster, and quite contrary to the public interest, if the result of the decisions of this court were such as to discourage salvors from taking risks and showing enterprise when rendering services at sea. The matter is summed up in a passage in Kennedy L.J.'s book on Salvage, to which I was referred in the course of the argument. There, at page 162, the learned author says: "In considering whether a salvor has "shown such a want of reasonable skill and knowledge as ought "materially to affect the court's award, or is guilty only of an "error of judgment, the court will incline to the lenient view, "and will take into favourable consideration any special circum-"stances which tend to exonerate the salvor from blame, such "as, e.g., a request for help, the suddenness of the emergency, "or the absence of more efficient means of succour." That appears to me to be the correct approach to the matter, and I gladly adopt that paragraph as part of my judgment.

[After considering the charges of negligence against the *Alenquer*, his Lordship stated that he was advised by the Elder Brother, that the manoeuvre adopted was wholly unseamanlike, and that the proper method would have been to keep the vessels on parallel courses one ahead of the other. He found that the *Alenquer*, having wrongfully put her engines astern, failed to correct the error promptly, and further that she attempted to carry out the manoeuvre of making fast to the *Rene*

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in an unseamanlike manner. He continued:] Now, what is the result of that? Here was the *Alenquer* embarked on this unseamanlike manoeuvre, with the result that she got herself into an extremely dangerous position, at close quarters, with nothing more than 20 to 40 metres between her stern and the drifting *Rene*. That of itself involved an unnecessary and undue risk—but, on top of that, the *Alenquer* was guilty of a wrong manoeuvre while in this very critical position—a wrong manoeuvre which within a matter of seconds must have brought the two vessels into very serious collision. I have asked myself whether in the circumstances, and bearing in mind the considerations I have already detailed which apply in favour of a salvor, I ought to hold the *Alenquer* to blame for this collision in the sense of holding her liable in damages. I have hesitated long before doing so, and I wish to make it clear that I have no desire to say anything which will discourage salvors from taking fair risks and showing their customary enterprise in rendering salvage services. But, having taken all the circumstances into consideration, I have come to the conclusion that the wrongdoing of the *Alenquer* in this case does exceed that which is permissible even to a salvor, and that in the circumstances the *Alenquer* has no defence to this damage claim brought against her by the owners of the *Rene*.

Bearing in mind that the service rendered by the *Alenquer* to the *Rene* was a very trifling service, which could in any case only merit a very slight award, and bearing in mind that the damage occasioned by the collision was very substantial and such as must far exceed any sum which could possibly be awarded by way of salvage to the *Alenquer*, I put it to Mr. Adams, and he very fairly accepted, that on the facts of this case, if I found that the *Alenquer* was to blame for the collision, he could not justify claiming any award of salvage. I think Mr. Adams was well founded in making that admission on the facts of this case—and I also think he was right when he said that each case must depend on its own particular facts. It must be clearly understood that my decision in the present case does not govern any other case where the facts may be different. I can well understand that where the service is a substantial one, such as would be likely to warrant a very substantial award, the fact that in the course of rendering such a service a salvor is to blame for a relatively trivial collision, causing only minor damage, would not be a sufficient reason for depriving him altogether of any award. But, bearing in mind the sort of figures we are dealing with in this case, it seems to me that the fact of the *Alenquer* being seriously to blame in respect of this very substantial collision, makes it quite impossible for me to make any award of salvage in her favour.

That is sufficient to dispose of this case, but I think it might be helpful to the parties if I go on to say this. Even if I had not been satisfied that the *Alenquer* was answerable in damages

for the collision, I think I should in any event (particularly having regard to the advice that I have received from the Elder Brother) have been forced to come to the conclusion that no very high degree of skill was exercised by her and that at the best her manoeuvres were open to criticism. Bearing in mind that these manoeuvres did lead to substantial damage, I think that in any case that would necessarily have been a matter to take into consideration in making any award I might otherwise have made. Awards of salvage are necessarily very much at large, but it is a commonplace that the figure to be awarded depends very much on the merits of the service. Having regard to the criticisms levelled against the navigation of the *Alenquer*, I do not think that upon any view it would have been possible to put her merits very high. I think it also right to say this. Had I felt able to make a salvage award in favour of the *Alenquer*, I do not think I could in any case have made an award sufficient to cover the figure at which she puts forward her own damage, namely, £981 12s. 11d. I need not refer at length to this matter, as it has now become an academic question, but Mr. Hewson satisfied me by reference to the authorities cited on pages 177 and 178 of Kennedy L.J.'s book on Salvage that all the circumstances, of which damages and expenses are only a part, must be looked at in determining the amount of an award of salvage. The fact that the damage sustained may be great is no ground for making an extravagant award in respect of trivial services. I should in any case have been forced to the conclusion that this was an extremely trivial service. As I have said, it in fact achieved no result at all and conferred no benefit on the *Rene*. Upon any view the right to any award at all would have been based upon a mere technicality, for the award could only have been one for standing by the *Rene* at request for the brief period that the *Alenquer* was engaged. Mr. Adams, in the course of his very fair argument, abandoned any claim in respect of the subsequent return and search made by the *Alenquer*. In all the circumstances, although I am not making an award, the sort of award I should have had in mind for this class of service, if I had felt able to make an award at all, would not have exceeded £450. As it is, my decision is that the collision action is determined in favour of the *Rene*, the *Alenquer's* counterclaim is dismissed—and, with regard to the salvage action, the *Alenquer's* claim for salvage is dismissed.

Claim in the collision action allowed—counterclaim dismissed.
Claim in the salvage action dismissed.

Solicitors: *Ingledew, Brown, Bennison and Garrett; Thomas Cooper and Co.*

A. S-R.

[COURT OF APPEAL.]

C. A.

1955
Feb. 7.

Singleton and Romer L.JJ.

* WESTMINSTER AND KENSINGTON FREEHOLDS LD. *v.* HOLME.

Landlord and Tenant — Rent restriction — Standard rent — Permitted increase—Rates—Covenant by landlords to pay rates during term — Expiration of lease — Tenant remaining as statutory tenant — Increase in rates before expiration of term—Claim for higher rent —Liability of statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 2 (1) (*b*) (3), 15 (1).

By the terms of a contractual tenancy for 14 years, which expired on March 25, 1942, the landlords covenanted during the continuance of the term to pay all the rates charged or to be charged on the premises. On the expiration of the lease the tenant remained in possession as a statutory tenant. Between September 1, 1939, and the expiration of the contractual tenancy on March 25, 1942, there had been an increase in the rates of about £12 a year, and these had been duly paid by the landlords in accordance with their covenant in the lease. In an action to recover rent due after the expiration of the contractual tenancy the landlords claimed to recover as part of the rent the amount of the additional rates imposed between September 1, 1939, and the date of the expiration of the contractual tenancy:—

Held, that the tenant was liable to pay those increased rates, since the words of section 2 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, "a dwelling-house for "which no rates were payable," meant payable by anyone, and not only by the tenant; and the tenant could not claim the benefit of the landlord's covenant to pay the rates in the original lease under section 15 (1) of the Act of 1920, since that provision was inconsistent with the provision in section 2 (1) (*b*) entitling the landlord to claim from the tenant additional rates over and above those payable on September 1, 1939.

INTERLOCUTORY APPEAL from an order of Glyn-Jones J.

The plaintiffs, Westminster and Kensington Freeholds Ld., were the owners of a flat, No. 43 Morpeth Mansions, Morpeth Terrace, S.W.1, of which the defendant, Mrs. Catherine Elizabeth Holme, was the tenant. The landlords brought an action against the tenant to recover a sum of £114 12s. 2d. made up of various items including a sum, expressed to be in respect of excess rates, amounting to £8 15s. 6d. The rent of the flat when the tenancy began in 1928 was £265 a year and it was common ground that, by reason of their rateable value, the premises came within the terms of the Rent Acts. The lease was for a term of 14 years from March 25, 1928, and on its expiration in 1942 the tenant remained on the premises as a statutory tenant. By clause 5 of the lease, the landlords covenanted with the tenant "(A) That "the lessors will during the continuance of the term pay all the "rates, taxes and assessments charged or to be charged on the "premises." The lease expired on March 25, 1942, and up to

that time the landlords paid all the rates in accordance with their covenant. They were not in a position, by reason of the terms of their covenant, to increase the tenant's rent down to the expiration of the lease in respect of increases of rates which had been made between September, 1939, and March, 1942, but they contended that they were entitled to recover the increases at the end of the contractual tenancy by virtue of section 2 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.[1] The tenant relied on the provisions of sections 2 (3) and 15 (1) of the Act.

The landlords applied for leave under R.S.C., Ord. 14, to sign judgment for the whole sum of £114 12s. 2d. claimed by them and an order to that effect was made by Master Clayton and affirmed on appeal by Glyn-Jones J. The tenant appealed.

W. J. Williams for the tenant.
James Miskin for the landlords.

SINGLETON L.J., having considered the other items of the plaintiffs' claim, to which he held that the defendant had no defence, continued: The only remaining claim arises in respect of what are described upon the writ as excess rates. That claim has given rise to a little difficulty and to some interesting argument. The rental of the flat, as agreed in the year 1928, was £265 a year. It is common ground between the parties that, by reason of the rateable value of the premises, they are premises which fall under the terms of the Rent Acts. The lease was for the term of 14 years from March 25, 1928; it continued throughout that period, and on its expiration the tenant remained in the premises and became a statutory tenant. Under clause 5 of the lease the landlords covenanted with the lessee: "(A) That the "lessors will during the continuance of the term pay all the "rates taxes and assessments charged or to be charged on the

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (as amended by Rent and Mortgage Interest Restrictions Act, 1939, Sch. I): "The amount by which the "increased rent of a dwelling-house "to which this Act applies may "exceed the standard rent shall, sub-"ject to the provisions of this Act, "be as follows, that is to say:—. . . "(*b*) An amount not exceeding any "increase in the amount for the time "being payable by the landlord in "respect of rates over the correspond-"ing amount paid in respect of the "yearly, half-yearly or other period "which included September 1, 1939, "or in the case of a dwelling-house "for which no rates were payable in "respect of any period which included "the said date, the period which "included the date on which the rates "first became payable thereafter. . . . "(3) Any transfer to a tenant of any "burden or liability previously borne "by the landlord shall . . . be treated "as an alteration of the rent,' and "where, as the result of such a trans-"fer, the terms on which a dwelling-"house is held are on the whole less "favourable to the tenant than the "previous terms, the rent shall be "deemed to be increased. . ."
S 15: "(1) A tenant who by virtue "of the provisions of this Act retains "possession of any dwelling-house to "which this Act applies shall, so long "as he retains possession, observe "and be entitled to the benefit of all "the terms and conditions of the "original contract of tenancy, so far "as the same are consistent with the "provisions of this Act. . ."

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"premises." The lease expired on March 25, 1942, and until that date the landlords were under covenant to pay, and did in fact pay, all the rates, and up to that time they could not make any charge against the tenant in respect of rates, because they had covenanted to pay them themselves.

The question which arises is, what is the true position as to rates after the expiration of the lease? [His Lordship read section 15 (1) of the Act of 1920 and continued:] Mr. Williams, on behalf of the tenant, claims that the landlords are seeking to put an additional burden on the tenant, in that they say: "As "from the end of the contractual tenancy we are entitled to "charge against you increases in rates made after September 1, "1939, but not commencing to run until the end of the tenancy." Mr. Williams submitted that as there were increases of rates between September 1, 1939, and the end of the tenancy in March, 1942, those increases could not be put upon the tenant, for to do so would be adding to the burden of the tenant, and would fall within the terms of section 2 (3) of the Act of 1920.

Mr. Miskin, on behalf of the landlords, relied on section 2 (1) of the Act of 1920, which permits landlords, in certain cases, to make an increase of rent against the tenant. [His Lordship read section 2 (1) (*b*) and continued:] Mr. Williams claims in aid the concluding four lines of paragraph (*b*), which begin "or in "the case of a dwelling-house for which no rates were payable." He submits that the tenant's case falls within those words, and that this house ought to be regarded as a dwelling-house for which no rates were payable in respect of the period by reason of the fact that the tenant was not paying rates up to the end of the lease because of the provisions of clause 5 of the lease.

I do not think that that submission is sound. The words are not "shall in the case of a dwelling-house for which no rates "are payable by the tenant." The words cover the case of a dwelling-house for which no rates were payable at the material time. That means payable by anyone. The provisions of paragraph (*b*) would meet the case of a house built after September 1, 1939, or a house which had not been subject to rating for one reason or another, and which later becomes subject to rating. I do not think that it helps the tenant in this case.

Mr. Williams saw his difficulty if his case was not covered by the last four lines of paragraph (*b*), and, indeed, it is obvious, for if it is not so covered, one is forced back to the correct construction of the earlier part of (*b*), which reads together with the commencement of the section: "The amount by which the "increased rent of a dwelling-house to which this Act applies "may exceed the standard rent shall, subject to the provisions "of this Act, be as follows . . . (*b*) An amount not exceeding "any increase in the amount for the time being payable by the "landlord in respect of rates over the corresponding amount paid "in respect of the yearly, half-yearly or other period which "included September 1, 1939. . . ."

The notices given by the landlords are, admittedly, in order as notices. When the contractual tenancy had ended, and the statutory tenancy had come into play, they gave notice that they claimed that there was an increase in the amount for the time being payable by the landlords in respect of rates over the corresponding amount payable on September 1, 1939, and there is no doubt as to that. It appears that between September 1, 1939, and March 25, 1942, there had been an increase in the rates of something over £12 a year, and after the year 1942 there were further increases of rates.

Mr. Williams agreed that the landlords were entitled to recover against the tenant increases after March 25, 1942, but he submitted that the amount of the increase before the conclusion of the contractual tenancy could not be recovered even in respect of a period after the contractual tenancy had ended. On the strict wording of section 2 (1) (*b*), it appears to me that the submission made by Mr. Miskin on behalf of the landlords is right. There is an increase over the corresponding amount paid in respect of the period which ended September 1, 1939, and upon the reading of the Act, I think the landlords were entitled to recover the amount of that increase in respect of each period after the contractual tenancy came to an end. Section 15 of the Act does not apply, for though the tenant is entitled to the benefit of all the terms and conditions of the original contract of tenancy, that only applies so far as it is consistent with the provisions of the Act, and one provision of the Act is that under section 2 (1) (*b*) the landlords are entitled to claim and to recover against the tenant additional rates over and above those which were payable on September 1, 1939.

I ought to add that the claim of the tenant could only be to recover two years' increased payment if her contention was right. That arises under section 7 (6) of the Act of 1938, which amended section 8 (2) of the Act of 1923, under which there had been a limit of six months; but perhaps this case is of more importance than appears at first sight, because it would appear that the judgment of this court covers rent for the future. It appears to me that the appeal of the defendant must be dismissed.

ROMER L.J. I agree. The only point of any substance in this appeal is that relating to the charge by the landlords in respect of increases of rates which took place between the years 1939 and 1942, and it appears to me that the tenant here can only achieve the result which she desires to attain by doing very considerable violence to the language of section 2 (1) (*b*) of the Act of 1920. That subsection refers to two periods of time. The first period is that which included September 1, 1939, and the second period which is mentioned, and which is introduced in

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the case of a dwelling-house for which no rates were payable in respect of the first period, is the period which included the date on which the rates first became payable thereafter. It is plain, if either of those periods had applied to the present case, that the landlords were well justified in demanding the increases which they did in fact require by their notice of 1948, but the tenant seeks to alter this provision by, in effect, introducing for the purposes of the present case a third period which would include the date when the tenant ceased to be a contractual tenant and became a statutory tenant instead. The justification which it is sought to bring to bear in supporting that third period is the argument that in this subsection in which the legislature speaks of payment of rates, it is meaning payment by the tenant. I can see no possible warrant for that suggestion at all, and if one takes the language of the subsection as one finds it, it is quite clear on the facts that the relevant period is the first period mentioned in the subsection, namely, the period which included September 1, 1939; and from that it follows that if one applies the language which is used there, the landlords were entitled, when the contractual tenancy came to an end, to increase the standard rent by reference to the period specified in the first part of the subsection.

It is quite true that that does result, in some measure, in the transfer of a burden from the landlord to the tenant which, during the contractual tenancy, had been borne by the landlord, but that consideration in itself affords, as I think, no answer to the argument of the landlords, which is founded upon the express language of this provision, and to which effect must be given accordingly; and I fail to see any hardship to the tenant because a landlord, who over a period of years has taken the liability, as these landlords did, for an increase of rates which might from time to time occur during the period of the contractual tenancy, when that tenancy comes to an end and the tenant is foisted upon them willy-nilly as a person with an irremovable status, transfers the burden to that person so that it would form a term of his future right to occupy the premises. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Greenwood, Milne & Lyall; Pierron & Morley.*

P. B. D.

[COURT OF APPEAL.]

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Revenue—Profits tax—Company—Principal and subsidiary companies—Grouping notice—Sums paid to principal company by subsidiary "by way of reimbursement of profits tax"—Amount deductible for income tax—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 22—*Finance Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 38 (3).

A subsidiary company paid to the principal company an amount by way of reimbursement of profits tax, which tax (a grouping notice having been given by the principal company) was payable by the principal company in respect of the chargeable accounting periods ending December 31, 1950, and the companies jointly elected under section 38 (3) of the Finance Act, 1947:—

Held, that the amount which the subsidiary could deduct for the purpose of assessment to income tax was that sum of profits tax which was payable by the principal company by virtue of the notice having been given, that was the amount which was attributable solely to the giving of the notice, which would not have been payable by the principal company if the notice had not been given; in other words, it was the increase in the total amount of profits tax payable by the principal brought by the grouping notice, as distinct from the prior obligation to profits tax of the principal company.

Decision of Upjohn J. reversed.

APPEAL from Upjohn J.

Chloride Batteries Ltd., a wholly owned subsidiary of Chloride Electrical Storage Co. Ltd., commenced business on January 1, 1950, and made up its first accounts to December 31, 1950. The principal company served a grouping notice under section 22 of the Finance Act, 1937,[1] which was accepted by the Commissioners of Inland Revenue, and for purposes of profits tax, the profits of the subsidiary company were treated as the profits of the principal company. For the chargeable accounting period ended December 31, 1950, the principal company paid £209,437 profits tax, but if no grouping notice had been given the profits tax

[1] Finance Act, 1937, s. 22: "(1) "Where a body corporate resident in "the United Kingdom is a subsidiary "of another body corporate so resi- "dent (hereafter in this section re- "ferred to as 'the principal com- "pany') the principal company "may, by notice in writing given to "the Commissioners of Inland Reve- "nue before the expiration of any "chargeable accounting period of the "subsidiary or within two months "thereafter, require that the provi- "sions of subsection (2) of this sec- "tion shall apply to the subsidiary as "respects that period and all subse- "quent chargeable accounting periods "throughout which it continues to be "a subsidiary of the principal com- "pany . . . (2) Where such a notice "is given, the profits or losses aris- "ing in any chargeable accounting "period to which the notice relates "from the trade or business carried "on by the subsidiary shall be "treated, for the purpose of the pro- "visions of this Act relating to "[profits tax] . . . as if they were "profits or losses arising in the cor- "responding chargeable accounting "period from the trade or business "carried on by the principal com- "pany."

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payable by the principal company would have been £131,742 and that payable by the subsidiary would have been £191,420. The difference between that latter amount and the addition to the assessment on the principal company (£77,695) was due to the fact that the subsidiary, if assessed independently, would have been liable to tax at a higher rate.

The subsidiary company paid to the principal company £191,420 "by way of reimbursement of profits tax." The companies then made a joint election under section 38 (3) of the Finance Act, 1947.[2]

The subsidiary company claimed that, for the purpose of assessment to income tax under Case I of Schedule D for the years 1949–50, 1950–51, and 1951–52, it was entitled to deduct the whole of the amount of the profits tax paid by the principal company, though (considering only the figures for the first year) for commercial reasons the claim was in fact limited to £191,420, that was the maximum amount which it appeared to the directors of the subsidiary company that they ought to reimburse to the principal company. The Crown contended that only the difference between the amount which was actually assessed on the principal company and the amount which that company would have been called on to pay if no notice was served could be deducted by the subsidiary, that is, £77,695. The Special Commissioners upheld the taxpayer company, and on appeal Upjohn J. affirmed that decision. The Crown appealed.

J. Millard Tucker Q.C., *Sir Reginald Hills* and *J. H. Stamp* for the Crown.

F. Heyworth Talbot Q.C. and *H. Major Allen* for the taxpayers.

In addition to the cases referred to in the judgment, the following were cited in argument: *Astor* v. *Perry*[3]; *Birmingham*

[2] Finance Act, 1947, s. 38: "(3) "Where—(*a*) such a notice as aforesaid is in force; and (*b*) the subsidiary to which the notice relates pays to the principal company an amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable by that company for any chargeable accounting period ending after the thirty-first day of December, 1946; and (*c*) the principal company and the subsidiary jointly so elect by notice in writing given to the Commissioners of Inland Revenue within six months from the end of that chargeable accounting period or such longer time as those Commissioners may in any case allow, the amount so paid, and any amount so paid in relation to a subsequent chargeable accounting period, by the subsidiary to the principal company shall for all the purposes of the Income Tax Acts be treated—(i) as regards the subsidiary, as an amount of profits tax payable in respect of its profits arising in the chargeable accounting period of the subsidiary corresponding to the chargeable accounting period to which the payment relates; and (ii) as regards the principal company, as reducing the amount of the profits tax payable by the principal company for the chargeable accounting period to which the payment relates."

[3] [1935] A.C. 398; 51 T.L.R. 325; 19 T.C. 255.

Small Arms Co. v. *Inland Revenue Commissioners* [4]; *Scottish Shire Line Ld.* v. *Lethem.* [5]

EVERSHED M.R. As Upjohn J. observed, the question in this appeal is a short one. It turns on the meaning of parts of two sections relating to profits tax, although as will later appear the actual question between Crown and taxpayer relates to income tax.

The two sections are section 22 of the Finance Act, 1937, which imposed, sub nomine the national defence contribution, what is now called profits tax, and section 38 of the Finance Act, 1947, which in many substantial (but for the purposes of this case not material) respects amended the Act originally passed. Those sections related to the case of what are called in the Acts "principal and subsidiary" companies. It is a well-known and frequent feature of trading companies to have companies controlled, sometimes wholly controlled, by what is more generally called a "parent" company. It is to that kind of case that the phrase "principal and subsidiary companies" relates, and I need not take time by referring to those parts of the section which define what constitutes principal or subsidiary companies, for in this case it is not in dispute that the taxpayer company, Chloride Batteries Ld., is a subsidiary company within the meaning of those sections, the principal or parent company relevant for consideration being another company called Chloride Electrical Storage Co. Ld.

The broad purpose of the two sections which I have mentioned was first to enable a principal company, if it so chose, to serve a notice (which once served was continuous in effect and was not apparently capable of being recalled) on the Commissioners of Inland Revenue, assuming to itself all the profits tax which might be properly leviable both on itself and on its subsidiary. Thereupon, so far as the Commissioners of Inland Revenue were concerned, they would look exclusively to the principal or parent company, and for the purposes of assessment the profits from the trade or business of the subsidiary would be treated as part of the profits of the trade or business of the principal; and, similarly, if the subsidiary suffered a trading loss the loss would be taken into account in computing the principal company's liability. But the effect was not limited to such an assumption by the principal company of the profits tax liability for itself and the subsidiary, for by section 38 of the Finance Act, 1947, it was possible for the subsidiary then to make a payment "by way of reimbursement" to the principal company, and if it did so and if the principal and the subsidiary jointly elected and communicated that election in writing to the commissioners, then for income

[4] [1951] W.N. 349; [1951] 2 All E.R. 296.

[5] (1912) 6 T.C. 91.

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tax purposes there was a consequential adjustment of the respective liabilities of principal and subsidiary; for at that time (though I think it is not so now [see section 25 (1) of the Finance Act, 1937, re-enacted by section 141 (1) of the Income Tax Act, 1952, but repealed as respects profits tax for chargeable accounting periods ending after the beginning of 1952 by section 76 (8) of the Finance Act, 1952, and Sch. XIV, and see now Finance Act, 1952, s. 33 (1).]) profits tax paid by a company was a legitimate deduction for income tax purposes.

The present case has arisen because all those options, so to speak, have been exercised. The principal company sent the requisite notice under the Act of 1937, and thereby assumed to itself exclusively the profits tax liability both in respect of its own and in respect of the subsidiary company's businesses. The subsidiary company then paid a series of sums (for there is more than one accountable year in question) to its principal company, and as a consequence the question now before the court is the resultant deduction which the subsidiary claims to make for income tax purposes by virtue of having made those payments.

It so happens that if the contentions of the subsidiary company are right they can, in the circumstances of the case, get a very considerable advantage by way of income tax relief, and that circumstance arises mainly from the fact that the subsidiary company began its business on January 1, 1950. Beyond question, for income tax purposes, deductions of this kind or of other corresponding kinds serve a very useful purpose extending over more than two years during the infancy of such a company. The fact that if the subsidiary company is right it will financially be able to benefit very considerably is plainly irrelevant for the purposes in view.

I will state as respects one year, for that will suffice for present purposes, what the figures are, to illustrate the points as my judgment proceeds. For the first year of the subsidiary company's life the total amount of profits tax which became leviable in respect of the joint enterprises of principal and subsidiary was the not inconsiderable sum of £209,437. The profits tax which the principal company would have been liable to pay, had there not been what Mr. Heyworth Talbot called this amalgamation of profits for tax purposes, would have been £131,742, that is, £77,695 less than the first total which I mentioned. But there is this complication which has to be stated, to make what follows clear; if there had been no notice served and if the subsidiary company had been left, accordingly, to pay its own profits tax in respect of its own trading profits, it would have paid a good deal more than £77,695 because it would have had to pay at a much higher rate. I need not explain why that was so; the difference depends on the fact that under the scheme of the profits tax there are variations in rate. The tax was at that time particularly designed to discourage distribution, but when there was an amalgamation and a distribution by

a subsidiary to a principal it did not, so to speak, count as a distribution. The figure—and this is the important matter—which the subsidiary company would have paid, if left to its own devices, would have been £191,420, much more than £77,695.

It is alleged on behalf of the subsidiary company that the option given by the joint effect of these sections to the subsidiary, or to the subsidiary and the principal working in collaboration, enables the subsidiary to reimburse the entire sum of profits tax which the principal, in the events which have happened, has been called on to pay, that is, £209,437, and that then the subsidiary may bring that sum into its accounts as a deduction in computing liability for income tax.

On behalf of the Crown it is said: "No; on a proper interpretation of the relevant parts of the sections the most that the subsidiary can pay over by way of reimbursement is the amount of additional tax which fell upon the shoulders of the principal company when, and because, it had assumed this liability, namely, £77,695." It is the fact that the sum which the subsidiary company paid to the principal and which it claims to be entitled to bring into its income tax account was not £209,437 but £191,420. The reason for that figure being paid was that those responsible thought that the fairest sum, as between the principal company and the subsidiary, and the commercially correct figure to pay over was a figure which represented what the subsidiary's liability would have been in respect of profits tax had it not been for the notice served by the principal company. But the fact that the subsidiary company paid £191,420, and not £209,437, is for the purposes of the argument irrelevant, and must not be allowed to affect it. Put another way, there is no case for saying that, if there be a limit to the amount which the subsidiary can reimburse, that limit is represented, not by the added obligation imposed on the principal, but by the obligation from which the subsidiary was saved.

I must now refer to the terms of the two sections so far as they are relevant. I gladly omit the parts of those sections concerning differential rates which were used, quite properly, to illustrate the argument, because, on the view which I take, I do not think that they really bear on the question which we have to decide. Section 22 (1) of the Act of 1937 provides that a principal company, as there defined, may by notice in writing given to the Commissioners of Inland Revenue, before a certain date related to any chargeable accounting period of the subsidiary, "require that the provisions of subsection (2) . . . shall apply "to the subsidiary as respects that period and all subsequent "chargeable accounting periods throughout which it . . ."—that is the subsidiary—". . . continues to be a subsidiary of "the principal company." I can pass over the proviso. Subsection (2) explains how the notice shall take effect: "Where "such a notice is given, the profits or losses arising in any "chargeable accounting period to which the notice relates from

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"the trade or business carried on by the subsidiary shall be "treated . . . as if they were profits or losses arising in the "corresponding chargeable accounting period from the trade or "business carried on by the principal company." If the provision had stopped there, there would be, at any rate in this case, no problem at all. The notice having been given, there would have been for profits tax purposes an amalgamation—I use again Mr. Heyworth Talbot's word—of the profits or losses of both principal and subsidiary, and the charge for tax would be on the amalgam.

Section 38 (3) of the Act of 1947, however, introduced this further option. [His Lordship read subsection (3), pointing out that the notice like the other, if given, was irrevocable so long as the relationship continued.] The effect for present purposes of subparagraphs (i) and (ii) is that, as regards the subsidiary with which the court is concerned, the amount so paid by way of reimbursement is to be treated for income tax purposes as a deduction.

The whole question turns on these few words "an amount by "way of reimbursement of profits tax which by virtue of the "notice having been given is payable by that company." It is not an involved formula; on the face of it, it is simple enough; but, beyond a peradventure, it has given rise to a sharp distinction between the views taken on either side. It is said by the taxpayers that the phrase "profits tax which by virtue of the "notice having been given is payable by that company" means the total resultant figure for which the principal company is liable since the notice has been given. I will try to use language which is clearly expressive of the point, but it can be most clearly stated by saying that in this case the figure is £209,437. That, it is said, is the profits tax payable by the principal company by virtue of the notice, because that is the sum which, the notice having been given, the principal company is now bound to pay; and if the notice had not been given some quite different and much smaller sum, namely, £131,742, would have been exigible.

On the other side it is said for the Crown: "No; the profits "tax which is payable by the principal company 'by virtue of "'the notice' means that part of the total obligation which is "exclusively referable to, and derives its force from, the notice, "as distinct from the obligations to which by virtue of the other "sections of the Act the principal company in any event, notice "or no notice, would have been liable."

The Special Commissioners and Upjohn J. favoured the view for which Mr. Heyworth Talbot has contended. I feel diffident in expressing a view contrary to that which commended itself to them, but having given the matter my best attention, the meaning which those words have to me is that for which the Crown contends. Perhaps it is right to say, as Mr. Heyworth Talbot said, that this should not be regarded as a matter of first

impression; and indeed, after listening for a day to the argument carefully presented in this court, the first impression has, perhaps, faded away a little. But in the end, and I shall try to give reasons in support of that view, the question is, having read those words, which are straightforward words in the English language, what do they mean to the reader (who is, in this case, myself)? Presumably, the draftsman had a clear idea of what he meant when he drafted the subparagraph. If anybody had suggested that the words were equivocal the doubt could have been resolved in the simplest possible way. If the draftsman had wanted to make clear beyond any doubt that the intention was in conformity with Mr. Heyworth Talbot's view he would, I should have thought, have said: "an amount by way of reimbursement of "the *total* profits tax which . . ." If he wanted to make certain that the view submitted for the Crown would be regarded as intended he would have said something to the effect, "by way "of reimbursement of the *additional* profits tax. . . ." But he has not said either of those things. I do not think that to conclude in the Crown's favour involves reading in words, any more than the view in favour of Mr. Heyworth Talbot would involve reading in words. The court cannot supply words which are not there. What we have to do is to say what the words, which are there, mean.

Upjohn J., at the end of his judgment, saying that he had agreed with the commissioners, said: "I think there can be only "one answer to this question. *The* profits tax payable by virtue "of the notice having been given is the whole profits tax." I am sorry to say that I cannot accept that view. I emphasized, when I read that sentence, that Upjohn J. had put in the definite article so that the vital words would read: "Where the subsidiary "to which the notice relates pays to the principal company an "amount by way of reimbursement of *the* profits tax which by "virtue of the notice having been given is payable by that "company. . . ." I do not say that this is by any means conclusive, but I confess that, if the definite article had been in, I should have been at least more inclined to think that "*the* "profits tax which by virtue of the notice" might have meant the whole, final, total sum; and when in the subparagraph (ii) below just that phrase is used, "the profits tax payable by the "principal company," it does mean the total sum so paid. And it will be noticed that the words "by virtue of the notice" do not occur in that subparagraph. But in the paragraph which the court has to construe the definite article is absent—"an amount "by way of reimbursement of profits tax which by virtue of the "notice . . ."

I follow the point that, since the subsidiary is not bound to reimburse the whole, or indeed anything, it might have been desirable, if the definite article had been in, or if it had clearly been the total sum which was referred to in the vital sentence, to have said "in or towards reimbursement," instead of saying

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"by way of reimbursement." It is idle speculation to try to guess how this sentence was built up; but the fact is that the phrase "profits tax" is used without the definite article. As I have said, I think that is a small point favourable to the view which I entertain. But more substantial, I think, is this: as a matter of strict English, if the question be asked: "What is "the amount of profits tax payable by the principal company by "virtue of the notice having been given?" surely the answer is "that amount of profits tax the obligation to pay which the "notice, and only the notice, brought about." As I have said, in the absence of the notice, the principal company would have been liable to pay £131,742. What the notice did as regards its liability to profits tax was to impose the additional obligation of £77,695.

I asked Mr. Heyworth Talbot whether it was a fair paraphrase to say that the question which this vital sentence raises was: how much of the obligation for profits tax was attributable to the giving of the notice? Mr. Heyworth Talbot agreed that those words would fairly pose the question. The next question is, how much was attributable to the giving of the notice? I do not think that it is true to say that the whole sum was so attributable. It is right to say that the final figure was arrived at because the notice had been given; and had it not been for the notice some other figure would have been arrived at. But of the sum of £209,437, £131,742 was an obligation wholly independent of the giving of the notice. To that view of the matter I think considerable support is lent by the use of the word "payable." It will be remembered that the tax in question (that is, the subject-matter which may be reimbursed) is profits tax which is *payable* and not that which has been paid. In other words, the use of the word "payable" introduces the conception of obligation and, as I think, justifies the formulation of the question which I have just put, that is, how much of the obligation is attributable to the giving of the notice?

Finally, I think that if one starts by having clearly in mind what is the notice, if in other words, instead of subparagraph (*a*) the necessary language is taken from section 22 of the Act of 1937, again one is assisted towards the conclusion which I have mentioned. What is the notice? It would read: "Where a "principal company has given a notice applicable to a subsidiary "and requiring that the profits or losses arising in any account-"able period from the trade or business of the subsidiary shall "be treated as if they were profits or losses arising from the trade "or business of the principal company, and the subsidiary to "which the notice relates . . ." The form and character of the notice is a notice by a principal company requiring that for a limited purpose, namely, for the purpose of ascertaining profits tax, the business profits or losses of the subsidiary shall be treated as the principal's. In this case, therefore, the effect of the notice, for the purpose of profits tax, is to increase by the

amount of the subsidiary's trading profit, the subject-matter to be taxed in the principal's hands.

It is against that background that the subsidiary pays to the principal a sum " by way of reimbursement of profits tax which " by virtue of the notice " which I have just read is payable by the principal. I think the vital sentence in that context shows that the notice is one by virtue of which for profits tax purposes an added burden is imposed on the principal. It would be strange if it were otherwise for what other purpose have the words " which by virtue of the notice . . . " served? The principal is given power, by notice, to assume to itself the whole of the profits tax, both its own and its subsidiary's. There is no corresponding option which would entitle it to place on the subsidiary the whole profits tax of itself and the subsidiary. Yet, if the taxpayer's argument is right, the subsequent option has the oblique effect of transferring to the subsidiary for income tax purposes the higher profits tax obligation of both of them put together. It seems to me that that effect is out of keeping with the general tenor of the sections and the rights conferred. For those reasons my reading of the vital words is not the reading which commended itself to the judge.

If I am wrong, at the very least, it seems to me that there is a real ambiguity. I do not mean an ambiguity which arises because counsel on one side and the other have contended for different meanings, but a real doubt of what the sentence does mean. If that is so, then the court is entitled to consider the general scope of the Act, and I have given a reason for thinking that Mr. Heyworth Talbot's view is out of keeping with my understanding of the scope of the section.

It is legitimate also to consider the anomalous results to which, I think, Mr. Heyworth Talbot's view would lead. I do not propose to elaborate this matter. Nor do I doubt that when regard is had to the differential rates, to the ingenuity of mankind and to the infinite variety of circumstances of life, peculiar results may on any view sometimes arise, not the less so because these options once exercised cannot be recalled. But we have been dealing with the case of a parent with one child, and, as Mr. Millard Tucker rightly pointed out, not only may a company commonly have more than one subsidiary, but the sections themselves show that a plurality of subsidiaries is contemplated. I think Mr. Millard Tucker is entitled to ask, if Mr. Heyworth Talbot's view is right and notices have been given in respect of two or three subsidiary companies, what would be the rights inter se of each of them? Each company, prima facie, is entitled to repay the whole joint profits tax for the whole group. The effect of that, of course, would be a greater benefit to the parent company than obviously it was entitled to receive. Mr. Heyworth Talbot's answer was: " The right to make payment is " expressed ' by way of reimbursement,' and if I undertake to " reimburse another for the expenses which he has incurred in

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" some particular connexion, then, once he has had from me " the amount which he has expended, he cannot be further " ' reimbursed ' in respect of those same expenses." I am not sure that that is necessarily so, but it is a very great deal to get out of those four words " by way of reimbursement " if the general argument is right. On any view, it seems to me that as the years roll by it might create very difficult problems of priority between the subsidiaries as to who was going to pay, to get in first, to reimburse the parent and gain the best advantage from the income tax provisions, assuming, of course, that the right to make the deduction had continued. I think Mr. Millard Tucker has made good his point that the view contended for on behalf of the company produces anomalies, and obviously does so as soon as the case of a plurality of subsidiaries is considered.

Mr. Heyworth Talbot took, as an example, a case where a company, a subsidiary, made a loss of £500, but the parent made a profit of £1,000. Notice had been given, with the result that the business profits for the purpose of profits tax were reduced from £1,000 to £500. Assuming profits tax at the rate of 10 per cent., the tax would be reduced from £100 to £50. Mr. Heyworth Talbot asked what, on the Crown's view, would be the amount which, within the terms of the vital sentence " of " profits tax which by virtue of the notice having been given," would be payable by the principal company. He contended that the answer in that case must be £50, and if that was so, all else followed. I agree with Mr. Millard Tucker that in those circumstances the right answer would be nil. The result of the notice produced no obligation to profits tax on the parent company. What it did in fact was to relieve the principal company of part of the obligation which the company would otherwise have had to bear.

It has been said so many times that on matters of construction over-elaboration may not be useful, but that, in the end, it is a question of interpreting, fairly and according to ordinary English sense, the words used. For the reasons which I have stated I would allow the appeal.

Jenkins L.J. I agree that this appeal should be allowed. I only venture to add a few observations of my own because we are differing both from the special commissioners and from the judge.

The case resolves itself into the question what section 38 (3) (*b*) of the Finance Act, 1947, means by " profits tax which by " virtue of the notice having been given is payable by that " company " that is to say, the principal company. It is to be observed that the expression is not simply " profits tax payable " by that company," but it is " profits tax which by virtue of the " notice having been given " is so payable. What profits tax can answer the description of being payable by the principal company by virtue of the notice? Surely only such profits tax as is payable by the principal company by reason of the notice

having been given, and which would not have been payable by the principal company if the notice had not been given. That seems to me to be the natural and inescapable meaning of the language used.

I think that that conclusion is reinforced if one reads into subsection (3) (*b*) of section 38 of the Act of 1947 the effect of the notice referred to in section 22 of the Act of 1937. It is a notice, to put it shortly, that the profits or losses of the subsidiary are to be treated as profits or losses of the principal company. If the effect of the notice is thus read into subsection (3) (*b*) it seems to me to be reasonably plain that the profits tax in this context which answers the description of being payable by the principal company by virtue of the notice is so much of the total profits tax payable by the principal company as is payable by that company by virtue of the fact that the profits of the subsidiary company are added to its own profits for the purpose of ascertaining its liability to profits tax. Accordingly, in my view, the relevant payment for the purposes of section 38 in this case must consist, as contended for on behalf of the Crown, of the £77,695, representing the increase brought about by the section 22 notice in the total amount of tax payable by the principal company.

The short point of construction admits of no great elaboration, but I would call attention to this. The argument for the subsidiary company is to the effect that the profits tax payable by virtue of the notice is the whole of the profits tax payable by the principal company on the combined profits of the principal and subsidiary. For the reasons which I have endeavoured to state I think that is a wrong construction; but by way of reinforcement of this view it is not without significance that, whereas the reference in subsection (3) (*b*) is to "profits tax "which by virtue of the notice having been given is payable by" the principal company and so on, when one comes to subparagraph (ii) of subsection (3), which states the effect on the tax position of the principal company of the payment by way of reimbursement, one finds this expression, "As regards the "principal company, as reducing the amount of the profits tax "payable by the principal company for the chargeable account-"ing period to which the payment relates." That is the expression used in the section to denote the whole of the profits tax liability of the principal company. I venture to think that, when the different and qualified expression "profits tax which by "virtue of the notice having been given is payable . . ." is used in subsection (3) (*b*), it is used because the reference is not to the whole of the profits tax payable by the principal company but only to that part of the total profits tax payable by the principal company which is payable by that company by virtue of the notice. Accordingly, in my view, and as a matter of construction, after paying the best attention I can to the careful arguments presented, I think that the Crown's contention is right.

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I will not pursue the arguments which were directed to the anomalies which it was said might arise one way or another whichever construction of the word is adopted. I will content myself by saying that it seems to me that, on the whole, the possible anomalies instanced by Mr. Tucker were more surprising than those which were suggested on the other side; but I prefer to found myself on the construction of the relevant sections and, having construed them, I agree with the Master of the Rolls that this appeal should be allowed.

MORRIS L.J. I am of the same opinion. The construction contended for by the subsidiary company is one which, in my judgment, might result if the words of section 38 (3) (*b*) of the Finance Act, 1947, were "the subsidiary to which the notice "relates pays to the principal company an amount by way of "reimbursement of profits tax payable by that company." But the words which by such a reading are omitted are, in my judgment, words which have significance and meaning. I refer to the words "which by virtue of the notice having been given." With the inclusion of those words an inquiry is denoted to determine what profits tax is payable by the principal company "by virtue "of the notice having been given." This, in turn, suggests an inquiry as to what the position would have been if no notice had been given, and what the position is "the notice having been "given." If no notice had been given, then on the figures in this case, the profits tax payable by the principal company would have been £131,742. "The notice having been given," the profits tax payable was £209,437. What then is the profits tax which by virtue of the notice having been given was payable by the principal company? In my judgment it was the difference between the two. If there is to be payment of "an amount by "way of reimbursement of profits tax" which is payable "by "virtue of the notice having been given," the amount referred to is, in my judgment, the amount of any resulting additional tax.

The notion of paying "an amount by way of reimbursement" suggests a measure of responsibility for that which is to be reimbursed. The principal company would have had, unless a notice was given, a liability to pay £131,742 by way of profits tax. When a notice was given, liability to that extent did not owe its origin to the giving of the notice, and was not payable by virtue of the notice having been given. But the amount of the resulting additional liability would be by virtue of the notice having been given.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Simpson, North, Harley & Co., for March, Pearson & Green, Manchester.*

E. D.

[COURT OF APPEAL.]

*HEELEX INVESTMENTS LD. *v.* INLAND REVENUE COMMISSIONERS.

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Evershed M.R., Jenkins and Morris L.JJ.

Revenue—Profits tax—Company—Principal and subsidiary company—Grouping notice—Subsequent exemption of principal company from profits tax—Whether subsidiary assessable to profits tax—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21—*Finance Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *ss.* 19, 22 (1) (2)—*Finance Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 31 (2).

H. company was a wholly-owned subsidiary company of S. Co. On September 28, 1948, S. Co. gave a "grouping" notice, which was accepted, to the Inland Revenue Commissioners under section 22 [1] of the Finance Act, 1937, requiring that the profits of H. Co. should be treated as the profits of S. Co., the principal company, for the purposes of profits tax. As a result of giving the notice, assessments to profits tax for the years 1947, 1948 and 1949 were made in respect of both companies and the tax was paid. By a notice given in September, 1952, the commissioners directed, pursuant to section 21 of the Finance Act, 1922, that the income of S. Co. for each of the years 1946–47 to 1948–49 should be deemed to be the income of the members and apportioned accordingly. On the footing that when the direction was made all the members of S. Co. were individuals, by virtue of section 31 (2) of the Finance Act, 1947,[2] the income of S. Co. became exempt from liability for profits tax.

The Inland Revenue Commissioners, having repaid the tax already paid for the period to which the direction related, made assessments on H. Co. for the profits for the chargeable accounting periods ending on January 31, 1948, and January 31, 1949. On appeal to the special commissioners it was contended on behalf of H. Co. that the effect of the grouping notice given in 1948 was that

[1] Finance Act, 1937, s. 22: "(1) "Where a body corporate resident in "the United Kingdom is a subsidiary "of another body corporate so resi- "dent (hereafter in this section "referred to as 'the principal com- "'pany') the principal company "may, by notice in writing given to "the Commissioners of Inland Reve- "nue before the expiration of any "chargeable accounting period of the "subsidiary or within two months "thereafter, require that the provi- "sions of subsection (2) of this sec- "tion shall apply to the subsidiary "as respects that period and all "subsequent chargeable accounting "periods throughout which it con- "tinues to be a subsidiary of the "principal company. . . . (2) Where "such a notice is given, the profits "or losses arising in any chargeable "accounting period to which the "notice relates from the trade or "business carried on by the sub- "sidiary shall be treated, for the "purpose of the provisions of this "Act relating to [profits tax] . . . "as if they were profits or losses "arising in the corresponding charge- "able accounting period from the "trade or business carried on by the "principal company."

[2] Finance Act, 1947, s. 31: "(2) "The said section 19 [the principal "charging section of the Act of "1937] shall not apply to any trade "or business carried on by a body "corporate during any chargeable "accounting period if, for a year or "period which includes, or for years "or periods which together include, "the whole of the chargeable account- "ing period, the actual income of the "body corporate from all sources is "apportioned under or for the pur- "poses of section 21 of the Finance "Act, 1922, and all the persons to "whom it is apportioned are "individuals."

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there were no profits assessable to profits tax of H. Co. for these years. The Crown contended that, when the principal company was exempt from profits tax, the provisions of section 22 (2) of the Act of 1937 were no longer operative, as there was an inherent assumption that the principal company must be liable for profits tax or section 22 would not operate.

On appeal to Upjohn J. from the decision of the special commissioners affirming the assessments, the assessments were discharged. The Crown appealed:—

Held, that there was no justification for holding that the subsidiary company was liable to profits tax on the ground that the exemption of the principal company by implication suspended or defeated the operation of and effect of the grouping notice, and there was nothing in section 22 of the Act of 1937 justifying an assumption that it was limited to cases where profits tax would be exigible. The words "for the purpose of the provisions of this "Act relating to" profits tax meant "for the purpose of ascer- "taining what profits tax, if any, would be exigible on the profits "of the principal and subsidiary companies respectively."

Dicta in *Inland Revenue Commissioners* v. *Birmingham District Power and Traction Co. Ld.* (1928) 141 L.T. 1 considered.

Decision of Upjohn J. [1954] 1 W.L.R. 1368; [1954] 3 All E.R. 379 affirmed.

Appeal from Upjohn J.

Heelex Investments Ld., a wholly-owned subsidiary company of Sidcup Investments Ld., was assessed to profits tax for the two accounting periods February 1, 1947, to January 31, 1948, and February 1, 1948, to January 31, 1949, in the respective sums of £12,903 16s. and £7,130 4s.

On September 28, 1948, Sidcup Investments Ld., the principal company, had given a notice under section 22 (1) of the Finance Act, 1937, requiring that the provisions of subsection (2) should apply to Heelex Investments Ld. as regards those periods. The notice was given out of time but was accepted by the Commissioners of Inland Revenue. No determination was given by the commissioners in accordance with section 22 (3) (*c*) relating to the accounting periods of the principal company to which the accounting periods under appeal were to be deemed to correspond.

On September 29, 1952, the special commissioners, by notice to the principal company, directed under section 21 of the Finance Act, 1922, that the income of that company for each of the years 1946–47, 1947–48 and 1948–49 be deemed to be the income of its members and that the amount thereof be apportioned among the members. The principal company was an investment company within section 20 of the Finance Act, 1936, and section 14 of the Finance Act, 1939, was therefore applicable.

On August 26, 1953, the subsidiary company gave notice of appeal against the two assessments to profits tax for the periods above mentioned. The special commissioners, on appeal, confirmed the assessments and the subsidiary company appealed. At the hearing before Upjohn J. the following matters were

taken to be common ground, in addition to those set out above: (a) it was assumed that all the members of the principal company were individuals, as required by the exempting section 31 (2) of the Finance Act, 1947; and (b) the assessments made on the principal company for the group profits for the years 1947, 1948 and 1949 were discharged following the direction under section 21 of the Act of 1922, and the tax already paid was repaid.

Upjohn J. reversed the decision of the special commissioners and the assessments on the subsidiary company under appeal were discharged.

The Crown appealed.

At the hearing before the Court of Appeal it was said on behalf of the Crown that the additional matters accepted before Upjohn J. had been taken to be common ground on the footing that certain correspondence was in evidence before the special commissioners. It had since transpired that that was not so. If it was sought to say that there was no evidence that all the members of the principal company were individuals, counsel for the Crown would submit that the point was not open to the subsidiary company, but, subject to that, the submission put on behalf of the Crown was on the footing that that correspondence had been before the commissioners. Counsel for the subsidiary company intimated that he would, if necessary, take the point, but he was not called upon to make any submission.

Geoffrey Cross Q.C. and *Sir Reginald Hills* for the Crown.
L. C. Graham-Dixon Q.C. and *John Creese* for the company.

The case cited in argument is referred to in the judgment.

EVERSHED M.R. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. This is an appeal by the Crown from a decision of Upjohn J. which reversed a decision of the special commissioners concerning the liability to profits tax of a company called Heelex Investments Ld. Heelex Investments Ld. is a wholly-owned subsidiary of Sidcup Investments Ld., and, accordingly, the provisions of section 22 of the Finance Act, 1937, apply to it. It has been assumed for the purposes of this case that all the shares in the principal company are held by individuals. Furthermore, it appears that the principal company is, and has at all material times been, a company in respect of which a direction could be given under section 21 of the Finance Act, 1922. [His Lordship read section 31 (2) of the Finance Act, 1947.]

It appears that on September 28, 1948, the principal company gave a notice under section 22 of the Act of 1937. A notice under that section can be given by a body corporate resident in the United Kingdom in respect of any other body corporate resident in the United Kingdom when the latter body corporate is a

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subsidiary of the former, as in this case, requiring the provisions of section 22 (2) to be put into operation. The effect of the provisions of section 22 (2) is that during all relevant accounting periods while the notice is in force—and I should add that the notice is irrevocable once given—the profits or losses of the subsidiary are to be treated for the purpose of the provisions of the Act of 1937 relating to profits tax as if they were profits or losses arising in the corresponding chargeable accounting period from the trade or business carried on by the principal company. On September 28, 1948, the principal company availed itself of the provisions of section 22 (1), and gave notice in accordance with that section in respect of the subsidiary company, thereby bringing into operation as regards the profits of that subsidiary the provisions of section 22 (2). It is not in dispute that this notice was, under the statutory provisions as they now stand, a valid notice, and was accepted as such by the commissioners; although, apparently, it was given out of time according to the provisions of section 22 as originally framed.

On September 29, 1952, which is to be observed is some four years after the section 22 notice was given, the special commissioners made a direction under section 21 of the Finance Act, 1922, to the effect that the actual income from all sources of Sidcup Investments Ld. should be treated as being income of its members and apportioned amongst its members accordingly. On the assumption made by Upjohn J., which for the purposes of this appeal can be adopted, that all the members of the principal company were individuals, that direction brought into play for the benefit of the principal company the exemption afforded by section 31 (2) of the Act of 1947. That concatenation of events produced a result unacceptable to the Revenue, inasmuch as the profits of the subsidiary company, which considered as a separate entity was liable to pay profits tax, were to be treated for the purposes of profits tax as though they were profits of the principal company; and as the profits of the principal company were exempted from profits tax by virtue of section 31 (2) of the Act of 1947, the effect of treating the profits of the subsidiary company for the purposes of profits tax as though they were profits of the principal company was to exempt the profits of the subsidiary company from profits tax altogether.

Mr. Cross has said all that could be said in support of the appeal. He admits very fairly, and rightly as I think, that in view of the language of section 22, any body corporate resident in the United Kingdom which is a principal company in relation to a subsidiary which is also a corporate body so resident, can give the notice referred to in section 22 irrespective of its own liability to profits tax. He, therefore, cannot and does not claim that the notice given under section 22 in the present case, which, indeed, was given long before the exemption of the principal company from profits tax under section 31 (2) of the Act of 1947 arose, was an invalid notice. He says, however, that words

must, by necessary implication, be read into section 22 (2) to the effect that the profits of the subsidiary company are only to be treated as profits of the principal if, and so long as, the income of the principal company is liable to profits tax. He spells that qualification out of the words " for the purpose of the provisions " of this Act relating to " profits tax, and he invites us to construe those words as meaning " for the purpose of charging " the profits of the subsidiary to profits tax." With respect to Mr. Cross I cannot find that these words are capable of any such meaning. It seems to me that the words " for the purpose of " the provisions of this Act relating to " profits tax mean " for " the purpose of ascertaining what profits tax, if any, is exigible " on the profits of principal and subsidiary companies respec- " tively." I see no reason for construing these words as limited to cases where tax will in the result be exigible.

Mr. Cross invites us to construe the section in this way on the ground that anomalous results, which could not have been intended by the legislature, would otherwise ensue; but it is not open to us to rectify defects in the language of taxing statutes. The subject must bear tax only if, on a fair construction of the statute as it actually stands, he falls within the charge to tax. I cannot find on that principle any sufficient justification for holding that the subsidiary company is liable to profits tax on the ground that the exemption of the principal company by implication suspends or defeats the operation and effect of the notice given under section 22.

Upjohn J., with whose judgment and the reasoning on which it is based I entirely concur, was referred, as this court was referred, to the case in the House of Lords of *Inland Revenue Commissioners* v. *Birmingham District Power and Traction Co. Ld.*[1] That case was concerned with corporation profits tax and it raised a comparable question, inasmuch as there was a provision in section 53 (3) of the Finance Act, 1920 (the Act imposing that tax) under which the profits of a subsidiary company, as therein defined, were, on the appropriate application being made, to be treated for the purposes of that part of that Act, that is to say, for the purposes of the provisions charging the corporation profits tax, as being the profits of its principal company. The Birmingham District Power and Traction Co. Ld. was exempt from the tax by virtue of the fact that it was carrying on a particular class of business, which was one of a number of businesses in respect of which exemption from tax could be claimed. That principal company had subsidiary companies which were not themselves exempt; and under section 53 (3) of the Act it made an application, which was accepted by the Inland Revenue Commissioners, for the profits of the subsidiaries to be treated as being profits of the principal company. Notwithstanding that application and its acceptance, assessments were

[1] (1928) 141 L.T. 1.

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made on the subsidiary companies. When these were objected to, they were discharged, and it was sought to charge the principal company, notwithstanding that it was exempted from tax by the express terms of the Act. Their Lordships were unanimously of opinion that the principal company could not be so assessed in the face of the statutory exemption. In the course of their speeches some of their Lordships made observations bearing to some extent upon the present question.

Lord Buckmaster, so far as his actual conclusion was concerned, held that as the application for the amalgamation of profits, if I may so describe it, had been, in fact, made by the principal company and had been accepted by the Inland Revenue Commissioners, and as the principal company was exempt from the tax, the assessments on the principal company could not stand. But he used language which suggested that had it not been for the fact that the application had been made and accepted, he would have taken the view that the provisions of section 53 (3) of the Act of 1920 did not apply at all in a case where the principal company was exempt from the tax. The language which he used does not, in so many words, state that conclusion, but it suggests that he would have arrived at that conclusion had the state of the case left it open for him so to do.

The other members of the House who touched on this aspect of the question were both, I think, of opinion that it was irrelevant that the principal company was exempt from tax, inasmuch as the provisions of the Act expressly enabled such a company to make an application under section 53 (3). As the plain terms of the Act allowed an application to be made by such a company, the consequences of such an application had to be accepted, whatever the result might be from the tax point of view. Accordingly, if a principal company, which was entitled to make an application under section 53 (3), did make such an application, it was no objection that, on account of the exemption of the principal company, the result might be that the profits of the subsidiary would escape tax.

All the observations in the speeches of their Lordships in that case which have a bearing on this aspect of the question were, strictly speaking, obiter, because the question actually in issue was whether the exempted principal company could itself be assessed to tax. That was the subject-matter of the decision. As regards the obiter dicta, it seems to me that, on balance, they tend in the present case to support the position of the subsidiary company rather than that of the Crown.

Accordingly, I find nothing in that authority which would prevent me from following what I conceive to be the true construction of the sections which are relevant in the present case. On the true construction of those sections, it seems to me to be plain that in the present case the notice which was given under section 22 operated to amalgamate the profits of the subsidiary with those of the principal company for the purposes of profits

tax with the consequence that, as the principal company was, for the time being at all events, exempt from profits tax (on the assumption on which the case has proceeded that all its shares were held by individuals at the material time), the subsidiary company's profits were relieved from profits tax because they fell to be treated for the purposes of that tax as being profits of the exempted principal company. In short, I entirely agree with the reasoning of Upjohn J. and his conclusion, and, indeed, I might have contented myself by adopting them without adding any reasons of my own. I am, accordingly, of opinion that this appeal fails and should be dismissed.

EVERSHED M.R. I agree. I cannot entertain any doubt that the judge was entirely right in his conclusion.

I would like to associate myself with what Jenkins L.J. has said about the *Birmingham District Power and Traction Co. Ld.* case,[2] because I am by no means satisfied that Lord Buckmaster went as far as Mr. Cross submitted. I doubt whether Lord Buckmaster was doing more than intimating his view that a company which was at the time exempt from corporation profits tax, could not make a valid or effectual application under section 53 of the Finance Act, 1920, or that, if it did make such an application, the commissioners were not bound to accept it. As they had done so, Lord Buckmaster took the view that it was then too late to challenge the result so far as that company was concerned.

In the present case, as Jenkins L.J. observed, Mr. Cross has conceded (and I think rightly conceded) that the principal company was entitled at the time of service to give a notice under the Finance Act, 1937, and in those circumstances I doubt whether Lord Buckmaster's language is of any assistance at all to Mr. Cross's argument. I do, however, observe that, in regard to the Act there in question, Lord Buckmaster said[3]: " . . . but " where the language is plain it cannot be altered by declaring it " to be irrational or assuming that it is something that Parlia- " ment could not have intended. In the last resort Parliament " intends what in the language of an Act of Parliament it says " and it would indeed be dangerous to depart from this rule in " the administration of the law." I find that expression of a well-known principle peculiarly apt in the present case.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Titmuss, Sainer & Webb.*

E. D.

[2] 141 L.T. 1.

[3] Ibid. 4.

[CHANCERY DIVISION.]

1955
Feb. 10, 11.

Harman J.

* THEOCHARIDES *v.* JOANNOU.

[1950 T. 1205.]

Legal Aid — Costs — Taxation — Solicitor — Instructions for brief and supplemental instructions for brief — Whether permissible to be grouped as one item—Power of judge to overrule taxing master on question of quantum—Exceptional circumstance—Country solicitor —Attendance in London.

On the taxation of the defendant's bill of costs of an action brought in the High Court in which both parties were in receipt of legal aid, the taxing master disallowed certain items and reduced others. The defendant objected to the taxation. The relevant items of objection were:

(a) Fees and travelling expenses charged by the defendant's country solicitor in respect of attendance in London at the examination of a witness on commission. These items were disallowed.

(b) A fee of three guineas for instructions for brief to counsel to attend the examination of the witness on commission. The taxing master disallowed this item on the ground that it was taken into account in assessing the amount allowed for instructions for brief.

(c) Nine items in respect of fees charged for attendance of the country solicitor in London at conferences and consultations and at the hearing. The taxing master allowed the R.S.C. Appendix N items for the attendances. He added a sum of 20 guineas to the amount allowed for the instructions for the main brief by way of extra remuneration for the extra items involved through attendance from the country.

(d) Instructions for the main brief. A sum of 600 guineas was claimed and 200 guineas was allowed (together with the sum of 20 guineas above referred to). The allowance was made by the taxing master in the exercise of his discretion over questions of quantum after taking into consideration all the circumstances.

(e) A fee of 50 guineas for supplemental instructions for brief which was prepared after the trial had lasted several days and for the purposes of its continuance after an adjournment. The taxing master disallowed this item and stated in his answers that he had taken it into account in the item "Instructions for brief."

The defendant took out a summons for a review of the taxation:—

Held, (1) that the items in respect of the attendance of the country solicitor in London were not matters of quantum but of principle, and that since the attendance of the country solicitor was essential for the proper conduct of the case those items should be allowed; and that in respect of such of those items which the taxing master had allowed at minimum fees (R.S.C., Appendix N) it was wrong in principle for him in answer to the objections to add 20 guineas to the block fee for instructions on brief to compensate the country solicitor, but that this sum was to be distributed among the items in question.

(2) That it was wrong in principle for the taxing master to group under one item, "Instructions for brief," all the remuneration to which the solicitor was entitled for drawing whatever instructions it might be necessary to give counsel at whatever stage in the proceedings. Accordingly, in the circumstances, the item for instructions for brief to counsel to attend at the examination of

the witness on commission should be allowed at the fee of three guineas, and that of the supplemental instructions for brief at 25 guineas.

(3) That although the reduction of the item, "Instructions for "main brief," from 600 guineas to 200 guineas was substantial, it was not, in the circumstances, so exceptional as to justify the judge, contrary to established practice, overruling the taxing master on a question of quantum.

Observations of Sachs J. in *Self* v. *Self* [1954] P. 480; [1954] 3 W.L.R. 119; [1954] 2 All E.R. 550 considered.

Observations on reviews of taxation in legal aid cases and on the practice to be followed.

SUMMONS to review taxation.

The plaintiff, a Cypriot, brought proceedings in the Chancery Division against his brother in which (1) he asked for an account in respect of certain moneys which he alleged his brother held on trust; (2) he claimed that a partnership subsisted between himself and the defendant in respect of two restaurant businesses. Both parties to these proceedings were granted civil aid certificates under the Legal Aid and Advice Act, 1949.

The action was heard before Roxburgh J. on April 28, 29, 30, and May 1, 1953. On May 4, 1953, the action was ordered to stand over with liberty to apply to restore it. On June 23, 1953, terms of settlement were approved by the judge under which the plaintiff accepted £500 in full satisfaction and an order was made for the taxation of the plaintiff's and the defendant's costs pursuant to Sch. 3, para. 4 (1) to the Legal Aid and Advice Act, 1949. The Law Society with leave of the Treasury agreed to waive its lien on the £500 in aid of the Legal Aid Fund.

On the taxation of the defendant's costs the taxing master disallowed certain items and reduced others. The defendant objected to the taxation.

The relevant items of objection were: (a) Items Nos. 2 to 5. The defendant's country solicitor attended in London at the examination of a witness on commission, and fees and travelling expenses were charged. The fees were reduced and the travelling expenses were disallowed. The ground of reduction and disallowance was that the defendant's solicitor's London agents could have attended at the examination. In his answers the taxing master referred to *W. F. Marshall* v. *Barnes and Fitzpatrick*,[1] and ruled that the expenses were incurred by overcaution.

(b) Item No. 1, a fee of three guineas for instructions for brief to counsel to attend the examination of the witness on commission. The taxing master disallowed this fee on the ground that this item was taken into account in assessing the amount allowed for instructions for brief.

(c) Items Nos. 12A, 17, 19, 21, 23, 25, 26, 28 and 30. These were fees charged for the defendant's country solicitor's attending

[1] [1953] 1 W.L.R. 639; [1953] 1 All E.R. 970.

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a conference, consultations and at the trial in London. The taxing master allowed the R.S.C. Appendix N items for the attendances. On objection he added a sum of 20 guineas to the amount allowed for instructions for the main brief (item No. 12) by way of extra remuneration for the extra items involved through attendance from the country.

(d) Item No. 12, "Instructions for the main brief." A sum of 600 guineas was claimed and 200 guineas was allowed, apart from the extra 20 guineas mentioned in (c) above. The allowance was made by the taxing master in the exercise of his discretion over questions of quantum after taking into consideration all the circumstances. The particular circumstances were that the effective period covered by the civil aid certificate was the 56 days before trial of the action, and that the defendant's solicitors did not produce any record or entry of attendances stating that they could not afford the time necessary to keep such records.

(e) Item No. 27. This was a fee for supplemental instructions for brief, which was prepared after the trial had lasted four days and for the purposes of its continuance after adjournment. The fee claimed was 50 guineas. The taxing master disallowed this item, and he stated in his answers that he had taken it into account in the item, "Instructions for brief" (item No. 12).

The defendant took out a summons for a review of the taxation.

Mark Nesbitt for the defendant.

Peter Foster for the Official Solicitor, as amicus curiae.

Harman J. This is a summons to review a taxation in a case in which both parties were granted legal aid certificates. Earlier applications of this kind have appeared in the reports, one of them before myself, *Warman* v. *Barclays Bank Ld.*,[1] and another before Sachs J., *Self* v. *Self*.[2] The difficulty in these cases is that the applicant whose solicitor's costs are being taxed, has, in effect, no interest in the matter. If he has a nil contribution, he cannot have any interest, and with a contribution of the sort which is usually found in legal aid cases, he practically never will have an interest. The application, therefore, is made for the benefit of the solicitor and possibly for the benefit of counsel who have been concerned in the case. In *Self* v. *Self*,[3] it was for the benefit of counsel, because where counsel takes a legal aid case he agrees to be satisfied with a proportion of the taxed fee and there is no agreement between him and the solicitor, such as is usual as between solicitor and counsel in an ordinary case, to pay him the fee marked on his brief. Another anomaly is that the other party to the litigation is not interested either. It is the Legal Aid Fund which is interested. The result is that

[1] [1954] 1 W.L.R. 191; [1953] 2 All E.R. 1575.

[2] [1954] P. 480; [1954] 3 W.L.R. 119; [1954] 2 All E.R. 550.

[3] [1954] P. 480.

there is nobody to put the other side of the picture, and the taxing master suffers under that difficulty. He may well consider himself to some extent forced into the position of guardian of the public purse because there is no one else to see to it. A good deal of the dissatisfaction in the present case has been caused by the fact that the taxing master avowedly adopted that attitude here. I do not think that he could help it. When this matter came before me, I was not satisfied to ply the labouring oar in that way. I therefore made application to the Lord Chancellor, by whose direction the Official Solicitor was appointed as amicus curiae, to put before me such considerations as the public interests demanded, and Mr. Foster very ably and temperately has carried out that task. There still remains, or may remain, a difficulty which I foresee, and that is this: in this case, as indeed in *Warman* v. *Barclays Bank Ld.*,[4] though not in *Self* v. *Self*,[5] the Legal Aid Committee had been asked to give and had given a fresh certificate or an amendment to a certificate to enable the application to be made. Suppose, then, the application wholly to fail. Suppose, moreover, that the respondent be not a person legally aided. Then costs might be given against the applicant to the extent of his means, and one would arrive, as far as I can see, at the position where the legally aided person might be liable to pay, at any rate in part, the costs of an application made solely for the benefit of his solicitor or counsel and which could not enure to his benefit in any event. That is a very extraordinary state of things which has not yet arisen and I do not know what may happen when it does arise.

The present case is a remarkable one. The defendant's bill of costs was brought in for some £2,400 and of that the taxing master has taxed off about £1,100. The defendant's solicitor says, in effect, that such a disallowance shows, on its face, that the taxing master was not exercising a judicial discretion. I have already felt bound to reject that plea because I do not think that there is any evidence to support it.

The objections taken were 33 in number and for the most part they were for comparatively small sums. With a good many of them I have dealt as the case proceeded. Those which I have allowed are certain items for the attendance of the country solicitor, because, as it seems to me, those were not matters of quantum. They were matters of principle, and it is not right that the country solicitor's expenses of attendance on difficult matters, as these were, should be denied him when the application is such that his attendance is really required. Consequently, items Nos. 2, 3, 4 and 5 were allowed on that footing. I have also allowed a small item, No. 8, which was for a copy of the statement of claim which seemed to me reasonable under the circumstances.

[4] [1954] 1 W.L.R. 191.

[5] [1954] P. 480.

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A number of items was abandoned. There remain also items Nos. 6, 10, 32 and 33 which I disallowed on the footing that they were mere matters of quantum; and further a series of items, Nos. 12A, 14, 17. 19, 21, 23, 25, 26, 28 and 30, which represent attendance fees for the solicitor, all based on R.S.C. Appendix N; all, that is to say, minimum fees. When that was pointed out to the taxing master on the objections, he, I think, regarded it as a reasonable objection and he added 20 guineas to the (so to speak) block fee for instructions on brief to compensate the country solicitor. In my judgment that was not the right way of doing it. I propose to distribute that 20 guineas among those items. That will have the effect of reducing the amount allowed by the taxing master for instructions on brief to 200 guineas.

There are three other matters with which I have not dealt. The first (item No. 1) was in respect of the instructions given to counsel who attended on the examination on commission of a witness. A modest fee of 3 guineas was asked for, and the taxing master disallowed it, or, rather, he stated that he had taken it into account in his instructions on brief. He overruled the objection. How much he took into account in those instructions, I do not know. Rather similar is item No. 27, which was a fee to the solicitor of 50 guineas for drawing supplemental instructions on the brief. These supplemental instructions were given to leading counsel during the intermission of the hearing, after the action had been heard for four days in the High Court and then adjourned, and at that point, having regard to the conduct of the proceedings and the course which the action had taken, a supplemental set of instructions became necessary. The solicitor asked 50 guineas for drawing it, and there were long and complicated documents. The taxing master again stated: "I "have taken this item into account in the item 'Instructions "'for brief.'" He considered that there should only be one item "Instructions for brief" and that that should include all the remuneration the solicitor got for drawing whatever instructions he gave to counsel at whatever stage in the proceedings. There was one set of instructions for examining or cross-examining the witness on commission (item No. 1), and there were the main instructions for the brief (item No. 12), and the supplemental instructions necessitated by the changes in the situation occurring during the hearing (item No. 27). It does not seem to me to be right to group all those items together in that way. Instructions to counsel for the examination or cross-examination of a witness on commission are quite a different matter from instructions for the trial, and the exceptional circumstance of the litigation, which was between two Cypriots whose affairs were in the greatest obscurity, and whose conduct was very difficult to ascertain as their language also was hard to make out, is a circumstance which would well justify further instructions to counsel quite distinct from the instructions upon which his brief was based. I propose to allow those two items,

but not at the amounts asked for. I propose to allow 3 guineas for item No. 1 and 25 guineas for item No. 27. I think that 50 guineas was too much to ask.

After taking out those two items, there remains the 200 guineas which the taxing master thought was a proper fee for the instructions on the main brief. Counsel for the defendant submitted that this fell so far short of the 600 guineas asked for, as of itself to show that the taxing master cannot have taken the matter properly into consideration. Secondly, it was said the taxing master went wrong because he did not believe that the work on which the instructions were based had all been done after the civil aid certificate was granted. Further, it was said that the taxing master had no right to disbelieve or discredit the solicitor's managing clerk, who told him that the whole staff had been engaged on this matter for the 56 days between the date of the certificate and the trial but who could not produce any attendances or diary to show how the work had been done, such as a London office might have been able to furnish.

I do not think that the taxing master did anything of the sort. What he said in effect was that he had kept in mind the fact that the work for which payment could be made under the certificate only represented the work of the last 56 days before the trial, the action having been started a long time before and pleadings having been long closed when the certificate was issued. He was entitled, therefore, to consider that the solicitor must have gathered a certain amount of information on which the defence had been settled. He was entitled, I think, to take into account that matter; in other words, that when the certificate was given, the solicitors did not start entirely de novo. He was also, I think, entitled to take the view that he should have been furnished with details to substantiate the claim as to the amount of work which had been done; but, on the other hand, the amount of a fee of this kind and for work of this nature does not depend upon a precise estimate of the time which the work took. It is a guess, for what it is worth. It seems to me the taxing master's guess is quite as good as another's, and very much better than anything of mine would be, because he is very much more experienced. I cannot say whether 200 guineas is the sort of fee which ought to be allowed on this sort of occasion. What was asked was 600 guineas. The taxing master considered that 200 guineas was a proper amount to allow. Before I could reject that, I should have to be satisfied that it was not an amount which any reasonable taxing officer could assess, and I can find no possible basis on which I can do that; it is, after all, well settled that the taxing office, except in very exceptional circumstances, must have the last word in these matters.

The authorities were reviewed by Wynn-Parry J. in *Coon* v.

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Diamond Tread Company (1938) Ld.[6] He there cited *White* v. *Altrincham Urban District Council*,[7] in the Court of Appeal, where Greene L.J. said: "The rule that the decision of a taxing "officer on questions of quantum ought not to be overruled by "the judge on a review of taxation has long been established. "This rule, in my opinion, applies generally to taxations in the "county court as it applies to taxations in the High Court, and "it is only in exceptional circumstances (which do not exist in "the present case) that a decision of the taxing officer on a "question of quantum should be overruled." What are exceptional circumstances is a matter on which it is very difficult to decide, but I do not see that the mere fact that what was asked was 600 guineas and what was given was 200 guineas can possibly be an exceptional circumstance. The difference is merely one of quantum and is not so outrageous as to speak for itself and show that the taxing officer did not exercise his discretion in a proper manner. I feel quite unable to interfere on that ground.

Then it is said that a principle has been established in *Self* v. *Self*,[8] and is stated in the headnote of the report of that case in the Law Reports as a principle of law. It reads: "It is "not a proper exercise of judicial discretion so to assess the fees "of counsel upon a taxation under the Third Schedule of the "Legal Aid and Advice Act, 1949, as to deprive those who do "such work under the Act of the 85 per cent. of that fair and "reasonable remuneration which is provided by the Schedule." I do not myself feel that the judgment really justifies that headnote. The judge did state that he would have been prepared to decide the case upon the footing that the registrar had disregarded a fee that was fair; in other words, that the registrar had not exercised his discretion on a proper basis. It does not go, I think, beyond that. If it did, it was not a dictum that I could follow, because it would be stating that the judge and not the taxing master is the proper arbiter in matters of quantum, and that is not the rule. What Sachs J. really said was that the registrar there taxing the bill only arrived at the figure he did arrive at because he took altogether wrong matters into consideration. On that footing, of course, the decision is perfectly understandable and right. I think that the obiter dicta at the end of the judgment[9] need rather a cautious approach. I do not see here that the taxing officer has been shown to have taken into account anything which he was not entitled to take into account, or to have left out of account anything he was bound to take in. That being so, it is not a matter of whether I will but whether I can interfere, and I cannot interfere. Therefore, I do not propose to alter the 200 guineas fee, allowed on the main instructions for brief.

[6] [1950] W.N. 343; 66 T.L.R. (Pt. 2) 8; [1950] 2 All E.R. 385.
[7] [1936] 2 K.B. 138, 145 (C.A.).
[8] [1954] P. 480.
[9] Ibid. 485.

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The result of that will be that I make certain allowances and reject the rest. I think an order in that form will be satisfactory, and I do not think I need send it back to the Taxing Office. I shall order that objections Nos. 1, 2, 3, 4, 5 and 8 be allowed at the amount appearing in the bill, that item 27 be allowed at a fee of 25 guineas. Item 12 may in effect stand at 220 guineas, although, as I have explained, I have attributed 20 guineas of that sum to certain other items. I propose to make the usual order for taxation of the applicant's costs under the Legal Aid and Advice Act, he having, rightly or wrongly, got a certificate covering this application. It is not a case in which I think I should order him to pay anybody else's costs.

Order accordingly.

Solicitors: *Joynson-Hicks & Co., for Robert C. Wilson, Margate; Official Solicitor.*

J. A. G.

[COURT OF APPEAL.]

* MEARNS *v.* MEARNS.

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Feb. 7, 28.

Jenkins and Morris L.JJ.

Husband and Wife—Divorce—Costs—Petition and answer—Wife's allegations of cruelty — Adultery of wife admitted — Measure of liability of party cited to pay costs.

A wife petitioned for divorce on the grounds of her husband's cruelty. By his answer the husband denied the wife's allegations of cruelty and asked for the dissolution of the marriage on the ground that his wife had committed adultery with the party cited and further asked that the party cited might be condemned in the costs of the suit. The wife and the party cited admitted the adultery. The party cited did not enter an appearance nor was he represented at the hearing. The commissioner, after rejecting the wife's petition and granting a decree nisi on the cross-prayer in the husband's answer, ordered the party cited to pay the husband's costs and the husband to pay the wife's costs, such costs to be recoverable by the husband from the party cited. The party cited appealed against the order as to costs:—

Held, (1) that it was wrong in principle to saddle a party cited, whose adultery with a wife was proved or admitted, with the costs of other issues raised between the husband and wife in which the party cited was in no way concerned and neither arising out of nor connected with the misconduct of which he was proved or admitted to have been guilty; (2) that as the commissioner had not found that any of the episodes relied on by the wife as cruelty were caused or contributed to by the party cited, the order he made was wrong in principle and the court was free to vary the order in accordance with the justice of the case; (3) that the proper order to be made was that: (i) the husband should bear and pay so much of his own and his wife's costs as would have been incurred if his answer had been confined to contesting the charges of cruelty without raising the issue of adultery; (ii) the party cited should pay the balance of the husband's costs; and (iii) the husband

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should pay the balance of the wife's costs but should be entitled to recover such balance from the party cited.

Kara v. *Kara and Holman* [1948] P. 287; 64 T.L.R. 329; [1948] 2 All E.R. 16 distinguished.

Appeal from Commissioner Sir Harry Trusted.

The wife, Shirley Rhona Mearns, petitioned for divorce on the ground of her husband's cruelty. In his answer the husband denied cruelty and prayed for the dissolution of his marriage on the ground of his wife's adultery with John Edward Bullen, whom he cited. The wife and the party cited admitted the adultery. The party cited did not enter an appearance and was not present or represented at the hearing. After a trial lasting three days the commissioner dismissed the wife's petition and granted a decree nisi on the cross-prayer in the husband's answer. He ordered the party cited to pay the husband's costs, the husband to pay the wife's costs and that such costs should be recoverable by the husband from the party cited. The party cited was informed on May 20, 1954, that the husband's costs amounted to £383 19s. 4d., and subsequently that he would also be liable for the wife's costs, which had not yet been taxed but which it was thought would amount to about the same figure.

The party cited obtained leave from the commissioner to appeal out of time against the order as to costs.

Bruce Campbell for the party cited.
J. G. K. Sheldon for the husband.

The following cases were cited in argument in addition to those referred to in the judgment of the court: *Langrick* v. *Langrick and Funnell* [1]; *Codrington* v. *Codrington and Anderson* [2]; *Bew* v. *Bew* [3]; *Rotch* v. *Crosbie* [4]; *Lever Brothers Ld.* v. *Masbro' Equitable Pioneer Society Ld.* [5]; *Société des Hôtels Réunis (Société Anonyme)* v. *Hawker* [6]; *British Russian Gazette and Trade Outlook Ld.* v. *Associated Newspapers Ld.* [7]; *Barker* v. *Barker* [8]; *Badcock* v. *Badcock and Chamberlain* [9]; Rayden on Divorce, 6th ed., pp. 478, 481.

Cur. adv. vult.

February 28. The judgment of the court was read by Jenkins L.J. The suit in which this appeal arises began with a petition by the wife, dated July 9, 1952, for dissolution of her marriage to the husband, a naval officer, on the grounds of cruelty. By his answer dated October 29, 1952, the husband denied the wife's allegations of cruelty, alleged that the wife had in or about June, 1950, committed adultery with one John

[1] [1920] P. 90; 36 T.L.R. 308.
[2] (1865) 4 Sw. & Tr. 63.
[3] [1899] 2 Ch. 467.
[4] (1909) 54 S.J. 30.
[5] (1912) 28 T.L.R. 294.
[6] (1914) 30 T.L.R. 423.
[7] [1933] 2 K.B. 616.
[8] [1950] 1 All E.R. 812; [1950] W.N. 158.
[9] (1858) 1 Sw. & Tr. 189.

Edward Bullen, another naval officer, whom he cited, at Pisky Cottage, Tregarnon Bay, Cornwall, and prayed dissolution of the marriage on this ground with costs against the party cited. The wife put in a reply to the husband's answer whereby she admitted the adultery therein alleged, but claimed that the husband had condoned such adultery and further that he had conduced to it by his cruelty. By her discretion statement dated December 14, 1953, the wife admitted adultery with the party cited on two occasions in 1950 at hotels in London in addition to the occasion mentioned in the answer. At the hearing of the suit the husband, with leave, amended his answer by adding an allegation of the wife's adultery with the party cited on the two occasions in London admitted in her discretion statement. The party cited, who did not dispute the adultery alleged against him, entered no appearance and was not present or represented at the hearing.

The case was tried by Commissioner Sir Harry Trusted on December 14, 15 and 16, 1953. The wife's charges of cruelty against the husband were fully investigated and on December 16 the commissioner delivered a careful and detailed judgment in which he reached the conclusion that " on the whole " the wife had not made out a case of cruelty which would justify the granting to her of a divorce. He added that had he thought otherwise he would have had very grave doubt whether or not it would be right to exercise discretion in her favour. As to the prayer in the answer, he held that there was no doubt at all that the wife had committed adultery with the party cited. That was, of course, obvious, as the wife admitted it and the party cited did not dispute it. The commissioner rejected the wife's plea of condonation on the ground that the forgiveness relied on by the wife as condonation took place when the husband was only aware of the one act of adultery at Pisky Cottage originally alleged in his answer, his knowledge of which depended on an admission made to him by the wife as to that one occasion only, without any reference to the two other occasions in London. The commissioner also rejected the wife's plea that the husband had conduced to the adultery, holding " that there was no possible " conduct of his which could conduce to her behaviour and there " was clearly no excuse for her behaviour." Accordingly the commissioner rejected the prayer in the wife's petition and granted a decree nisi on the cross-prayer in the husband's answer. The delivery of the judgment was followed by a discussion about costs, which resulted in an order to the effect that the party cited was to pay the husband's costs, and that the husband was to pay the wife's costs, such costs to be recoverable by the husband from the party cited as costs in the cause.

On December 21, 1954, the party cited obtained the leave of the commissioner to appeal out of time from this order as to costs, and pursuant to such leave he now appeals to this court. [After considering the reason for the party cited's delay in appealing, his Lordship continued:] In all the circumstances we

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do not think the appeal should be rejected merely on account of the party cited's delay, which cannot be said to have prejudiced the husband in any way.

We pass, therefore, to consideration of the question whether this case is one in which the Court of Appeal can properly interfere with the order as to costs made by the commissioner.

The order here made undoubtedly bears heavily on the party cited, inasmuch as it makes him liable not merely for the husband's and the wife's costs of the issue of adultery, which he must clearly bear, as the costs which the husband has incurred on his own behalf or must defray on his wife's behalf in proceedings justly brought by him on account of the admitted adultery of the party cited with the wife, but also for the costs of both spouses on the issue of cruelty, although that issue was wholly concerned with charges made by the wife against the husband with which, prima facie, the party cited had nothing to do.

Mr. Sheldon, for the husband, referred us to some of the numerous cases which establish the well-known proposition that the power of a trial judge, under section 50 of the Judicature Act, 1925, and Rules of the Supreme Court, Order 65, r. 1, to determine by whom and to what extent the costs are to be paid, being by the express terms of the section and rule a discretionary power, his exercise of such discretion, by making some particular order as to costs in any given case, should not be interfered with by this court, even though he has given the necessary leave to appeal under section 31 (1) (*h*) of the Act, unless the circumstances are such as to warrant the conclusion that, in making the order under appeal, the judge took into consideration some irrelevant matter, or excluded from consideration some relevant matter, or proceeded upon some wrong principle, so that the order made was not the product of a proper exercise of the discretion reposed in him.

We need not refer to the authorities cited by Mr. Sheldon in support of this unassailable proposition, which of course we fully accept, and from which it follows that, in the present case, this court should not interfere with the commissioner's order as to costs merely on the ground that if it had rested with us to exercise the discretion we would for our part have exercised it in a different manner.

But it must in our view be wrong in principle to saddle a party cited, whose adultery with the wife is proved or admitted, with the costs of other issues raised between the husband and the wife in which the party cited is in no way concerned, and neither arising out of nor connected with the misconduct of which he is proved or admitted to be guilty.

Thus, in the present case, if the facts had been that the last act of cruelty relied on by the wife had taken place before the wife even became acquainted with the party cited and that she had at some later date admittedly committed adultery with him,

it would in our view clearly be wrong in principle to make the party cited liable for the costs of the issue of cruelty raised by the wife's petition.

In *Kara* v. *Kara and Holman*,[1] Hodson J., sitting in the Court of Appeal in a case in which a co-respondent was held liable for the costs of cross-charges of cruelty made by the wife against the husband, and delivering the judgment of the court on the question of costs, explained in these words the court's reason for holding the co-respondent liable for the costs of these cross-charges[2]: "We condemned the co-respondent in the costs of "the allegations of cruelty on the ground that the history of the "case showed that his association and eventual adultery with "the wife were bound up with the matrimonial disputes from "which the allegations of cruelty arose. In particular, he was "closely concerned with the final act of cruelty relied on and "was a discredited witness called to support the wife in respect "of this final act. In this connection the court was referred to a "decision of Hill J. in *Darnborough* v. *Darnborough and Smith*,[3] "in which considerations of this kind actuated the learned judge "to make a like order."

In the present case the commissioner gave no reasons for making the order as to costs appealed from by the party cited. Mr. Sheldon, for the husband, urged that we should assume that the commissioner, having heard all the evidence, came to the conclusion that, as in *Kara* v. *Kara and Holman*,[4] the association and adultery of the wife and the party cited were bound up with the disputes out of which the allegations of cruelty arose and that, accordingly, the party cited should be saddled with the whole of the costs.

Having read the commissioner's judgment, we can make no such assumption. The sequence of events as narrated in his judgment is plainly against it. The behaviour of the husband relied on by the wife as amounting to cruelty arose, according to her, out of the husband's excessive sexual demands and his rough, not to say brutal, conduct in forcing such demands upon her at times when she was unwilling to comply with them. The parties were married on October 6, 1945. The first specific instance of cruelty relied on by the wife took place in December, 1946. At this time the spouses were at Lossiemouth, where the husband was stationed. The party cited was also stationed there, and we gather on friendly terms with both spouses, but there is nothing in the judgment to suggest that the unsatisfactory relations obtaining between the husband and the wife at that period had anything to do with the party cited. The adultery did not take place until the first half of 1950, when the husband was on service abroad, the last of the three occasions being in

[1] [1948] P. 287; 64 T.L.R. 329; [1948] 2 All E.R. 16.
[2] [1948] 2 All E.R. 16, 18.
[3] (1926) 96 L.J.P. 24.
[4] [1948] P. 287.

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June, 1950. The husband returned in November, 1950. There is no doubt that the wife's brief association with the party cited was by then a thing of the past. He was in fact married in December, 1950. The wife's admission to the husband of one of three acts of adultery took place in December, 1950, when, knowing only of this one incident, he seems to have forgiven her. He did not know of the other two occasions until they were disclosed by her discretion statement. The last two incidents of cruelty relied on by the wife were of precisely the same character as the incident of December, 1946, and the inference seems irresistible that they were recrudescent symptoms of the same sexual maladjustment as had caused the earlier trouble. We have been unable to discern in the commissioner's judgment any finding, express or implied, to the effect that any of the episodes relied on by the wife as cruelty were caused or contributed to by the party cited. On the contrary, he seems to us to treat the husband's allegedly cruel conduct on the one hand and the wife's brief adulterous association with the party cited on the other hand as entirely distinct and separate matters; and we think this must be taken to have been his view of the facts.

In the brief discussion about costs which followed the judgment, no one was concerned to argue that the party cited should not bear all the costs. In substance the only question debated was whether the wife should be given her costs against the party cited or the husband should pay the wife's costs, with a right to recoupment against the party cited, and the commissioner adopted the latter alternative.

For the reasons we have endeavoured to state, we think that the order made was wrong in principle, so far as it made the party cited liable for the costs of the husband and the wife on the issue of cruelty. In our judgment, therefore, this court is free to vary the order in accordance with our own view of the justice of the case. We think the proper order to be made in the circumstances is an order to the effect that: (i) The husband should bear and pay so much of his own and the wife's costs as would have been incurred if the answer had been confined to contesting the charges of cruelty without raising the issue of adultery; (ii) the party cited should pay the balance of the husband's costs; and (iii) the husband should pay the balance of the wife's costs, but should be entitled to recover such balance from the party cited.

The effect of an order in this form should be to make the party cited liable for the costs of the issue of adultery, including the costs of the pleas of condonation and conduct conducive raised by the wife, so far as the raising of those pleas occasioned any addition to the costs which would have been incurred on the hypothesis mentioned in (i) above. Accordingly, we would allow this appeal and vary the commissioner's order as to costs in the way we have indicated.

We were told that the party cited has already paid a total of some £320 on account of the husband's costs. Any excess of this amount over and above the total sum payable by the party cited under the order now to be made should be repaid to him.

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Appeal allowed.

Solicitors: *Bircham & Co.; Wedlake, Letts & Birds.*

B. A. B.

[PROBATE, ETC., DIVISION.]

* WELLS-KING *v.* WELLS-KING.

1955
Jan. 28.

Lord Merriman P. and Collingwood J.

Husband and Wife—Divorce—Rehearing—Jurisdiction of Divisional Court—Concurrent appeal to Court of Appeal—Allegation of undisclosed adultery—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940), *r.* 36 (1).

A wife was granted a decree nisi of divorce on the ground of cruelty in a defended suit, but her allegations of sodomy were rejected. The husband afterwards obtained evidence which, he alleged, showed that the wife had committed adultery prior to the hearing. After receiving an intimation that the Queen's Proctor did not intend to intervene the husband filed two notices of motion for a rehearing, one in the Court of Appeal (which was asked in the alternative to rescind the decree), and one in the Divisional Court under rule 36 (1) of the Matrimonial Causes Rules, 1950. After the motion had been adjourned in the Court of Appeal the application under rule 36 (1) came before the Divisional Court:—

Held, that although the discovery, after the hearing, that the wife had previously committed adultery might be a ground for an application under rule 36 (1) (although it might also have been open to go to the Court of Appeal) the application to the Court of Appeal was a clear allegation of error in the court below. In such circumstances the Divisional Court had no jurisdiction to hear the motion before it, for that application concerned one aspect only of a matter which was indivisible.

Prince v. *Prince* [1951] P. 71; 66 T.L.R. (Pt. 2) 493; [1950] 2 All E.R. 375 applied; *Alhadeff* v. *Alhadeff* [1951] W.N. 367 considered.

Per curiam: The fact that a wife is carrying on a clandestine adulterous association at the material times is plainly a matter to be taken into account in assessing allegations made by her of cruelty, particularly in sexual matters, for it throws light upon charges of abnormality which she has brought and affords a possible cause to which her nervous and mental condition might be referable. If she has suppressed her own guilt not only to her husband but to the court to which she has complained, the effect of that suppression upon her credibility will also be material.

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Motion for a rehearing under rule 36 (1) of the Matrimonial Causes Rules, 1950.[1]

A wife by her petition dated June 22, 1953, alleged that her husband had treated her with cruelty and had committed, and attempted to commit, sodomy upon her. The husband denied these allegations, but made no cross-charge, and on July 28, 1954, after a three-day hearing, Mr. Commissioner Blanco White Q.C. dismissed the charge of actual sodomy but granted a decree nisi on the ground of cruelty. It was extracted from the wife in cross-examination, and the admission was accepted as accurate, that the main body of her case was the charge of sodomy, not only the charge of actual sodomy, but of attempts to commit sodomy, in the course of which, and in connexion with which, much of the ill-treatment of which she complained was said to have occurred. Other charges made concerned alleged ill-treatment in connexion with the chastisement of the daughter of the marriage, the husband being said to have lost his temper with the wife when she tried to interfere.

The husband alleged on the present application that as a result of investigations subsequent to the granting of the decree he had obtained evidence that the wife had frequently committed adultery with a named man, prior to the date of the hearing, of which he then had no knowledge. On August 20, 1954, he submitted this evidence for the consideration of the Queen's Proctor. On September 6, 1954, an intimation was received from the Queen's Proctor that he did not propose to take action. The six weeks from the date of the decree nisi expired on September 8, 1954, and the first date for the application to make that decree absolute was September 9, 1954. On September 7, 1954, the husband filed two notices of motion, one to the Court of Appeal in general terms, asking that the decree nisi might be set aside and the petition dismissed or, alternatively, for a new trial, and the other to the Divisional Court under rule 36 (1) asking for the decree to be set aside and a new trial ordered, on the ground that the wife had committed adultery on various specified occasions, and had "failed to disclose to the court at the hearing of the "suit any of the said adultery committed by her."

The appeal to the Court of Appeal came into the list first, and after a brief hearing at which the court was informed that the application to the Divisional Court was pending, it was intimated that if the two proceedings were both effective, it was manifestly

[1] Matrimonial Causes Rules, 1950, r. 36: "(1) An application for "re-hearing of a cause heard by a "judge alone where no error of the "court at the hearing is alleged shall "be made to a Divisional Court of "the Probate, Divorce and Admiralty "Division. The application shall be "by notice of motion, stating the "grounds on which it is based, filed "in the Divorce Registry, and served "upon the opposite parties within "six weeks after judgment. The "notice shall be a fourteen days' "notice and may be amended at any "time by leave of the judge.

"(2) Any other application for re-"hearing shall be made by way of "appeal to the Court of Appeal."

convenient that the application to the Divisional Court should be heard first, and the other adjourned. No ruling was given upon the question of jurisdiction under rule 36 (1).

A. C. Munro Kerr for the husband.
Norman Lermon for the wife.

The following cases were cited in argument in addition to those cited in the judgment: *Pattenden* v. *Pattenden & Herzfield* [2]; *Taylor* v. *Taylor & Darg* [3]; *Skull* v. *Skull* [4]; *Corbett* v. *Corbett*.[5]

LORD MERRIMAN P. referred to the history of the case and to rule 36 of the Matrimonial Causes Rules, 1950, and said that it had been made perfectly clear in argument on behalf of the husband that the validity of the judgment of the commissioner was being emphatically challenged in the Court of Appeal. [His Lordship continued:] It is quite plain that the commissioner dismissed the charge of sodomy as such, that is, the completed offence. In effect, he said that on the evidence which was presented to him he was quite satisfied that no criminal court would convict, and he did not propose to do so himself. It is not so certain that he disregarded altogether the allegations of attempts, but there are parts of the judgment which we have read which appear to leave it in the air whether some of the quarrels between a husband, whom he described as highly-sexed, and a wife who was plainly dreading the possibility of a sixth or seventh pregnancy, were or were not accompanied by attempts at irregularity in sexual matters.

Otherwise, on the face of the pleadings there were added, by further and better particulars, certain charges of ill-treatment in connexion with chastisement of the daughter of the marriage. Put quite briefly, the suggestion was that when the wife resented and tried to interfere, the husband transferred his attentions to her, and she was the victim of his temper.

We have, of course, no means whatever of going into the merits of the criticisms and comments against this judgment, nor, indeed, have we any right to do so, but at the end of it all, the substance of the matter is this, that having got rid of the actual charge of sodomy, which, according to the opinion that he had formed, was really the background and the main part of the wife's case, the commissioner, nevertheless, found a charge of cruelty proved, on material which, it was suggested, did not reach the required standard. A challenge of this nature against the correctness of the judgment in a defended case—and I emphasize the fact that it was a contested case—makes it impossible

[2] (1868) 19 L.T. 612.
[3] (1899) 68 L.J.P. 116.
[4] [1954] P. 458; [1954] 2 W.L.R. 1049; [1954] 1 All E.R. 1030.
[5] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69.

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to say that it is a case of which it is even faintly possible to say that no error of the court at the hearing is alleged. In other words, it is quite plain that from that point of view it is a matter for appeal to the Court of Appeal.

That, however, is not the end of the matter. What is now said is that, unknown to the husband, at the time when the events of which the wife complained were happening, and unknown to the husband at the time of the hearing, or, indeed, at any material time, the wife was conducting a clandestine association of an adulterous character with a certain man. It is said that it is no fault of the commissioner that that aspect of the matter, if it exists at all, was not taken into account at the hearing, because nobody knew about it, least of all the commissioner, and it is on that ground that we are asked to order a rehearing.

Having taken the appropriate steps to ensure that he was in time, whatever way the spin of the coin resulted, the husband now asks this court to deal in isolation with one aspect of a matter which seems, to put it quite shortly, to be indivisible.

I will assume, for the purposes of the argument, that had the commissioner's judgment on the materials then before him been unchallenged and unchallengeable, it would have been appropriate to bring the motion to this court, on the basis that there was this undisclosed and unknown matter with which, through no fault of his own, he was precluded from dealing. I say I will assume this, and I do not think that it is necessary to go through the case law on this subject again. We have had the advantage of hearing the cases referred to, some of them old cases before the jurisdiction of this court was narrowed in the way which first occurred after the earlier Judicature Act,[1] and as it stands in terms of the present rule, which reflects the limitations imposed on our jurisdiction under the Matrimonial Causes Rules, 1924, r. 46. I need only say that having had the advantage of re-reading *Prince* v. *Prince*,[2] the opportunity of doing so has only increased my admiration, if I may humbly say so, for the masterly survey of the history of this matter, and of the case law on the subject, in the judgment of Evershed M.R. By that test, and leaving out this question of adultery, it is, in my opinion, so plainly a case for the Court of Appeal that it is unnecessary to discuss the matter in detail.

The question, then, is whether the matter is disposed of by assuming, for the purposes of the argument, that if the introduction of the new issue of the wife's adultery afforded the only challenge against the commissioner's judgment and this motion were solely based upon the introduction of that fresh element, it might have been proper to come to this court, notwithstanding that, on such fresh material, it might also have been open, in what was a hotly contested case, to go to the Court of Appeal.

[1] Supreme Court of Judicature Act, 1890, s. 1.

[2] [1951] P. 71; 66 T.L.R. (Pt. 2) 493; [1950] 2 All E.R. 375.

Further, bearing in mind that it does not matter whether there is or is not a formal allegation of error, if in fact error is, and must be, alleged, I agree with Mr. Lermon's view that conversely, although a formal allegation of error is implicit in the filing of the notice of appeal to the Court of Appeal, if that were removed by the withdrawal of that particular challenge to the judgment, it might be open to us to deal with the adultery issue separately. That, quite definitely, is not this case, for Mr. Munro Kerr made it abundantly plain that he was not prepared to abandon either of the two horses and ride only one, and that the appeal to the Court of Appeal, with full force and effect, stands adjourned.

In my opinion, the only thing which has caused any doubt at all has been, upon what basis was the appeal adjourned by the Court of Appeal? It was suggested that when the appeal came into the list in that court before this motion was due to come on here, some expression of opinion or direction—it was not suggested that there was an order—was made, that this was a proper case for us to deal with rather than the Court of Appeal, and that it was suggested that, if it were desired to appeal from the decision of this court, the two appeals could be heard together in the Court of Appeal. It would have been surprising if that had been the basis of any direction to us to hear the merits of the motion, for it is plain that the mere fact that an appeal to the Court of Appeal from an erroneous decision of this court could be heard at the same time as the other appeal could not possibly give us jurisdiction if we had not already got it. We were informed that the Court of Appeal were told (and this is common ground) that it would be very much more convenient if we dealt with the case here because the appellant was a poor man, and because to bring out the points of criticism in the Court of Appeal would involve a transcript of the evidence, which would not necessarily be involved in this court. That again, though no doubt a matter of practical importance, could not possibly give us jurisdiction if we did not already possess it. However, there being no shorthand note of the proceedings in the Court of Appeal and, therefore, no possibility of obtaining a transcript, I made such inquiries as were open to me during the adjournment yesterday, and it is plain, as I announced at the time, beyond the slightest doubt that no direction that we should hear the case, nor anything resembling such a direction, was given. All that happened, when it was made clear that these proceedings were also pending, was that it was intimated, without any examination of papers or going into detail (for the whole matter lasted only a few minutes) that if these two proceedings were both effective, it was manifestly convenient that this one should come on first, and, for that purpose, that the other should be adjourned; but nothing whatever happened to decide that this proceeding was right and that we must deal with it.

If, as I am satisfied, the right course was taken in going

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to the Court of Appeal by way of challenging the correctness of the judgment of the commissioner, it seems to me to be beyond doubt that it would be open to the appellant to attempt to persuade the Court of Appeal either to hear the new evidence introducing the charge of adultery against the wife, or, if they did not wish to take that course, to order a rehearing in order that the issues raised by both parties might be considered together, for it really is unarguable that on a charge of cruelty by a wife, the fact that she is, during the whole of the material time, alleged to be conducting a clandestine adulterous association, is entirely disconnected with the charge of cruelty. It is said that in this case the husband is not alleging that anything he did wrong (if he did anything wrong, which he denies) was provoked by his knowledge, or suspicion even, of an adulterous association. Be it so. But that is not the only test. It really goes without saying that a tribunal, which is made aware of the fact that during the whole time covered by her complaints the wife is, or ought to be, suffering from a guilty conscience, may think that this must necessarily have an effect on her attitude to the married life; and this is plainly a matter to be taken into account in assessing allegations of cruelty, particularly of cruelty in connexion with sexual matters. Apart from that, of course, the effect on the wife's credibility of her having suppressed, if she has suppressed, her own guilt, not only to her husband at the material time but to the court to which she complained, is obvious. If, moreover, she succeeds in proving her charge of cruelty, and the husband also succeeds in proving his cross-charge of adultery, it would be a question for the judge who heard the case to decide whether to dismiss both the petition and the answer outright, on the rival discretionary bars provided by those circumstances, or to give a decree to the one or the other, according to his assessment of culpability, or even to give a decree to both.

All these matters would be dealt with together on the appeal on the case as a whole. We are asked to deal with one aspect of it, and one aspect only, and on the ground of this undisclosed adultery to order a rehearing, because the commissioner did not know about the adultery and was not asked to deal with it. In my opinion it is clear that this is a case which, regarded as a whole, as it ought to be regarded, is one for the Court of Appeal and not for this court.

Collingwood J. I agree. [His Lordship referred to the history of the case, and continued:] The result is, that on the same day, September 7, 1954, the husband (1) invoked the jurisdiction of this court, a condition of his right to do so being that no error of the court at the hearing is alleged, and (2) gave notice to the Court of Appeal, thereby clearly challenging the correctness of the decision of the trial judge, albeit in a separate

document. That application has not been withdrawn, and is still pending.

As Lord Merriman P. has said, there have been a number of decisions with regard to the limitation on the jurisdiction of this court under rule 36, and it is not necessary to go into them in any detail, more particularly because the law on the matter was exhaustively reviewed by Evershed M.R. in *Prince* v. *Prince*.[3] There are two short passages to which I would like to refer in that decision. After considering the early history of the rule and *Winter* v. *Winter*,[4] Evershed M.R. said[5]: "Up to this point "the Divisional Court had not considered any application for a "rehearing of a cause in which there had been a conflict of "evidence on vital matters, and in which the loser was seeking "to obtain a rehearing on the ground that fresh evidence was "available which would put an entirely different complexion on "the case. In such a case, if the Divisional Court has exclusive "jurisdiction to order a rehearing, such power obviously trenches "on the general jurisdiction of the Court of Appeal to make a "similar order." After pointing out that the question whether the Divisional Court had jurisdiction to order a rehearing in such a case was first raised in *Petty* v. *Petty*,[6] Evershed M.R. continued[7]: "The application was by the wife for the rehearing "of a contested case, in which the wife asked for a divorce on "the ground of her husband's cruelty and desertion, while the "husband denied those charges and charged the wife with "desertion. Both parties gave evidence and called witnesses. "The judge dismissed the wife's prayer and gave the husband a "decree because he preferred the husband's evidence to that of "the wife. The basis of the wife's application for a rehearing "was that since the hearing she had obtained statements from "several witnesses, whose evidence would persuade the court "that the truth lay with the wife and not with the husband. "Also it was said that the preparation of the wife's case had been "interfered with by enemy action." The passage to which I particularly wish to refer follows[8]: "Lord Merriman P., in the "course of his judgment, said: 'We feel that the peculiar juris-"'diction vested in this court by rule 36 (1) should only be "'exercised in cases in which it is plain that this court is "'intended to have the jurisdiction to the exclusion of the Court "'of Appeal.'" Evershed M.R. then continued[9]: "After "reviewing the history of the jurisdiction now embodied in the "rule, Lord Merriman P. said that, in his view, it was impossible "to attach to the word 'error' in the rule any interpretation or "limitation based solely on any part of the earlier history of the "court. 'It is much more likely,' he continued, 'that the words "'were deliberately chosen as being apt to impose a limitation

[3] [1951] P. 71.
[4] [1942] P. 151; 58 T.L.R. 365; [1942] 2 All E.R. 390.
[5] [1951] P. 71, 78.
[6] [1943] P. 101; 59 T.L.R. 385; [1943] 2 All E.R. 511.
[7] [1951] P. 71, 78.
[8] Ibid. 79.
[9] Ibid.

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"'on our special jurisdiction to order a rehearing notwith-
"'standing the vesting in the Court of Appeal of the general
"'right to deal with such applications from this Division.' Lord
"Merriman P., when presiding in the Court of Appeal in the
"recent case of *Everitt* v. *Everitt*,[10] again emphasized this limitation of the jurisdiction of the Divisional Court under rule 36. "He said[11]: 'In dealing with cases under rule 36 of the Matri-
"'monial Causes Rules, 1947, the Divisional Court has always
"'been careful to avoid any semblance of trespassing on the
"'exclusive jurisdiction of the Court of Appeal: *Petty* v. *Petty*[12]
"'and *Peek* v. *Peek*[13]; although if the Divisional Court is
"'satisfied that a case comes within the rule it is bound to deal
"'with it, as I pointed out in the Divisional Court in *Peek* v.
"'*Peek*,[13] because no other court can do so.'"

Applying those principles to the present case, it is quite clear that in the absence of any allegation of error the discovery, after the hearing before the commissioner, of a hitherto undiscovered adultery by the petitioner, would be a ground for application under rule 36. An outstanding example of that is *Alhadeff* v. *Alhadeff*.[14] But the fact remains that in the present case it is abundantly clear that the husband is alleging error on the part of the trial court, and that is so whether one does or does not have regard to the existence of the notice of motion to the Court of Appeal.

The limitations which have been placed upon the jurisdiction of this court in those passages which I read from the judgment of Lord Merriman P., however, exclude the case put forward today on behalf of this respondent from our consideration. Finally, I agree with what Lord Merriman P. has said with regard to the evidence which it is proposed to bring with reference to the adultery by the wife in this case. The sexual life of the parties here, certainly from 1948 onwards (and that is the date when the association with the named man is alleged to have begun) is of vital import in the case. The question Aye or No: Was there an adulterous association on the part of the wife at that time? is of paramount importance in two regards: (1) as throwing light on the charges of abnormality which she brings against her husband, and (2) as affording a possible cause to which her nervous and mental condition was referable.

This matter should be dealt with by the Court of Appeal, and not this court.

Application dismissed.

Solicitors: *Gustavus Thompson & Sons for Herrington & Carmichael, Camberley; Kinch & Richardson for Close & Son, Camberley.*

J. B. G.

[10] 65 T.L.R. 121; [1948] 2 All E.R. 545.
[11] 65 T.L.R. 123.
[12] [1943] P. 101; 59 T.L.R. 385; [1943] 2 All E.R. 511.
[13] 64 T.L.R. 429; [1948] 2 All E.R. 297.
[14] [1951] W.N. 367.

[CHESTER ASSIZES.]

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Feb. 11.

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Criminal Law—Wounding—Causing grievous bodily harm with intent to murder—Causing grievous bodily harm with intent to cause grievous bodily harm—Unlawful wounding—Defence that wounds inflicted while accused in state of automatism—Defence of insanity not raised—Onus on the prosecution to prove conscious acts.

The accused was charged with causing grievous bodily harm with intent to murder his son, causing him grievous bodily harm with intent to cause him grievous bodily harm, and unlawful wounding. No plea of insanity was raised. Medical evidence was given to the effect that the accused was not suffering from such a disease of the mind as to render him insane at the time of the commission of the acts; but that his actions were consistent with his having a cerebral tumour, a condition in which a person is liable to an outburst of impulsive violence, quite motiveless, and over which he has no control.

In his charge to the jury, the judge said that if they were satisfied that, owing to his condition, the accused did not knowingly strike his son, but was acting as an automaton without any knowledge of, or control over, his acts, it was open to them to return a verdict of Not Guilty on all three charges.

TRIAL ON INDICTMENT.

The accused Stanley Charlson, was charged on an indictment with the following offences: unlawfully and maliciously causing grievous bodily harm with intent to murder, contrary to section 11 of the Offences against the Person Act, 1861; unlawfully and maliciously causing grievous bodily harm with intent to cause grievous bodily harm, contrary to section 18 of the Offences against the Person Act, 1861; and unlawful wounding, contrary to section 20 of the Offences against the Person Act, 1861.

At the trial the following facts were proved or admitted: The accused, who was a shopkeeper, lived in a house the back room windows of which overlooked a river two feet deep. The accused called his ten-year-old son Peter into the back room telling him that there was a rat to be seen standing on a stone in the river. When the boy came to the window the accused picked up a wooden mallet from the floor and struck the boy twice on the head, breaking the skin of the scalp and causing blood to flow. The boy tried to defend himself from further attack by wrapping his head in a towel. The accused thereupon picked the boy up and threw him out of the window. The boy fell twenty-five feet into the river and suffered severe injuries to his leg and arm. He eventually managed to crawl out of the river and call for assistance.

When the accused was interviewed by the police he appeared to be very distressed and bewildered. He admitted that he had

[Reported by A. KYNRIC LEWIS, Esq., Barrister-at-Law.]

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struck the boy but he did not know why he had done so. A full account of his statements to the police and his demeanour upon apprehension is given below in the judge's charge to the jury. The material parts of his statement made under caution are also given.

Evidence was given by the prison medical officer that the accused was sane and that he had no disease of the mind whatsoever. On the other hand, clinical examination and the history of the case pointed to the possibility that the accused was suffering from a cerebral tumour, in which case he would be liable to a motiveless outburst of impulsive violence over which he would have no control at all; and during such an outburst he would not know the difference between right and wrong.

H. Emlyn Hooson for the Crown.

D. Eifion Evans Q.C. and *Philip Owen* for the accused.

Barry J. (in his summing-up to the jury). Members of the jury; on any view you may think this is a very pathetic case. You have heard from the police officers, from other witnesses, and from the accused's own wife, the type of man he is. It is not disputed by the prosecution that he has been throughout his married life a very devoted husband and father, and there is nothing to suggest—indeed there is everything to suggest the contrary—that he and this little boy had any serious differences at all.

It is clear that he was a very devoted and indulgent father, and that he and his little son got on very well together. Such is the man who faces these very serious charges.

The charges are three in number. The first and most serious one is the charge of causing grievous bodily harm to this little boy—Peter Stanley Charlson—with intent to murder him. The second alternative charge, which is somewhat less serious than the first, is a charge of causing grievous bodily harm to this little boy with the intention of causing him grievous bodily harm. The third and least serious of the three charges, is the charge of inflicting grievous bodily harm upon this boy without any specific allegation as to his intention.

No plea of insanity is raised in this case. If the facts warrant it, it is always open to an accused person to say: "I "was guilty of the offence with which I am charged, but at the "time I committed the offence I was insane and therefore "should not be punished for what I did." That is a defence which has not been raised in this case. Indeed, you have heard from the medical officer of Her Majesty's Prison in Manchester that the accused man is sane and that he is not suffering from any disease of the mind.

That, however, does not conclude the matter. The prosecution have to prove the case against him. What have the prosecution to prove in relation to each of the three alternative

charges? With regard to all of them they have to prove that the accused caused some grievous bodily harm to his son. There has been no dispute about the facts here. The defence accept the story told to you by this little boy about what happened on the evening of January 13, 1955; and they do not suggest that those blows upon the head did not amount to grievous bodily harm, quite apart from the injuries which the boy sustained when he fell into this shallow water from the window of the back room nearly 25 feet above. Therefore you need not trouble about that aspect of the case when considering any of these three alternative charges.

However, the prosecution must prove more than that. In relation to the first two charges it is necessary for the prosecution to prove the intention alleged in the indictment. That is to say, in relation to the first charge, the prosecution must satisfy you not only that the accused man did cause grievous bodily harm to his son, but also that at the time he did so he intended to murder this boy. Nothing short of that will suffice. Both the act of causing grievous bodily harm and the intent to murder must be established to your complete satisfaction.

The burden of proof rests upon the prosecution, who must satisfy you as to all the essential elements of each of the offences with which the accused is charged; it is not for him to prove his innocence. If you are in any doubt about the matter, then the accused is entitled to an acquittal.

Similar considerations apply to the second charge of causing grievous bodily harm with the intention of causing that grievous bodily harm. There again, the prosecution has not only to prove that the accused did inflict those injuries upon his son, they must also prove that when he inflicted the injuries he intended to do some serious injury to the boy.

Lastly there is the charge of inflicting grievous bodily harm and in relation to that the prosecution need not prove a definite intent either to murder or to inflict grievous bodily harm, as would be the case in relation to the first two charges. They do have to prove, however, that the grievous bodily harm was caused by the accused unlawfully and maliciously. That means that there must be a conscious act on the part of the accused. Malice does not necessarily involve the existence of some hostility to the person injured. It does, however, mean that the act must be done consciously. The accused, in order to commit an unlawful and malicious act, must know what he is doing, and also he must realize that he has no lawful justification for his act.

These are all criminal offences and the first two charges are of offences of the very utmost gravity. In order to commit any of these three offences there must be some sort of guilty mind. For example, an act that otherwise might be an assault would not be an assault if it were done purely accidentally. You or I in a public street might suddenly put our hands up to stop our hat being blown off and hit a passer-by on the nose without

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knowing he was there. If we had consciously put out our hands, whatever the motive, to hit the passer-by on the nose, it would be an assault; but it would have to be a conscious act. If it were purely accidental, no assault would be committed; the element of consciousness would not be present.

Similarly in the case of certain diseases, a person suffering from a disease may be deprived of the control of his actions. We all of us know something about the effects of epilepsy and the actions of a man who is suffering at any given moment from an epileptic fit. A man in the throes of an epileptic fit does not know what he is doing. Thus if a friend bends over to assist the epileptic and in the midst of his fit the latter grips that friend by the throat, not knowing what he is doing, and in so doing throttles him and causes his death no offence has been committed against the criminal law; because the actions of an epileptic are automatic and unconscious, and his will and his consciousness are not applied to what he is doing; he is not in control of his actions. Let us apply those principles to the facts of the present case. [His Lordship referred to the boy's evidence and continued:] You have got to consider the whole of the evidence and apply your minds to each of these charges in turn. When you consider the first count you must ask yourselves whether there is anything in this case which could possibly justify you in reaching the view that this man really intended to murder his son. You remember that that intent to murder must be brought home to the accused with certainty. If you think it has not been proved, and there is nothing in the evidence to justify the conclusion that this man had a conscious intention of murdering his son, then you would proceed to the second alternative charge and consider that with equal care. Again, members of the jury, you will look at the whole picture. You will consider the sort of man that the accused was, and you will consider all the events leading up to the very tragic incidents which resulted in these injuries to the boy.

He was invited by his father to go and look at a rat which his father had seen below the window which was just above the river, and he did so. He did nothing which could have annoyed any parent, and the boy does not suggest that his father showed any signs of annoyance with him before he struck him in this way. All these are matters which you have to consider in addition, of course, to the evidence of the prison doctor. You have to ask yourselves whether, having regard to those circumstances, you ought to infer that the accused did have a real intention of causing serious injury to his son.

The intention of the accused can, of course, only be inferred from all the circumstances which have been proved before you. Neither you nor I can ever look into the mind of an accused person and say with positive certainty what his intention was at any particular time. A jury is entitled to infer a man's intentions from his acts. As you were rightly told by the counsel for the

prosecution when this case was opened, under normal circumstances a man is presumed to intend the normal consequences of his acts. If a man consciously and deliberately strikes another man or woman with a mallet of this kind, in ordinary circumstances any jury would feel entitled to say that he must have intended to do some serious injury. You cannot strike people on the head with a mallet or stab them in the chest with a knife, without the extreme probability that serious injury will result; and therefore, other circumstances being equal, the jury is perfectly entitled to infer the intent from the mere act itself.

However, that is not an inference which must always be drawn. You should look at all the surrounding circumstances and ask yourselves what inference should be drawn in the present case. You may think, and it is open to you to think, that although an ordinary person under ordinary circumstances must inevitably have intended to do injury by using a mallet of this kind on the head of a little boy, none the less you are not satisfied that this particular man had that intention, owing to the state of his health as we now know it, and having regard to his relationship with the boy, and also to the lack of any provocation on the part of the boy or any motive of any kind for the crime.

It is for you to look at the whole of the circumstances and, having done so, to make up your minds whether it has been established to your satisfaction that the accused, when he inflicted those injuries, intended to do grievous bodily harm to his son. If you are not satisfied that that intention was there, then there must also be a verdict of not guilty on the second of those alternative charges, and you would have to consider the third.

As I have told you, no specific intention need be proved by the prosecution before the accused can be found guilty of the third charge of inflicting grievous bodily harm. You must, however, be satisfied that he was acting consciously and that he knew what he was doing when he inflicted those blows. If he did, however much his mind was disturbed and whatever mitigating circumstances there might be, he would be guilty of this offence. If he knew that he was striking his son, and realized that he had no legal excuse for striking him, as clearly he had not, and if he did that act consciously and of his own volition, then he would be guilty of inflicting grievous bodily harm.

Therefore, in considering this third charge you have to ask yourselves whether the accused knowingly struck his son, or whether he was acting as an automaton without any knowledge of or control over his acts. If you think that he was in a condition similar to that of a person in an epileptic fit, who does not know what he is doing at all, then the elements of malice and unlawfulness would not have been established. If the accused knew that he was striking the boy, and if he realized that he had no legal justification for what he was doing, then he is guilty of the charge. If you are left in doubt about the matter, and you

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think that he may well have been acting as an automaton without any real knowledge of what he was doing, then the proper verdict would be "not guilty," even on the third and least serious of these alternative charges.

There is the evidence of a doctor on the vital issue of the accused's consciousness and the existence of any intention on his part at the time that these acts were committed. There is nothing in the boy's evidence or that of any other witness which suggests any sort of provocation or motive for these acts. There is also the evidence of the accused; and reading between the lines from his wife's evidence it appears that he was almost too lenient with his son and on occasions it was she who had to do the correcting when he had done wrong. There was nothing strange about the accused's actions or words before these acts were committed, and the little boy did not suggest that there had been anything untoward in any of his acts before this attack.

What happened afterwards? We have got his statement, and you will be able to take that with you when you retire to consider your verdict. He has given his account of what he remembers. You will remember that he describes how they got into this back room (I need not go through that again), and that the rat had gone. Then he said: "I kicked something on the floor "and I saw that it was the big joiners' mallet that's usually kept "in the drawer. I picked it up to put it back in the drawer. I "remember hitting Peter on the head with the mallet. I do not "know why I hit him, but I do remember hitting him."

He then says: "The next thing I remember was being in "Openshaw in my car." Of course, to remember something does not necessarily mean that one remembers the conscious act. You have got to ask yourselves: when he took this mallet into his hand and struck his son, did he know he was doing it? Did he intend to do it, and did he realize he was doing an unlawful act? If he did, then he is guilty of the third charge at least. On the other hand, you may consider that he may not have known what he was doing at all, although perhaps he remembered it in a vague sort of way. If you think it was purely automatic action for which he had no responsibility at all, and over which he had no control, then the proper verdict would be "not guilty."

He says: "The next thing I remember is being in Openshaw "in my car. I had my windjammer and my woollen pullover on. "My raincoat and scarf were on the seat beside me." Then he says: "I stopped, and I knew something dreadful had happened. "I backed into a little side street to think. I knew there was "something about Peter and that I should not be there. I put "my raincoat and scarf on as I felt shivery. I knew I should go "back. I drove back to Stalybridge, and when I got back I saw "a Morris 8 outside my door. I knew it was the police car and "then I knew that something was wrong. I had remembered "when I was driving home that I had hit Peter on the head with

" the mallet. I drove round for a while, then I drove the car into " Revell's yard."

Sergeant Stewart then found him, and Sergeant Stewart has given an account of the conversation that he had with him. The conversation, you may think, largely bears out what the accused said in his statement. When the sergeant arrived he found the accused sitting in the driving seat of the car, and his head was bent forward on the steering wheel. The sergeant opened the off-side door and put his light into the car and shone it on to the accused's face. The accused then said very quietly: " My God, " tell me what I have done." Then there was a pause, and the accused went on: " It is something dreadful, isn't it; it's Peter, " isn't it?" The police sergeant said: " I don't know what you " have done; what have you done?" and the accused did not reply. By then it was just after half past nine. He was dazed and bewildered and was trembling violently.

A little later, you may remember, he was seen by Detective-Sergeant Charles Bentley who arrived at Revell's yard after Sergeant Stewart and Constable Merrick. He said to the accused: " I believe you are Mr. Charlson?" and the accused said " Yes." Sergeant Bentley then asked what had happened. The accused said: " I have done something dreadful to Peter "; and he was cautioned and told he would be taken to the police station. Again, according to the detective-sergeant, the accused appeared to be very distressed and was trembling violently. He was given a drink of water at his request, when he arrived at the police station, and Sergeant Bentley said that that seemed to revive him, and he said: " Why did I do it; I have done " wrong; I will have to be punished." The detective-sergeant told him that Peter, the little boy, was in the District Infirmary. He said to the accused: " He is injured, and he says you threw " him into the water." The accused replied: " Why did I do it?"

The detective-sergeant said to him: " Can you tell me what " did happen?" and the accused said: " We were in the back " room looking for a big rat which I had seen on a stone under " the window. I remember hitting Peter, but I don't know why " I did it; I will tell you what I remember." It was at that period that he wrote the statement that has been read to you more than once and the material portions of which I have just again brought to your attention. That is the evidence apart from the medical evidence.

The medical evidence shows that there has been a history of ill-health in the accused's family, and particularly ill-health of a certain kind, the existence of which in the accused is at least suspected by the medical officer of the prison. The accused's mother died of a cerebral haemorrhage; his aunt died of a cerebral tumour; his own sister died of meningitis; and his brother, who is still alive, has had an operation for a mastoid. That is the family history and there is a history of certain complaints which the accused has mentioned to the prison doctor. The accused

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has told the prison doctor that six or seven years ago he had some trouble with his legs which was then diagnosed as neuritis. No one suggests that what he says is untrue; the prison doctor appears to have accepted it, and there was no reason why he should not accept it. He said that after that he had increasing weakness in his legs and difficulty in co-ordinating their movements. He said that he could walk slowly satisfactorily, but he found difficulty in controlling the movements of his legs if he tried to run. Also he complained of persistent headaches which are sometimes of great severity, so severe as to be quite incapacitating.

He was examined by the prison doctor, Dr. Williams, who said this. On clinical examination he found signs of organic disorder of the nervous system which clearly indicated the need for further investigation. Without further investigation the doctor was not going to commit himself to say that this man had got a cerebral tumour. On the other hand, he said that clinical examination and the history of the case pointed at least to that possibility. It may well be that such a tumour exists. If a man or a woman is suffering from a cerebral tumour, says the doctor, he or she is liable to an outburst of impulsive violence, quite motiveless, and over which the patient has no control at all. The doctor does not state positively that that is the inference to be drawn from these events, but he says that it may be; and if a tumour does in fact exist, then the conduct of the accused would be wholly consistent with that of someone suffering from such a disease.

You, members of the jury, must consider this matter; and, of course, the defence involves the accused's statement that he did not know what he was doing, nor what he had done, and so was not in any case responsible for his actions; and that kind of defence requires very careful consideration from a jury. There are, however, circumstances in this case which might lead you to accept that defence more readily than you would do in very many other cases. It is entirely a matter for you to decide.

Looking at the whole of these circumstances, are you satisfied that the accused intended to murder the boy when he caused these injuries to him? If you are so satisfied, beyond any real doubt, then the verdict would be " Guilty " on the first count. A verdict of " Guilty " on the first count means that the remaining two counts need not be further considered. On the other hand, if you are not satisfied that he intended to kill his son, you have to consider the second alternative charge; and there the problem is: are you satisfied beyond any real doubt that, when he inflicted those injuiries, he intended to inflict serious physical injuries to his son? If you are satisfied, the verdict is " Guilty "; if you do not think that intention is proved, then the proper verdict is " Not Guilty." If you find him " guilty " on the second charge, you have no need to proceed to the third count. If you

find him " Not Guilty " on the first two charges, the third charge of inflicting grievous bodily harm must receive consideration.

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There you need not trouble yourselves with these questions of intention. The question is whether the accused knew what he was doing when he struck those blows. If he struck his son with the mallet, knowing what he was doing, and by those blows caused the injuries, then he is guilty of the third charge. If he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit then no responsibility rests upon him at all, and the proper verdict is " Not Guilty " of all the three charges.

Would you be good enough now to retire and let me know in due course whether you find the accused " Guilty " or " Not " Guilty " of any of the three offences with which he is charged. I will arrange for you to have a copy of the statement before you; and the document which shows that when he was formally charged by the police with this first offence he said: " I did not mean to " kill him; I don't know why I hit him "; and when before the magistrates he was asked if he wished to say anything, he said: " I can only plead Not Guilty to the charge; I would never want " to hurt Peter; I desire to reserve my defence."

Not Guilty on all three counts.

Solicitors: *Solicitor, Cheshire County Council; Davis, Hope & Furniss, Glossop.*

[QUEEN'S BENCH DIVISION.]

* JOHN *v.* HUMPHREYS.

1955
Mar. 10.

Lord Goddard C.J., Ormerod and Gorman JJ.

Road Traffic—Licence—Driving licence—Onus of proof—Not for prosecutor to prove that the defendant was not the holder of licence—Burden on defendant—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 4 (1).

The defendant, who was charged with driving a motor-vehicle, he not being the holder of a licence, contrary to section 4 (1) of the Road Traffic Act, 1930, did not appear in answer to the summons, but wrote to the court admitting the offence. The prosecution, having proved that the defendant drove a motor-vehicle at the time and in the place alleged, called no further evidence, contending that the burden of proving that he was the holder of a licence was on the defendant. The justices were of the opinion that before such burden passed to the defendant, the prosecutor must establish a prima facie case against him and that mere proof that the defendant had driven a motor-vehicle on the road did not establish a prima facie case, and they dismissed the information. On appeal by the prosecutor:—

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Held, that where the obtaining of a licence was by statute a prerequisite to the doing of some act, the onus was on the person doing the act to prove that he had a licence, it being a fact peculiarly within his own knowledge; thus in prosecutions under section 4 (1) of the Act of 1930 it was not for the prosecutor to prove that the defendant was not the holder of a driving licence; accordingly, in the present case, there being evidence that an offence had been committed, in the absence of proof by the defendant that he was the holder of a licence, the justices were bound to convict.

Rex v. *Oliver* [1944] K.B. 68; 60 T.L.R. 82; [1943] 2 All E.R. 800 applied.

CASE STATED by Bedfordshire justices sitting at Dunstable.

An information was preferred against the defendant, George William Joseph Humphreys, that he on August 14, 1954, in High Street, Dunstable, drove a motor-vehicle, he not being the holder of a licence, contrary to section 4 (1) of the Road Traffic Act, 1930.[1]

The following facts were found by the justices: The defendant on the day and at the place alleged in the information drove a motor-vehicle of which he was the owner. He did not appear in answer to the summons, but a letter to the court purporting to be written by him was read in which he admitted the offence and requested the court to accept a plea of Guilty.

It was contended by the prosecutor that the provisions of section 4 of the Road Traffic Act, 1930, constituted an absolute prohibition against a person driving a motor-vehicle on a road unless he was the holder of a licence and that, having proved that the defendant was the driver of the motor-vehicle on the occasion in question, no further evidence by the prosecution was required, and that the burden of proving that he was the holder of a licence was then on the defendant, since it was a fact peculiarly within his own knowledge.

The justices were of opinion that the prosecutor's contention was wrong in law and that before the burden of proving that he was the holder of a licence passed to the defendant, the prosecution must establish a prima facie case against him, and that mere proof that the defendant was driving a motor-vehicle on a road (that not being prima facie a wrongful act) did not establish such a case against him, and that if the prosecutor's contention was correct, the penalty could not be properly assessed as proof would be absent as to the date of expiry of the driving licence previously

[1] Road Traffic Act, 1930, s. 4: "(1) A person shall not drive a motor "vehicle on a road unless he is the "holder of a licence . . . and if any "person acts in contravention of this "provision, he shall be guilty of an "offence. . . . (5) Any person driving "a motor vehicle on a road shall, on "being so required by a police con- "stable, produce his licence for ex- "amination . . . and if he fails so to "do, he shall be liable to a fine not "exceeding five pounds: Provided "that, if within five days after the "production of his licence was so "required the licensee produces the "licence in person at such police "station as may be specified by him "at the time its production was "required, he shall not be convicted "of an offence under this subsection."

held, or whether he had in fact ever held such a licence. Accordingly, they dismissed the information.

The prosecutor appealed.

Peter Lewis, for the prosecutor, referred to *Rex* v. *Oliver*.[2]

The defendant did not appear and was not represented.

LORD GODDARD C.J. This is a case of a very unusual character which raises a point under the Road Traffic Act, 1930, which, so far as I know, has never been considered before. It is a case stated by justices for the county of Bedford, before whom the defendant was summoned for driving a car without a licence. He did not appear, but wrote a letter offering a plea of Guilty.

Unfortunately, at the present moment there is no machinery for enabling a plea of Guilty to be entered in this way by a defendant before a court of summary jurisdiction, although proposals are on foot at the present time for the purpose of saving man-power and expense to allow a person to send a formal plea to the court if he wishes to admit the case. In the present case, the defendant having admitted his offence, the police did not call any evidence except a police officer, who said that he had seen the defendant driving a car in Dunstable. The justices refused to convict because they had no evidence that he had not a licence. The police said that it was for him to prove that he had a licence. The justices were right, as the law is at present, in ignoring the defendant's letter, although I think that if the police could have proved that he was the person who had written the letter, that would have been evidence on which they could have convicted.

Mr. Lewis' point is that section 4 (1) of the Road Traffic Act, 1930, says that a person shall not drive a motor-vehicle on a road unless he is the holder of a licence; and that when an Act of Parliament provides that a person shall not do a certain thing unless he has a licence, the onus is always on that person to prove that he has a licence because it is a fact peculiarly within his own knowledge. *Rex* v. *Oliver*,[1] to which our attention has been called, after an elaborate review of the authorities, lays that down. Therefore, in theory, I suppose, a police officer who sees a car being driven in the street can always summon the driver of the car and leave it to the driver to prove that he had a licence. Of course, it is not to be contemplated for a moment that police officers would act in such a way; if they did, not only would they have costs given against them, but I should think that very severe steps would be taken. In the present case nothing of that sort happened. Although it is not stated in the case, we have been told, I think quite rightly, in the very unusual circumstances, and it is just as well that the court should know it, especially as the defendant has written to say he agrees with everything said in the case, that a police officer saw

[2] [1944] K.B. 68; 60 T.L.R. 82; [1943] 2 All E.R. 800.

[1] [1944] K.B. 68.

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the defendant nearly run over a child on a pedestrian crossing, and that he took his number but could not stop the car. When inquiries were made in Shropshire, where the car was registered, it could not be found that the defendant had a licence and so he was summoned for driving without a licence. Of course, if he had had a licence, he could have sent it to the clerk of the court and said: "Here is my licence, you can see it"; but the justices thought that as he was not present they could not convict him because there was no evidence, and they said—I can quite understand it, it is a sensible point to take—"If the prosecution's "contention is correct, the penalty could not be properly assessed "as proof would be absent as to the date of expiry of the driving "licence previously held, or whether he had in fact ever held "such a licence." All those things the defendant could have proved if he wanted to. He did not, and therefore I think that this case must go back to the justices with an intimation that there was evidence that an offence was committed, and as the onus was on the defendant to prove that he had a licence, they were bound to convict. If he did not choose to tell the police that he had a licence he must take the consequences and a proper penalty must be imposed. But it is not to be supposed that police officers will take these proceedings merely because they see somebody driving in the street, without having made proper inquiries, or think that there is ground for supposing that the driver had not a licence. In the present case there is every ground for thinking that the defendant had not a licence, and, therefore, there is no reason why he should not be convicted.

Ormerod J. I agree, although I come to the decision with some reluctance, as it seems an extraordinary position that if a police officer sees somebody driving in the street he can cause him to be summoned and put him to proof that he has a licence. There is some ground for my reluctance to be found in subsection (5) of section 4 of the Act of 1930, which provides the machinery for the police to demand a licence, and if the person has not got it, for giving him an opportunity to produce it in the next five days. My first view was that, reading the section as a whole, there must be some evidence to prove that the defendant did not possess a licence, but having regard to the decision in *Rex* v. *Oliver*,[2] it appears to me that there is no alternative but to say that this appeal must be allowed, and therefore I agree.

Gorman J. I agree.

Appeal allowed.

Solicitors: *Turner & Evans for John Q. Clayton & Co., Luton.*

J. F. L.

[2] [1944] K.B. 68.

[PROBATE, ETC., DIVISION.]

* PILINSKI *v.* PILINSKA

1955
Feb. 18.

Mr. Commissioner Latey Q.C.

Conflict of Laws—Marriage—Validity—Religious ceremony in Germany —No civil ceremony—Failure properly to register the marriage.

The parties, who were Poles, went through a religious ceremony of marriage in the Hamburg area of Germany in August, 1946, but there was no civil ceremony of marriage before a registrar as required by German law. By a decree of August 13, 1948, promulgated under the authority of the Allied Control Commission, religious ceremonies were, however, validated retrospectively if duly registered at Hamburg by December 31, 1950; but the only registration of marriage to be made in the present case was in the register of Papenburg in November, 1947:—

Held, that as the Papenburg registration was made in accordance with a temporary local arrangement between the district registrar and the regimental priest merely to record religious marriage ceremonies, it was not effective to validate the marriage in German law, and as the lex loci celebrationis governed the formalities the marriage in fact celebrated in church was null and void.

Starkowski v. *Attorney-General* [1954] A.C. 155; [1953] 3 W.L.R. 942; [1953] 2 All E.R. 1272 distinguished.

ISSUE as to validity of a marriage.

The following statement of the facts founded upon the evidence is taken from the judgment: The husband, Josef Pilinski, aged 41 years, who was formerly in the Polish Army serving with the Allied Forces in the late war, presented a petition for divorce on March 18, 1953 against his wife, Maria, née Romowicz, aged 32 years. The petition was amended in May, 1954, by a plea that the marriage was a nullity. On that plea an issue was ordered to be joined with the husband as plaintiff and the wife as defendant.

The plaintiff was a Pole who was called up to the Forces in 1939 when his country was invaded by the Nazis and like many of his compatriots he experienced many vicissitudes before joining the British Forces during the war. In 1946 he was stationed in Germany and having already been on terms of close friendship with the defendant in Poland he arranged for her to come to Germany. She came, and she was then suffering from consumption. He agreed to marry her so that she could go into hospital as a soldier's wife. They were both Roman Catholics and they went through a ceremony of marriage at the parish church at Tinnen, in the Hamburg area of Germany, on August 4, 1946, with the regimental priest officiating. There was never at any time a civil ceremony of marriage between them. Four days later she went into hospital. In May, 1947, the husband was transferred to England and in the autumn of that year the wife came to England also. She went into hospital and they never lived together again.

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Mark Smith for the husband.
John Latey for the wife, who offered no opposition.

Mr. COMMISSIONER LATEY, Q.C., stated the facts and continued: In August, 1946, the German law was that only a civil marriage before a registrar was valid. That was the German law even before the war and it is still the law. Non-civil marriages are void ab initio. (See Foreign Office Manual of German Law, 1950, vol. I, paragraph 488.) An expert in German law drew to my attention the fact that on August 13, 1948, a German decree was promulgated under the authority of the Allied Control Commission, the effect of which was to validate such marriages as this retrospectively if duly registered at the register office at Hamburg not later than December 31, 1950. The reference for that decree is Ordinance Gazette for the British Zone at page 238. This proviso was peremptory and laid down the time limit for registration.

The marriage certificate on the file purported to be a copy of the marriage entry in the register of Papenburg, bearing date November 18, 1947. On this a question arose that this might be registration within the meaning of the 1948 decree; but the expert in German law had taken pains to clear up this point himself. He received official communications from the marriage registrars at Papenburg and Hamburg, which, he assured me, would be admissible evidence in the German courts, to the effect (*a*) that this registration was merely a local and temporary arrangement between the district registrar and the then Polish regimental priest, placing on record that there had been a religious marriage ceremony; and (*b*) that this registration was not effective to validate the marriage in German law.,

The Hamburg marriage registrar in his declaration also referred to similar decrees dated March 17, and December 2, 1950, regarding "the recognition" of emergency marriage ceremonies, applications for which could not be entertained after December 31, 1951. I do not know if these decrees are at all relevant to this case as I have not seen their terms, but clearly December 31, 1951, was the last date for registration under those decrees also. The Hamburg marriage registrar also said in this communication that there had been no such registration at Hamburg in regard to this ceremony in what was the main register office for the district in which the ceremony was performed.

In English law the validity of a marriage abroad, unless it comes within the ambit of the Foreign Marriage Acts, 1892 to 1947, is governed as to form and formalities by the lex loci celebrationis, on the well-known authority of *Berthiaume* v. *Dastous*,[1] *per* Lord Dunedin, and therefore as the peremptory proviso of registration was not complied with in time or at all the retrospective decree

[1] [1930] A.C. 79, 83; 45 T.L.R. 607.

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Mr. Commissioner Latey Q.C.

or decrees did not validate this invalid marriage. In *Starkowski* v. *Attorney-General* [2] there was a religious ceremony of marriage between two Poles in Austria. In that case there was a retrospective validating decree with a proviso as to registration which was complied with and therefore it validated the originally invalid marriage.

Therefore on this issue the husband here succeeds. There was not a valid marriage, and on his petition I pronounce a decree nisi of nullity.

Decree nisi of nullity.

Solicitors: *How, Davey & Lewis; Roche, Son & Neale for Lucas, Butter, Williams & Goude, Whitchurch, Shropshire.*

J. B. G.

[2] [1954] A.C. 155; [1953] 3 W.L.R. 942; [1953] 2 All E.R. 1272 (H.L.); aff. [1952] P. 302; [1952] 2 T.L.R. 606; [1952] 2 All E.R. 616 (C.A.); aff. [1952] P. 135; [1952] 1 T.L.R. 851; [1952] 1 All E.R. 495.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1955
Feb. 28;
Mar. 7.

Lord Goddard C.J., Ormerod and Gorman JJ.

*REGINA *v.* BLANDFORD.

REGINA *v.* FREESTONE.

Criminal Law—Practice—Venue—Receiving—Offences not committed in county where tried—Appellants not resident in county—Other persons resident in county summonsed for similar offences committed there—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 11 (1) *—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 1 (2) (*b*).

The appellants, F. and B., were separately indicted and convicted at Montgomery Quarter Sessions for receiving stolen property. F. received the goods in Stafford and B. in Southampton. At the hearing of the appeal, it was stated that the appellants were tried in Montgomeryshire because other persons resident in that county were summonsed to appear before examining justices there charged with receiving in Montgomeryshire similar property stolen from the same prosecutors. On the question whether the Montgomery Quarter Sessions had jurisdiction to deal with the offences since the appellants neither resided, nor received the goods, in that county:—

Held, that the examining justices would not have had jurisdiction to issue a summons returnable before them for offences committed in Stafford and Southampton had it not been that other persons were being summonsed or brought up in custody at the same time and place for similar offences, but the fact that there was a nexus between the offences charged against the other persons and that in respect of which the appellants were summonsed brought the case within section 1 (2) (*b*) of the Magistrates' Courts Act,

C. C. A.

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Regina v. Blandford. Regina v. Freestone.

1952 [1]; accordingly, the summonses were "lawfully issued" within section 11 (1) of the Criminal Justice Act, 1925,[2] and the quarter sessions had jurisdiction.

Per curiam. A justice acting under section 1 (2) (*b*) should bear in mind that it is not only the interests of the prosecution that are at stake, but also the interests of the defendants.

Appeals against conviction and sentence.

The appellants, Gordon Nightingale Freestone and Harold Percy Blandford, were separately indicted before the Montgomery Quarter Sessions for receiving goods in Stafford and Southampton respectively. The summonses had been issued on October 20, 1954, together with summonses against other persons charged with receiving similar stolen goods from the same owners. In two of the cases the property was received in Montgomeryshire by persons resident in the county and in one in London. The thieves involved had been convicted on September 27, 1954. Freestone and Blandford were convicted.

P. L. W. Owen for Blandford.
H. G. Talbot for Freestone.
Emlyn Hooson for the Crown.

Turf Publishers Ld. v. *Davies* [3] was referred to in argument.

Cur. adv. vult.

Mar. 7. Lord Goddard C.J. read the following judgment: These two appellants were separately indicted and convicted before the quarter sessions for the County of Montgomery for receiving stolen goods. Freestone was sentenced to five years' imprisonment and Blandford to 18 months, and both appealed against sentence. On the case coming before the court it did not appear, from such information as we had, how the quarter sessions of Montgomery had jurisdiction to deal with the offences as, though the property was stolen in that county, the goods the subject of the charge against Freestone were received by him in the County of Stafford and the receipt by Blandford was in the County Borough of Southampton. We accordingly directed that the appeal should be treated as an appeal against conviction as

[1] Magistrates' Courts Act, 1952, s. 1: "(2) A justice of the peace for "a county or borough may issue a "summons or warrant under this "section—. . . (*b*) if it appears to the "justice necessary or expedient, with "a view to the better administration "of justice, that the person charged "should be tried jointly with, or in "the same place as, some other per- "son who is charged with an offence, "and who is in custody, or is being "or is to be proceeded against, within "the county or borough; . . ."

[2] Criminal Justice Act, 1925, s. 11: "(1) A person charged with "any indictable offence may be pro- "ceeded against, indicted, tried and "punished in any county or place in "which he was apprehended, or is in "custody on a charge for the offence, "or has appeared in answer to a "summons lawfully issued charging "the offence . . ."

[3] [1927] W.N. 190.

well as against sentence, and directed that the prosecution should be represented in order that we might hear on what grounds it was suggested there was jurisdiction in the quarter sessions.

Before 1925 the venue in the case of receiving was governed by section 39 (3) of the Larceny Act, 1916, and that subsection enabled a receiver to be indicted, tried and punished in that part of the United Kingdom where he received the property in the same manner as if it had been originally stolen or taken in that part. The law relating to venue in indictable offences was altered and extended by section 11 (1) of the Criminal Justice Act, 1925, which provided that a person charged with any indictable offence may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence. These two men appeared before the justices sitting as examining justices on summonses issued on October 20, 1954, the thieves concerned having been convicted at the quarter sessions on September 23. It seems, therefore, that we have to consider whether the summonses on which they appeared were lawfully issued.

On the hearing of the appeal, counsel for the prosecution informed the court that the reason why the appellants were summoned to Montgomeryshire was because other persons resident in that county were summoned to appear at the same court also charged with receiving in Montgomeryshire similar property stolen from the same prosecutors, and he contended that the provisions of the Magistrates' Courts Act, 1952, authorized in these circumstances proceedings being taken in that county. Counsel for both appellants agreed that the facts were as stated by counsel for the prosecution, and that as both of them had full knowledge of the facts, having represented the appellants below, we did not think it necessary to call for formal evidence on the point.

We have now, therefore, to consider the provisions of the Magistrates' Courts Act, 1952, which, as the long title shows, is a consolidation Act relating to the jurisdiction of, and the practice and procedure before, magistrates' courts. The Act, in effect, deals with the practice and procedure both where the magistrates are sitting as a court of summary jurisdiction and where they are sitting as examining magistrates under the Indictable Offences Act, 1848. By section 1 (2) (*b*) it is provided that a justice may issue a summons or warrant if it appears to him necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being or is to be proceeded against, within the county or borough. By section 2 (3) a magistrates' court shall have jurisdiction as examining justices over any offence committed by a person who appears or is brought before the court, whether or not the offence was

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committed within the county or borough. In our opinion the words " who appears " refer to a person appearing on a summons and the words " is brought before the court " refer to a person brought before the court in custody as the result of an arrest with or without a warrant. So far as this case is concerned we are dealing with a summons and in our opinion the words " who " appears " must mean " appears on a summons lawfully issued." If the person has appeared on a summons lawfully issued, then section 9 directs the magistrates, if they commit for trial, to commit him to quarter sessions or assizes as the case may be for the place where he is to be tried, and by subsection (2) it is provided that if a magistrates' court proposes to commit a person for trial before a court of assize or quarter sessions that has jurisdiction to deal with the offence by virtue only of subsection (1) of section 11 of the Criminal Justice Act, 1925, provisions are made enabling them in case of hardship to commit to another court of trial, and provision is made for appeal to the High Court if the accused considers that the magistrates' decision would cause him hardship. As the magistrates did commit under this section to the Montgomery Quarter Sessions we are thrown back again to section 11 (1) of the Act of 1925 and must consider whether the summons was lawfully issued.

It is quite clear that, but for the fact that other people were being summoned or being brought up in custody at the same time and place, the magistrates would not in our opinion have had jurisdiction to issue a summons returnable before them for offences committed in Staffordshire and Southampton, but the facts of which we have now been apprised appear to bring the case within section 1 (2) (*b*) of the Act of 1952. That section operates although the persons are not to be tried jointly. It is enough if some other person is charged with an offence and that must mean an offence connected with the offence in which the summons has been issued against the other defendant. The justice has to consider whether or not it is necessary or expedient with a view to the better administration of justice that the defendants should be summoned to what may be called a foreign jurisdiction. The fact that persons resident within that jurisdiction are being charged with offences so similar or closely connected that the witnesses for the prosecution or some of them will be the same in both cases may, we think, be a good reason for the justice exercising the discretion vested in him by the section. Further, it is a matter which can properly be considered that, where there are offences which are so similar or closely connected, uniformity in treatment of the accused persons may be desirable. The High Court could only interfere by means of prohibition or certiorari if there was no ground on which the justice could exercise his discretion, and had there been no such ground, no doubt this court could have quashed the conviction because of the lack of jurisdiction. We cannot limit the words " an offence " so that in this case it would be confined to the theft of the goods; but as

we have already said, there must be some nexus between the offence charged against the other person and that in respect of which the summons under consideration was issued.

We desire, however, to emphasize that a justice acting under this subsection should bear in mind that it is not only the interests of the prosecution that are at stake but also the interests of the defendants. While it may be very convenient and economical from the point of view of the prosecution that they should be able to proceed in a particular county, it must be remembered that to bring a man, as in this case, from Hampshire to North Wales is a very serious matter. It would necessarily cause him considerable expense and might put very great difficulties in the way of the preparation and presentment of his defence and the calling of witnesses. We are not saying that any injustice or any undue hardship was caused in this case, and as the section empowered the justice to issue the summons and we find it impossible to say there were not grounds on which he could exercise his discretion, it follows that the defendants could be lawfully committed to the Montgomery sessions, and, accordingly, this appeal fails.

Appeals against convictions dismissed. Sentences varied.

Solicitors: *Churchill, Clapham & Co. for Richard George & Jenkins, Newtown; Kingsford, Dorman & Co. for Argyle & Sons, Tamworth; Milwyn Jenkins & Jenkins, Newtown.*

C. J. E.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION.

(GUARDIANSHIP OF INFANTS ACTS, 1886 AND 1925.)

Practice and Procedure—Infant—Guardianship—Appeals from county courts or courts of summary jurisdiction—Reasons for decision below to be lodged with application for directions—Guardianship of Infants Acts, 1886 *and* 1925 (49 *&* 50 *Vict. c.* 27 *and* 15 *&* 16 *Geo.* 5, *c.* 45).

Order 55A, rule 6 (4) of the Rules of the Supreme Court provides that within 10 days after service of the notice of motion which originates an appeal from an order made or refused under the Act of 1886 or the Act of 1925, the appellant shall obtain an appointment for the purpose of obtaining the judge's directions as to the hearing of the appeal.

Before giving such directions and deciding (inter alia) whether the parties shall be permitted to adduce further evidence, the

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judge will require to see and consider the reasons upon which the county court judge, or the justices, made the order under appeal.

The appellant's solicitors should therefore apply for a statement of the reasons for the decision complained of, and lodge it with the judge's clerk when obtaining the above-mentioned appointment.

By direction of Mr. Justice Roxburgh.

W. S. JONES,
Chief Registrar,
Chancery Division.

March 14, 1955.

[CHANCERY DIVISION.]

1955
Feb. 15, 16.

Wynn-Parry J.

* ATID NAVIGATION CO. LD. *v.* FAIRPLAY TOWAGE & SHIPPING CO. LD.

[1953 A. 1727.]

Practice and Procedure—Parties—Joinder of parties—Defendants' application to add further defendants—Sole purpose to assist on counterclaim—No jurisdiction—R.S.C., Ord. 16, *r.* 11.

The discretionary jurisdiction of the court under R.S.C., Ord. 16, r. 11, on application by the defendants to join additional defendants against the wishes of the plaintiffs does not extend to the case where the sole purpose of the defendants' application is to add additional plaintiffs in their counterclaim, and the presence of the additional parties is not necessary for the determination of the issues as pleaded between the plaintiffs and the defendants.

Dictum in *Norris* v. *Beazley* (1877) 2 C.P.D. 80 applied.

PROCEDURE SUMMONS.

The defendant company applied under Ord. 16, r. 11,[1] of the R.S.C. for an order that there should be added as defendants two limited companies, the Borchard Shipping Agency Ld. and Borchard (United Kingdom) Ld., and that the defendant company be at liberty to amend their counterclaim by adding those two additional defendants as plaintiffs to the counterclaim.

The action was started by a specially indorsed writ issued in the Queen's Bench Division on June 6, 1953, asking for an order that the defendants should pay to the plaintiffs £65,900 as money lent and interest. On an application under Ord. 14, for summary

[1] R.S.C. Ord. 16, r. 11: ". . . The "Court or a Judge may, at any stage "of the proceedings, either upon or "without the application of either "party, and on such terms as may "appear to the court or a judge to be "just, order that . . . the names of "any parties, whether plaintiffs or "defendants, who ought to have been "joined, or whose presence before the "court may be necessary in order to "enable the Court effectually and completely to adjudicate upon and settle "all the questions involved in the "cause or matter, be added. . . ."

judgment in September, 1953, leave to defend was given, and a defence delivered in December, 1953.

In February, 1954, the action was transferred to the Chancery Division. There was also on foot another action in the Chancery Division in which all the parties, who would be parties to this action if the present application were acceded to, were parties except the present defendants. An attempt was made to consolidate that action with the present action which did not succeed.

Following that attempt, the defence in the action was struck out in its entirety and a new defence and counterclaim was delivered on December 14, 1954. That defence was of considerable length and complication, but its terms do not call for report.

F. Ashe Lincoln Q.C. and *E. J. Cohn* for the defendant company, Fairplay Towage & Shipping Co. Ld.

Eric Falk and *Immanuel Goldsmith* for the plaintiff company, Atid Navigation Co. Ld.

Cases cited in argument not referred to in the judgment: *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* [2]; *McCheane* v. *Gyles (No. 2)* [3]; *Montgomery* v. *Foy, Morgan & Co.* [4]; *Pender and Others* v. *Taddei* [5]; *Raleigh* v. *Goschen* [6]; *Thoresen* v. *Graham & Co.* [7]

WYNN-PARRY J. having stated the facts continued: I approach this matter bearing in mind that the general rule is that a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone, and he cannot be compelled to proceed against other persons whom he has no desire to sue. But the court is given a discretion by Ord. 16, r. 11—and it is entirely a discretionary jurisdiction—in certain circumstances to compel the plaintiff to join other parties as defendants as a condition of allowing him to proceed with his action.

It is against that general background that I must now embark on the extremely difficult task of attempting an analysis of the defence which has been delivered in this case.

[His Lordship analysed the defence and counterclaim and continued:]

That is the position in which this extremely complicated matter comes before me. It appears to me that, on a fair view of the defence in this action, it is not possible for the defendants to say that the addition of either of the two proposed new defendants is necessary for the determination of the issues raised

[2] [1951] Ch. 33; 66 T.L.R. (Pt. 2) 559; [1950] 2 All E.R. 605.
[3] [1902] 1 Ch. 911.
[4] [1895] 2 Q.B. 321; 11 T.L.R. 512.
[5] [1898] 2 Q.B. 798.
[6] [1898] 1 Ch. 73; 14 T.L.R. 36.
[7] (1887) 3 T.L.R. 373.

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between the plaintiff company and the defendant company by the statement of claim and defence in this action.

The real defence is a defence of set-off, or, alternatively, a right to have substituted as between the plaintiffs and the defendants a third company as the debtor of the plaintiffs. It appears to me that those two issues can perfectly well be decided in the proceedings as they are at present constituted without bringing in either of the other two proposed defendants. In my view, the defendants' application must stand or fall on their submission that they ought to be allowed to have these two further companies joined as defendants in order that they may become plaintiffs in the counterclaim.

I do not doubt, in view of the judgment of the Court of Appeal in *Norbury Natzio & Co. Ld.* v. *Griffiths*,[1] that there is jurisdiction in a proper case to make an order against the will of a plaintiff compelling a plaintiff to join other parties as defendants where one of the circumstances is that the defendants, and proposed further defendants, desire to prosecute a counterclaim against the plaintiff company. But it is to be observed that in *Norbury Natzio & Co. Ld.* v. *Griffiths* [1] the court was prepared to proceed on the basis that it was a case of a joint contract, reserving to the trial the question whether or not in fact it was a joint contract. It was, therefore, a case in which the court was persuaded to make the order for the purpose of joining the proposed interveners as defendants. The circumstance that there was a counterclaim to which they would become plaintiffs was treated as an additional ground. I know of no authority which goes so far as saying that the court would make an order, as asked in this case, merely to enable the proposed interveners to join with the existing defendants in prosecuting a counterclaim. Indeed it appears to me that there is no jurisdiction to make such an order. After all, the basis of the whole jurisdiction to add defendants is that there is a cause of action by the plaintiff against not only the existing defendant but the person who would be joined if the application were successful.

In *Norris* v. *Beazley*,[2] Lord Coleridge C.J. after referring to Ord. 16, r. 13, as it then stood, said: "It seems to me to be "correctly argued that those words plainly imply that the defen- "dant to be added must be a defendant against whom the "plaintiff has some cause of complaint, which ought to be "determined in the action, and that it was never intended to "apply where the person to be added as defendant is a person "against whom the plaintiff has no claim, and does not desire "to prosecute any."

I hold, therefore, that I have no jurisdiction to make the order asked for.

Apart, however, from the question of jurisdiction, there is also this circumstance to bear in mind. It was made quite clear

[1] [1918] 2 K.B. 369.

[2] (1877) 2 C.P.D. 80, 83, 84.

in *Wilson Sons & Co.* v. *Balcarres Brook Steamship Co.*[3] that a defendant is not entitled as of right to have another joint contractor added as a defendant, and that where the proposed further defendant is resident out of the jurisdiction, then, generally speaking, the court ought not to exercise its discretion to order such a person to be joined.

It is quite true here that the two defendants which it is sought to join are resident in the jurisdiction. But it is to be observed (and this is one of the great embarrassments I have had in considering this matter) that there has been joined as a defendant to the counterclaim Barnett Brothers and Borchard Ld., one of the Haifa companies resident out of the jurisdiction. I wish to say no more than I need say at this stage on that matter. I am not to be taken as expressing any view one way or the other as to the success or failure of a summons, if a summons be brought before the court for the purpose of obtaining leave to serve that company out of the jurisdiction.

But I would be entitled to take into account, in weighing this matter and deciding how to exercise my jurisdiction, assuming that I had any, that such a procedure must cause further delay. The matter appears to me to be complicated enough as it is and one which should not be complicated any further than is necessary, and one in which the plaintiffs should not be occasioned any further delay than is necessary. Taking those circumstances into consideration, and reading the defence as I do, I would not be prepared to make the order asked for. The defendants may start further proceedings and later ask for consolidation—that is a matter for them and their advisers to consider—alternatively on the basis that—although this case deals with a right of set-off in the defendants—the defendants may consider that having regard to all the matters pleaded in the defence there is a right of contribution from other parties, in which case third party proceedings might be appropriate.

But having given the matter the best consideration I can I do not feel that this is a case in which, even assuming that I had jurisdiction which in my view I have not, I should exercise it to make the order asked for.

In the result I propose to dismiss the summons. The costs of the plaintiffs will be their costs in any event.

Summons dismissed.

Solicitors: *A. Kramer & Co.; Cardew-Smith & Ross.*

I. G. R. M.

[3] [1893] 1 Q.B. 422.

[QUEEN'S BENCH DIVISION.]

1955
Mar. 3, 4, 7.

Barry J.

*CARTWRIGHT *v.* W. RICHARDSON & CO. LD.

[1952 C. No. 3793.]

Evidence — Evidence Act, 1938 — *Admissibility — Action for personal injuries—Written statement made by witness at time of accident —Witness employed by defendants when statement made—Not in defendants' employment when statement signed — Inadmissible in re-examination to vary witness's oral evidence—"Person interested"—Evidence Act,* 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1 (1) *and* (3).

The plaintiff, a chargehand, was injured in an accident which occurred when, in the course of his employment by the defendants, he was, with other employees of the defendants, lowering a heavy tank into a pit by means of a winch. At the hearing of the plaintiff's action for damages against his employers, J., the assistant brakesman on the winch when the accident occurred, gave evidence for the defendants and, after his cross-examination, counsel for the defendants sought to put to the witness in re-examination a written statement made by him shortly after the accident happened, but which he had not signed until some years afterwards when he had left the defendants' employ. The statement differed from the account of the accident which the witness gave in evidence. The defendants claimed that the statement was admissible under section 1 (1) of the Evidence Act, 1938:—

Held, that the Evidence Act, 1938, did not over-rule the ordinary rules of procedure applicable in trials of civil cases, and that, therefore, since J. was not an adverse or hostile witness, the statement was inadmissible in re-examination.

Held, also, that the statement was inadmissible by virtue of section 1 (3) of the Act, since the witness must be regarded as an interested person having been closely associated with the accident and in the defendants' employ at the time the statement was in fact made, and it was immaterial that he had left their employment when the statement was signed.

Action.

The plaintiff, George Cartwright, was employed by the defendants, W. Richardson & Co. Ld., in a building operation, and on November 28, 1951, in the course of his duty, he was required, with other employees of the defendants, to instal a large and heavy cylindrical metal tank which was being lowered into a pit in the ground by means of a winch and wire rope. During the course of the installation the weight of the tank caused the winch to rotate rapidly in reverse and the plaintiff's hand became entangled with and twisted round the driving handle and he sustained permanent injuries. He brought an action for damages against his employers, alleging negligence and breaches of the Building (Safety, Health and Welfare) Regulations, 1948. The defendants denied liability.

At the hearing of the action the defendants called as a witness the assistant brakesman on the winch at the time of the accident. After he had given his account of the movements of the tank

and the winch at or immediately before the moment when the accident occurred, and had been cross-examined, counsel for the defendants sought to put to the witness in re-examination, by virtue of section 1 of the Evidence Act, 1938,[1] a written statement made by the witness in 1951 shortly after the accident took place to show that he had described some portion of the accident differently at that time. When the statement was made the witness was in the defendants' employ, but he was not employed by them some four years later when he signed the statement. Counsel for the defendants submitted that the material date was the date when the statement was signed and that as the witness was not in the defendants' employ when he signed the statement he was not an interested person so as to render the statement inadmissible under section 1 (3) of the Act.

Objection was taken by counsel for the plaintiff on the grounds (1) that the material date was the date when the statement was made and not when it was signed and that, as the witness was employed by the defendants at the time when he made the statement, it was inadmissible under section 1 (3) of the Act as being made by a person interested; and (2) that having regard to section 3 of the Criminal Procedure Act, 1865,[2] which also applies to civil actions, the statement was inadmissible unless the witness was an adverse or hostile witness.

G. Glynn Blackledge Q.C. and *J. G. Burrell* for the plaintiff.
Martin Jukes Q.C. and *Peter MacNair* for the defendants.

The following cases were cited in argument: *Barkway* v. *South Wales Transport Co. Ld.*[3]; *Bain* v. *Moss Hutchison Line Ld.*[4]; *Evon & Evon* v. *Noble.*[5]

BARRY J. This application made by Mr. Jukes to put the statement to this witness seems to me to raise a point of considerable importance.

[1] Evidence Act, 1938, s. 1: "(1) "In any civil proceedings where "direct oral evidence of a fact would "be admissible, any statement made "by a person in a document and "tending to establish that fact shall, "on production of the original docu-"ment, be admissible as evidence of "that fact if the following conditions "are satisfied, that is to say—(i) if "the maker of the statement either—"(a) had personal knowledge of the "matters dealt with by the state-"ment; . . . and (ii) if the maker "of the statement is called as a wit-"ness in the proceedings: . . .

"(3) Nothing in this section shall "render admissible as evidence any "statement made by a person inter-"ested at a time when proceedings "were pending or anticipated involv-"ing a dispute as to any fact which "the statement might tend to "establish.

[2] Criminal Procedure Act, 1865, s. 3: "A party producing a witness "shall not be allowed to impeach his "credit by general evidence of bad "character; but he may, in case the "witness shall in the opinion of the "judge prove adverse, contradict him "by other evidence, or, by leave of "the judge, prove that he has made "at other times a statement incon-"sistent with his present testimony; ". . ."

[3] [1949] 1 K.B. 54; 64 T.L.R. 462; [1948] 2 All E.R. 460.

[4] [1949] 1 K.B. 51; 64 T.L.R. 473; [1948] 2 All E.R. 294.

[5] [1949] 1 K.B. 222; [1948] 2 All E.R. 987.

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The production of the statement is objected to by Mr. Blackledge on two grounds: first, that the statement was made by a person interested, and secondly, on the ground that, despite the provisions of the Evidence Act, 1938, the statement cannot be put to a witness or put in evidence in re-examination under the circumstances in which Mr. Jukes seeks to produce it in this action.

I am bound to say that, in my judgment, and with the very greatest respect to the opinion of other judges who I am told have allowed statements to be put in in circumstances similar to these, I do not think that it can be put to this witness in re-examination. [His Lordship read section 1 (1) of the Evidence Act, 1938, stated the facts, and continued:] I do not think that the Evidence Act does, or was intended to, overrule the ordinary rules of procedure applicable in the trial of civil actions. Mr. Jukes has, very rightly, not invited me to treat this witness as a hostile witness. Having seen the witness and having heard his evidence it would have been impossible for me to have acceded to any such invitation had it been made.

In these circumstances, as he is not an adverse or hostile witness, I do not think that the provisions of the Evidence Act assist Mr. Jukes in any way. The only purpose of introducing this statement is to show that on an earlier occasion some portion of the account of the accident given by the witness was differently described by him. If such evidence were admissible that might have the result of shaking the faith of the court in the evidence given by him in the witness-box. That does not seem to me to be a proper use of the provisions of the Evidence Act. Except in the case of an adverse witness, I do not think that the fact that a witness has made a previous contradictory statement is a fact which is admissible in evidence in re-examination. In these circumstances, I am not prepared to agree to the statement being used as evidence or being put in as a document as evidence of any relevant or admissible fact. Having regard to the very full description of the accident which the witness has given, his evidence could not be improved upon, but only varied, if this statement were allowed to be admitted. On those grounds primarily I feel bound to hold that the statement should not, at this stage and in these circumstances, be put in evidence.

On the authorities cited to me, it is highly probable that the witness was, in the correct interpretation of that term, a "person "interested" at the time when the statement was made. I think the material time must be the time when the statement was in fact made, and at that time the witness was employed by the defendants. It is true that he was not employed on the brake of the winch, but was merely there to assist the brakesman, but having regard to his very close association with the work being carried out, and to his interest that his employers should be successful in any litigation, I think that he ought to be regarded as a "person interested" at the time that the statement was

made. The fact that he was not in the defendants' employment at the time when he merely signed the statement in order to acknowledge that it had been made by him does not, in my judgment, alter the position, which must be judged as at the time when the statement was made.

In those circumstances, on both the grounds submitted by Mr. Blackledge, this statement is inadmissible.

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Statement excluded.

Solicitors: *Helder, Roberts & Co. for John A. Behn, Twyford & Reece, Liverpool; Barlow, Lyde & Gilbert.*

E. M. W.

[COURT OF APPEAL.]

* WEST *v.* NATIONAL MOTOR AND ACCIDENT INSURANCE UNION LD.

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March 7.

Singleton, Hodson and Romer L.JJ.

Insurance—Warranty—Breach—Rescission of policy—Repudiation of claim—Dwelling-house and contents—Proposal form basis of contract of insurance—Under-statement by assured in proposal form of value of contents — Burglary — Claim by assured — Whether insurance company, having affirmed the policy, were entitled to repudiate the claim.

Contract—Condition.

The claimant, desiring to insure his house and its contents against, inter alia, burglary, signed a proposal form supplied by the respondents, which contained the following clause: "I agree "that this proposal and declaration shall be the basis of the "contract of insurance between the company and myself, and "declare that the above amounts represent the full value of the "property to be insured." He declared the value of the house to be £1,300, and of the contents to be £500. When, some four years later, a burglary occurred and the claimant put forward a claim under the policy to be indemnified, the respondent company, whose assessors had valued the contents of the house at £2,000, repudiated the claim, but did not repudiate the policy. In reply to the court, counsel for the company stated that they did not rely on any particular condition in the policy, but merely on the general principle that they could repudiate a claim when the proposal form contained a material under-statement or a material non-disclosure of value:—

Held, that the respondent company, having affirmed the policy as a good policy, were not entitled to repudiate the claim, and the claimant therefore was entitled to be indemnified for his loss.

Decision of Lord Goddard C.J. affirmed.

APPEAL from Lord Goddard C.J.

In April, 1949, the claimant, wishing to insure his house and its contents against, inter alia, burglary, signed a proposal form

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supplied by the respondents, the National Motor and Accident Insurance Union Ld., in which he declared the value of the house to be £1,300, and of the contents £500. The proposal form contained the following clause: "I agree that this proposal and "declaration shall be the basis of the contract of insurance "between the company and myself, and declare that: (1) the "above amounts represent the full value of the property to be "insured." A policy dated May 19, 1949, was granted by the respondents and it recited that the proposal form was the basis of the contract. On February 21, 1953, the claimant's house was burgled, jewellery, personal effects and cash were stolen, and he made a claim for £218 10s. 10d. The value of the jewellery, effects and cash having been valued by assessors at £2,000, the respondents, while affirming the policy, repudiated the claim on the ground that the proposal form, which formed the basis of the contract, contained a material under-statement or non-disclosure of the full value of the contents of the house.

On appeal by the claimant, by way of case stated, from the finding of an arbitrator, Lord Goddard C.J. held that the insurers, having affirmed the policy, were not entitled to repudiate the claim.

The respondents appealed.

B. H. Gerrard for the respondents.

I. D. L. Glidewell for the claimant was not called upon.

The following case was cited in argument: *Heyman* v. *Darwins Ld.*[1]

Singleton L.J. This is an appeal from a judgment of the Lord Chief Justice, which was given on November 16, 1954. Unfortunately, there was no appearance by the insurance company before the Lord Chief Justice—apparently their advisers did not know that the case was in the List—and so Lord Goddard had not before him the argument which Mr. Gerrard, on behalf of the insurance company, has placed before this court.

The claimant lived in the neighbourhood of Manchester. He was about to go into a house in Cheetham Hill Road, Manchester, in or about April, 1949, and he wished to insure his house and the contents. He was seen by an agent of the respondent company, and signed a proposal form. The premium payable on the building was 2s. 6d. per £100, and on the contents 5s. per £100. The house was valued at £1,300, the contents at £500, and the total premium payable upon those figures was £2 17s. 6d. a year.

In that part of the proposal form which covers the contents of the house there appear the words: "If the value of all gold "and silver articles, jewellery and furs included in the above

[1] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

" sums exceeds one-third thereof, please state the value," and no value of jewellery was stated. At the foot of the proposal form there are these words: " I agree that this proposal and " declaration shall be the basis of the contract of insurance " between the company and myself, and declare that:—1. The " above amounts represent the full value of the property to be " insured." Thus the claimant, who was signing the proposal form with a view to the insurance of his house and goods in the house, agreed that the proposal and declaration should be the basis of the contract of insurance, and declared that the amounts which he had stated above represented the full value of the property to be insured.

For some years he continued to pay the premium due under the policy, and on February 21, 1953—that is, nearly four years after the date of the proposal form—the house was broken into and jewellery to the value of £530 and personal effects to the value of £26 17s. 6d. and £56 in notes were stolen. After the burglary a claim was made on behalf of the claimant. The precise amount of that claim is not very clear. The figures on the form which Mr. Gerrard passed up to me appear to have been filled in by the insurance company's assessors. Paragraph 12 of the agreed statement of facts reads: " The insured has subse- " quently to repudiation by the company limited his claim to " two hundred and eighteen pounds ten shillings and tenpence, " being one hundred and sixty-six pounds thirteen shillings and " fourpence for the jewellery, twenty-six pounds and seventeen " shillings and sixpence for the personal effects and twenty-five " pounds cash, in accordance with the limits imposed by the " said policy."

The policy, which had been issued on May 19, 1949, and under which the claim was made, began by reciting that the insured had signed a proposal and declaration which he, the insured, " hereby agrees shall be the basis of this contract and " be considered as incorporated therein." The policy granted by the company, so far as material, is in these terms: " Now the " company agrees that in consideration of the payment to the " company of the amount above designated ' First Premium,' " and subject to the terms, exceptions, conditions, and memo- " randa herein contained or endorsed or otherwise expressed " hereon, all of which are to be read as part of the policy and " shall so far as the nature of them respectively will permit be " deemed to be conditions precedent to the right of the insured " to recover hereunder in the event of any of the said contin- " gencies happening within the period from the 13th day of " April 1949 to four o'clock in the afternoon of the 13th day of " April 1950, both days inclusive, and during any subsequent " period in respect of which the insured shall have paid and " the company have accepted payment for the renewal of this " policy, the company will by payment, reinstatement or repair,

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Singleton L.J.

"indemnify the insured against loss, damage, and liability as set "out in the schedule hereto."

The schedule, in the part which deals with contents, covers loss or damage to household goods and personal effects other than certain ones excluded under condition 2, "including cash, treasury "notes, and bank notes to an amount not exceeding £25, or 5% "(five per cent.) of the full value of the contents as herein "declared, whichever is the less," and in smaller print there are these words: "The total value of gold and silver articles, "jewellery, and furs shall be deemed not to exceed one-third of "the full value of the contents as above declared, unless specially "agreed herein." Thus the promise of the company is that, so long as the premium is paid and accepted, the company will pay for loss or damage to the household goods, and to jewellery to a certain extent. The policy covered the risk of burglary.

When the claim was made the company sent their assessors to investigate, and they found that, in their view, there was in the house at the time of the burglary jewellery to the value of just over £500, and they appear to have said that at the date of the burglary the contents of the house altogether were worth about £2,000. The claimant does not dispute that. He had put the figure of £500 in the proposal form four years earlier. It is not easy for anyone to declare with accuracy the value of the things which he has in his house, or the value of jewellery of someone else in the house whose goods are covered by the policy, maybe. However, it was accepted, according to the case, by counsel who appeared on the arbitration for the claimant, that the position was such that the insurance company might successfully have repudiated the policy.

The case stated by the arbitrator refers to the agreed statement of facts, and adds: "In addition it was admitted before "me by counsel for the claimant that the respondents, had they "so chosen, could have repudiated the policy on the ground of "misrepresentation and/or non-disclosure of a material fact by "the claimant. It was agreed by counsel for the respondents "that they had not repudiated the policy, but only repudiated "the claim, the subject matter of this arbitration." The case stated exhibits a letter dated August 19, 1953, from the manager of the insurance company, in which it is said: ". . . We confirm "our telephone conversation of today's date, when we said that "we had not repudiated the policy, as it appeared quite clear "from our letter of the 16th June last to Messrs. Arthur R. "Jones Ld., but had repudiated this particular claim . . ." and before the arbitrator that was the position taken up by the company: "We do not repudiate the policy; we might have "done so; we have not done so; we recognize the policy as a "policy in force, but we decline to pay a claim under that policy."

In this court Mr. Gerrard submitted that the company were entitled to repudiate the claim because the proposal was the basis of the contract, and there was a material under-statement

in the proposal form. That submission led Romer L.J. to ask him: "Are you relying on any particular condition in the policy?" and Mr. Gerrard said "No! I merely rely upon the general "principle that I can repudiate a claim made when the proposal "form contains a material under-statement or a material non-"disclosure." In other words, there is nothing in the conditions in this policy at which we ought to look; but the submission made on behalf of the insurance company is that though the policy appears to give an indemnity to the assured, and though the policy is recognized as good, the insurance company need not pay a claim under that policy.

There may, of course, arise a case in which an insurance company could refuse to pay a particular claim if the household goods or the jewellery in the house did not belong to a person whose goods were covered by this policy, but nothing of that sort arises. Their case is: "This proposal form contained an "under-statement of the value of the goods; it is the basis of "the contract, and therefore we, the insurance company, are "entitled to say we will not pay a claim." In my judgment, they are not entitled to adopt that attitude if they recognize the policy as a good policy and in force at the material time.

They might, as the Lord Chief Justice said, have repudiated the policy. I do not know whether they would have succeeded, though there is a considerable difference in the amounts. At the same time, property and goods have changed greatly in value in the last few years, and though, as I have said, it appears that the insurance company might have repudiated the policy, they did not endeavour so to do, and the policy remained in force. I do not know or understand the reason for the course they have adopted. It may be that this insurance company does not wish it to be said that they repudiated the policy because of an under-statement of the value of the goods in the house; but if they do not like that to be said about them and so accept the policy as good, they cannot be heard to say that the claim made under the agreement contained in the policy is bad for a reason which would have enabled them to repudiate the policy.

The Lord Chief Justice had before him only the argument on one side. His judgment upon this point seems to me to cover the whole case, and I am content to say that I agree with it, and that the appeal should be dismissed.

Hodson L.J. I also agree with the judgment of the Lord Chief Justice. The claim falls within the clear terms of the policy, and the insurance company cannot repudiate the claim without repudiating the policy. It is quite true the basis of the contract of insurance was the proposal made by the claimant, and that proposal contained a considerable under-valuation of the contents of the house. It was agreed between the parties that, in view of that under-valuation, it was open to the insurers to repudiate the contract altogether. That they did not do; they

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did not take advantage of the fact that the contract had lost its basis, but proceeded on the footing that the basis remained, and in those circumstances, in my judgment, they cannot resist this claim.

Romer L.J. I agree, and I would only add that I share the distaste with which the Lord Chief Justice regarded policies of this kind, which entitle an insurance company to repudiate all obligation under the policy if it turns out that the assured has under-valued, which he might very well do by mistake, the property which is the subject of the cover.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown, for Shaw, Smith & Co., Manchester; Robbins, Olivey & Lake.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

1955
March 2.

Lord Goddard C.J., Ormerod and Gorman JJ.

* REGINA *v.* PADDINGTON (SOUTH) RENT TRIBUNAL. *Ex parte* MILLARD.

Landlord and Tenant—Rent tribunal—Furnished premises—Security of tenure—Application for extension of security of tenure made before expiry of previous extension—Application heard by tribunal after expiry of notice to quit and extension of time—Jurisdiction of tribunal—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 *Geo.* 6, *c.* 40), *s.* 11.

A rent tribunal, on an application for an extension of security of tenure under section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, directed that a notice to quit should not have effect until November 30, 1953. On a second application by the tenant made before November 30 the tribunal extended the date until March 10, 1954, on which day a third application by the tenant came before the tribunal for hearing and was adjourned until after the determination of proceedings for possession brought by the landlord in the county court. The landlord's claim for possession was dismissed and the tribunal heard the adjourned application on October 25, 1954, when they held that they had no jurisdiction to determine the application since the notice to quit and extension of time had expired. On an application by the tenant for an order of mandamus:—

Held, that the effect of an application under section 11 (2) (*a*) of the Landlord and Tenant (Rent Control) Act, 1949, was to "freeze" the period at the end of which the notice to quit took effect so that time did not run under the notice to quit until after the tribunal had made their determination, and that, therefore, an extension awarded by a tribunal was in addition to the period of time, if any, which still remained to run under the notice to quit. Accordingly the tribunal had jurisdiction and the

tenant would be entitled, if the tribunal thought proper, to a further period of three months in addition to that portion of the extended period which was unexpired when the application was adjourned.

APPLICATION for an order of mandamus.

In October, 1950, the applicant became the tenant of a furnished basement room at No. 48, Leinster Gardens at the weekly rent of £1 1s. under an oral contract of tenancy. On October 9, 1952, on a reference by the applicant under section 2 (1) of the Furnished Houses (Rent Control) Act, 1946, the rent tribunal reduced the rent to 10s. a week. On August 21, 1953, the landlord served notice to quit the premises on the applicant who on the same day applied to the tribunal for an extension of security of tenure under section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949.[1] On August 30, 1953, the tribunal directed that the notice to quit should not have effect until November 30, 1953. On November 12 the applicant made a second application under the same section for an extension of security of tenure and the tribunal extended the notice until March 10, 1954. On February 25, 1954, the applicant made a third application to the tribunal for an extension of security of tenure; the application came before the tribunal on March 10, when the landlord applied for an adjournment of the hearing on the ground that proceedings for possession had been commenced in the county court, and the tribunal adjourned the application to a date to be fixed after the determination of the county court proceedings. The landlord had issued a writ for possession in the county court on March 9, and on October 11, 1954, the county court judge dismissed the landlord's claim on the ground that the notice to quit had not expired. On October 12, 1954, the applicant notified the tribunal that the county court proceedings had been determined and on October 25, 1954, the adjourned application of February 25 came before the tribunal for hearing. At the hearing the tribunal raised the question of jurisdiction and after hearing some argument came to the conclusion that they had no jurisdiction because the notice to quit had expired and they declined to determine the application.

[1] Landlord and Tenant (Rent Control) Act, 1949, s. 11: "(1) Where "a contract to which the Act of 1946 "applies has been referred to a tribunal under that Act, and the "reference has not been withdrawn, "the lessee may, at any time when a "notice to quit has been served and "the period at the end of which the "notice takes effect (whether by virtue of the contract, of the Act of "1946 or of this section) has not "expired, apply to the tribunal for "the extension of that period:

"(2) On an application being made "under this section—(*a*) the notice to "quit to which the application relates "shall not, unless the application is "withdrawn, have effect before the "determination of the application; "(*b*) the tribunal, after making such "enquiry as they think fit, and "giving to each party an opportunity "of being heard . . . may direct that "the notice to quit shall not have "effect until the end of such period, "not exceeding three months from "the date at which the notice to quit "would have effect apart from the "direction, as may be specified in the "direction."

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Regina v. Paddington (South) Rent Tribunal. *Ex parte* Millard.

The applicant applied for an order of mandamus directing the tribunal to hear and determine her application on the ground that the tribunal were wrong in law in holding that they had no jurisdiction.

Miss S. Norwood for the applicant.
Rodger Winn for the tribunal.

Ormerod J. stated the facts as set out above, referred to section 11 of the Landlord and Tenant (Rent Control) Act, 1949, and continued: The tribunal formed the opinion that, as the original time for extension of the notice had expired before the county court proceedings were heard and before these proceedings were heard, they had no option but to refuse the application on the ground that the longest period of extension which they could give was a period of three months, which was bound to run from the expiry of the original period of three months, which, of course, had expired long before the last hearing before the tribunal. That, I think, is quite the wrong view to take of the section. The true position is that under subsection (2) (*a*) the period is, as it were, frozen until the tribunal have come to their determination. There is still a period, or may well still be a period to run either of the original period of notice or of an extended period of notice. Under subsection (2) (*b*), the maximum amount which the tribunal are entitled to award in addition to whatever period remains is a period of three months, and in those circumstances, the applicant in this case would be entitled, if the tribunal thought it proper, to a further period of three months on anything that remained of the extended period which was still available to her when her application was adjourned. There must, therefore, be an order of mandamus for the tribunal to consider the matter on that basis.

Lord Goddard C.J. I agree.

Gorman J. I agree.

Order of mandamus.

Solicitors: *Peter Kingshill; Solicitor, Ministry of Health.*

J. F. L.

[COURT OF APPEAL.]

*PARISH *v.* BIRCH BROS. (DOVER) LD.

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Mar. 15.

Evershed M.R., Jenkins and Morris L.JJ.

PRACTICE NOTE.

[1955 P. No. 51.]

Court of Appeal—Notice of appeal—Form—Discretion of registrar—Rule of convenience—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 68 (2)—*R.S.C., Ord.* 58, *r.* 8.

APPEAL from Wynn-Parry J.

In this case Wynn-Parry J. having granted an injunction until judgment in the action, the defendants appealed to the Court of Appeal. On the setting down of the appeal a question arose as to the proper length of notice to be given under rule 3 of R.S.C., Ord. 58. At the hearing of the appeal no point was taken as to this, but, after referring to section 68 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] and to R.S.C., Ord. 58, r. 8, which requires "the proper officer of the Court of Appeal" to set down appeals in "the proper list of appeals," EVERSHED M.R. said: "In the hope that it will be useful to practitioners, "I take this opportunity of repeating what was in effect said by "my predecessor [Sir Wilfrid Greene M.R.] in *Walton* v. *Rikof*.[2] "There is no form specified by statute or in the rules for giving "notice of appeal to this court. For the convenience of the court "and also of litigants it has long been the practice, and is the "practice, of the court to give the chief registrar a wide measure "of discretion as regards form in accepting notices of appeal as "proper or sufficient. Where it appears that points of substance "arise the chief registrar will always consult the president of the "appropriate division of the court. The purpose of these arrange-"ments is to avoid unnecessary costs by way of applications to "the court itself."

M. J. Albery (*Arnold Carter & Co. for Dunn & Baker, Exeter*) for the defendants; *G. M. Parbury* (*Martineau & Reid for Campion Symons & Co., Exeter*) for the plaintiffs.

E. D.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 68 (2): "Any doubt which may arise as to "what orders or judgments are final, "and what are interlocutory, shall be "determined by the Court of Appeal."

[2] [1937] W.N. 360.

[HOUSE OF LORDS.]

H. L. (Sc.)† 1955 *Jan.* 11, 12; *Mar.* 4.

* HAROLD HOLDSWORTH & CO. (WAKEFIELD) LD. . . . . Appellants;

AND

CADDIES . . . . . Respondent.

Company — Director — Managing director — Terms of appointment — Subsequent restriction of duties—No breach of contract—Companies Act, 1948 (11 *& 12 Geo.* 6, *c.* 38), *Sch. I, Table A, paras.* 107, 109.

By an agreement made in 1949 between the appellant company and the respondent it was provided by clause 1 that, for a term of five years, he was appointed "a managing director of the "company and as such managing director he shall perform the "duties and exercise the powers in relation to the business of the "company and the businesses . . . of its existing subsidiary "companies . . . which may from time to time be assigned to or "vested in him by the board of directors of the company." In 1950 the board resolved that he should "confine his attentions to "[one of these subsidiaries] only." The respondent brought an action for damages for breach of contract:—

Held (*per* Viscount Kilmuir L.C., Earl Jowitt, Lord Morton of Henryton and Lord Reid) that nothing in the Companies Act, 1948, prevented his managerial duties being limited to such activities as the board might select; that the first part of clause 1 did not limit the powers of the board under the remainder of the clause and that therefore the resolution did not amount to a breach of contract. The action should accordingly be dismissed.

Per Lord Keith of Avonholm dissenting. The appellant company was not entitled to force a new master on the respondent and, since the subsidiary was a separate legal entity, the action should not be dismissed in the absence of evidence of the actions and intentions of the parties and the surrounding circumstances showing what was meant by the resolution.

Decision of the First Division of the Court of Session reversed.

Appeal from the First Division of the Court of Session.

This was an appeal against interlocutors of the Lord Ordinary (Lord Strachan) and of the First Division of the Court of Session in an action of damages for alleged breach of contract in which the appellants, William Holdsworth & Co. (Wakefield) Ld., were defenders and the respondent, Robert Fyvie Caddies, was pursuer. The appellants tabled a plea to the relevancy of the respondent's averments and on November 28, 1952, the Lord Ordinary allowed parties a proof before answer of their averments.

The facts are set out in the opinions of their Lordships.

C. W. G. Guest Q.C. (of the English Bar, Q.C. of the Scottish Bar), *John Megaw Q.C.* (of the English Bar) and *C. E. Jauncey* (of the Scottish Bar) for the appellant company.

I. H. Shearer Q.C. and *R. S. Johnston* (both of the Scottish Bar) for the respondent.

Their Lordships took time for consideration.

† *Present*: Viscount Kilmuir L.C., Earl Jowitt, Lord Morton of Henryton, Lord Reid and Lord Keith of Avonholm.

March 4. VISCOUNT KILMUIR L.C. My Lords, in this action the respondent seeks damages against the appellants for breach of contract. In the summons he concludes for payment of £25,000 and in the condescendence he makes averments purporting to support his claim for payment of that sum. The appellants plead that the action is irrelevant and contended before the Lord Ordinary (Lord Strachan) and before the First Division of the Court of Session that it should be dismissed without inquiry. The First Division adhered to the interlocutor of the Lord Ordinary allowing a proof before answer. It is against that allowance of proof that the defenders appealed to your Lordships' House.

The relevant facts as presented by the pursuer are as follows. The pursuer is a worsted spinner and manufacturer of wool goods. He was formerly managing director of the British Textile Manufacturing Co. Ld. (which I shall call "the textile company") and the beneficial owner of all the shares. In November, 1947, the appellant company, which carries on business as worsted spinners at Balne Mills, Wakefield, purchased from the respondent the whole share capital of the textile company. In terms of the agreement dated November 3, 1947, by which the purchase was effected, the appellant company was bound to procure that the respondent be appointed to the board of the appellant company and be appointed managing director of the textile company upon terms set out in the second schedule to the said agreement. The terms of the said agreement were duly implemented and the respondent was appointed managing director of the textile company on November 3, 1947. The appointment was for a period of five years and thereafter until terminated by written notice to be given by either party. The business of the textile company was in Irvine in Ayrshire, and was the manufacturing of knitted articles of wool clothing. By an agreement dated April 1, 1949, but to operate as from October 1, 1948, the respondent was appointed a managing director of the appellant company. Such appointment was for a period of five years and thereafter until terminated by written notice by either party. It was provided in the second agreement, in words which I shall examine more closely in a moment, that the respondent as such managing director should perform the duties and exercise the powers in relation to the business of the appellant company and the businesses of its existing subsidiary companies at the date thereof which might from time to time be assigned to or vested in him by the board of directors of the appellant company. At that time the appellant company controlled the textile company, Whalley & Appleyard Ld. and David Allan (Knitwear) Ld. The respondent's remuneration under the second agreement was to be a fixed salary of £2,500 per annum with, in addition, an annual commission on the combined net profits of the company and all its then existing subsidiaries. At all times the respondent was the sole managing director of the appellant company, and he avers (though it is denied by the company) that he was entrusted

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with the whole executive management of that company. The effect of the second agreement upon the first was not argued before us, but in fact the respondent continued to carry out certain duties in relation to the textile company. His actions and proposals occasioned opposition from certain members of the board of directors of the appellant company who, he avers, attempted to persuade him under threat of removal to relinquish his appointment as managing director of the company. Ultimately, at a meeting of the board of directors of the company, held on May 10, 1950, the board resolved that the respondent should confine his attentions to the textile company only and that permanent arrangements for the management at Balne Mills would be made later. The respondent regarded the said decision as a breach of the second agreement between himself and the company and intimated to the company on June 19, 1950, that as the company had repudiated the second agreement he was no longer bound to give, and would not give, his services to the company. On October 10, 1950, he commenced this action.

My Lords, when the case was heard in the procedure roll on the appellants' plea to the relevancy of the respondent's averments, the Lord Ordinary held that the question whether the resolution of May 10, 1950, constituted a breach of the agreement could not be decided without an inquiry into the facts. Lord Strachan took the view that the agreement and resolution should be construed in the light of the whole surrounding facts and circumstances, and that regard should be had not only to the terms of these documents but also to the effect which the resolution in fact had upon the possibility of the respondent continuing to carry out the duties of a managing director of the appellants. The Lord Ordinary also rejected an argument for the company that, even on the assumption that there had been a breach of contract, the breach was not sufficiently material to justify repudiation of the second agreement by the respondent.

When the appellants' motion for review came before the First Division on February 24, 1953, the court took the view upon a construction of the agreement and resolution that there had been no breach of the agreement. The Lord President, who gave the leading opinion, was of opinion that the respondent had made no clear and specific averments of surrounding facts and circumstances competent and relevant to be taken into account in determining whether a breach of the agreement had taken place. During the course of the hearing the respondent moved for leave to amend, and the case was continued in order that the respondent might be given an opportunity of considering an amendment. The Lord President said: "If Mr. Shaw had not "made the motion with which he concluded his argument, I "should have been for recalling the Lord Ordinary's interlocutor, "sustaining the first plea-in-law for the defenders and dismissing "the action." The respondents subsequently lodged a minute of amendment which was duly answered by the appellants.

The case was again put out for hearing by the First Division, and on June 25, 1953, the court pronounced an interlocutor affirming the interlocutor of the Lord Ordinary. I cannot help noting that on this second occasion the Lord President said: "The averments, new as well as old, descriptive of 'surrounding "'facts and circumstances' bearing upon this question afford "unexpectedly little aid on the point of construction, and disclose "little, if any, material difference between the parties," and later stated: "I am fully conscious that in expressing the above "conclusions I am departing from the provisional views which "I formed at the previous debate. But the fuller argument "which we have heard and a closer examination of the documents "and certain of the decisions have led me to change my mind." In his second view the Lord President was of opinion that the very foundation of the agreement was the appointment of the respondent to a specific office, namely, the office of managing director, and that he was not appointed to perform such duties, if any, as the appellants' board of directors might assign to him. Lord Cooper considered that although the appellants were free to vary the powers and duties of the respondent within reasonable limits, they were not entitled to deprive him of the right to act as "a managing director of the company" while leaving him with the name. Lord Carmont, on the other hand, took the view that under the agreement the functions to be exercised by the respondent were incapable of being viewed as a post or office and that he could claim nothing exclusive or paramount in control or even anything definite in its character. Lord Carmont, nevertheless, was of the opinion that under the agreement some duties of a managerial kind had to be assigned to the respondent and that the resolution evinced an intention by the appellants no longer to be bound by the contract. Lord Russell concurred with the opinion of the Lord President.

The most important clause in the second agreement is clause 1 and I therefore set it out in full: "Mr. Caddies shall be and he "is hereby appointed a managing director of the company and "as such managing director he shall perform the duties and "exercise the powers in relation to the business of the company "and the businesses (howsoever carried on) of its existing "subsidiary companies at the date hereof which may from time "to time be assigned to or vested in him by the board of directors "of the company." Clause 2 sets out the period of engagement. Clause 3 states that Mr. Caddies shall devote his whole time, attention and abilities to his duties under the contract, shall obey the orders and directions of the board, shall well and faithfully serve the company and shall not be engaged in any other occupation or business whatsoever, with a saving for investments and also for being a director of, or shareholder in, any of the company's subsidiary or associated companies. Clause 4 deals with salary. Clause 5 deals with the commission payable to Mr. Caddies and fixes a minimum of £1,500 a year. Clause 6 deals with secrecy.

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Clause 7 gives the company a power of determination in the event of incapacity, misconduct, breach of obligations or refusal or neglect to comply with any lawful orders or directions given to the respondent by the board of directors of the appellant company. I do not think it is necessary to refer to the provisions of clauses 8, 9 and 10.

I return to clause 1 and endeavour to analyse its provisions. First, the respondent is appointed a managing director. If one then asks what are the duties which he shall perform and what are the powers he shall exercise, the answer, from the words of the clause, is, the powers and duties which may from time to time be assigned to or vested in him by the board of directors. If one then asks how shall he perform and exercise them, the answer is, in relation to the business of the company and the businesses (howsoever carried on) of its existing subsidiary companies at the date of the contract. The Lord President bases his second view on the initial words. He says: "On the other "hand, if the agreement is to be given ordinary business efficacy, "I have come to the conclusion that weight must be given to "the plain fact that the appointment of the pursuer was an "appointment as 'a managing director of the company'—a well "recognized title in company administration, carrying responsi- "bilities of a familiar nature and involving sundry obligations "and liabilities under the Companies Act. The pursuer was not "appointed to perform such duties, if any, as the board might "assign to him. To borrow the language of Asquith J. (as he "then was) in *Collier* v. *Sunday Referee Publishing Co. Ld.*,[1] "'the very foundation of the contract was the appointment of "'the plaintiff, during the contract period, to a specific office.'" Later the Lord President says: "The defenders were, in my "view, disabled from depriving the pursuer of the right to act "as 'a managing director of the company.' They could not "leave him with the name and withdraw the substance of his "office." I confess that this conception of a stratification of a position as managing director has puzzled me. Neither side relied on any provision in the articles of the appellant company, and they were not included in the record. By way of illustration, however, I refer to the relevant provisions of Table A in Schedule I to the Companies Act, 1948. Paragraph 107, the first dealing with a managing director, is as follows: "The "directors may from time to time appoint one or more of their "body to the office of managing director for such period and on "such terms as they think fit, and, subject to the terms of any "agreement entered into in any particular case, may revoke such "appointment. A director so appointed shall not, whilst holding "that office, be subject to retirement by rotation or be taken "into account in determining the rotation of retirement of

[1] [1940] 2 K.B. 647, 651; 57 T.L.R. 2; [1940] 4 All E.R. 234.

"directors, but his appointment shall be automatically deter- "mined if he cease from any cause to be a director." That paragraph states specifically that the board can fix such terms as they think fit, while the director so appointed gets the advantage of not being subject to retirement by rotation. Paragraph 108 gives the directors the right to determine remuneration. Paragraph 109 gives the directors a complete discretion to entrust to and confer upon a managing director any of their own powers. I cite with approval the summary in Halsbury's Laws of England (3rd ed.), vol. VI, p. 297, where it is stated: "A managing "director may either be merely a director with additional "functions and additional remuneration, or else he may be a "person holding two distinct positions, that of a director and "that of a manager." I cannot find, either in the statute or in the cases in which the matter has been considered, anything to prevent a board of directors appointing a managing director and limiting his duties according to their own wishes. In other words, the first part of clause 1 does not, in my view, limit the powers of the board under the remainder of the clause.

I now come to consideration of the view of Lord Carmont, and I make two quotations from his judgment: (1) "Although "this is not an appointment to a post, I have come to be of "opinion that it is a contract whereby *some* duties must be "assigned to the pursuer of a managerial kind." (2) "I do "not think that the pursuer's averments further his case much "beyond the statement which is not in dispute that he was "withdrawn from any managerial participation at Balne Mills. "If the board so acted under the impression that they were "entitled totally to withdraw the pursuer from management "there, provided they allowed the pursuer to continue to manage "something elsewhere, then I think they were misinterpreting "their contract with the pursuer. The board may have been "misled into the course they followed by the wrong view of the "legal relations existing between the parent company and its "subsidiaries, but none the less the pursuer was deprived of all "managerial functions at Balne Mills, and in my opinion that "deprivation could not be operated without a repudiation of the "contract with the pursuer. Such relegation to complete inaction "from management so far as Balne Mills was concerned evinced "an intention no longer to be bound by the contract."

With all respect to this reasoning, I cannot spell it out of clause 1 of the contract. As I have stated, that clause lays down that the pursuer as such managing director shall perform the duties and exercise the powers assigned to or vested in him by the board "in relation to the business of the company and the "businesses (howsoever carried on) of its existing subsidiary "companies." I find it difficult not to read these words distributively and to treat them as giving a right to assign duties in relation to a subsidiary, but even if one reads them collectively, then the result of so doing is to give the power to the board to

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assign duties with regard to the activities of a group of companies viewed as a whole. This cannot, in my mind, mean that the managerial duties must cover the appellant company and every subsidiary. They can be limited to such activities as the board may select.

I have tried to give full weight to Lord Carmont's words that the board must have been misled by a wrong view of the legal relations existing between the parent company and its subsidiaries. I regret that I cannot understand how this raises difficulties in relation to the textile company. On the pursuer's own averments, the pursuer was still managing director of that company and acting as such pending the appointment of a successor. There was no personal or mechanical difficulty in his exercising managerial functions in regard to that company. Further, the appellant company owned all the shares and therefore could, if any difficulty arose, ensure that the desires of its board with regard to the management of the textile company could be enforced.

Equally, the fact that the pursuer was obligated to devote all his time to his duties under the second agreement does not seem to me to present any difficulty if managerial functions were assigned in relation to a particular subsidiary.

On the view of the contract which I have taken and tried to explain, I am therefore of opinion that the resolution of May 10, 1950, did not constitute a breach of the contract. It is therefore unnecessary for me to consider Mr. Guest's second and third points, namely, that under the contract it was unnecessary for the appellants to assign any duties and alternatively that, even if there was a breach, such breach did not go to the root of the contract. I therefore am of opinion that the appeal should be allowed, that the interlocutors of the First Division and of the Lord Ordinary should be recalled, that the first plea-in-law of the defenders, the present appellants, should be sustained and the action should be dismissed.

I should further say that the respondents pay the appellants their costs here and in the courts below.

Earl Jowitt. My Lords, the appellants are a limited company carrying on business as worsted yarn spinners at Balne Mills, Wakefield, Yorkshire. In 1947 the appellants had purchased from the respondent the entire share capital of a company known as the British Textile Manufacturing Co. Ld. whom I refer to as "the textile company." The business of the textile company, which was carried on at Irvine, Ayrshire, was the manufacture of knitted articles of wool clothing. The appellants thus became and remained at all material times the beneficial owners of all the shares in the textile company. They were also beneficial owners of all the shares in two other limited companies.

By an agreement between the textile company and the respondent concluded in 1947 the respondent had become the managing director of the textile company at a salary of £2,200 a year together with a commission on profits. He was obliged under such agreement to devote the whole of his time to the business of the textile company and to obey the instructions of the directors of that company. By an agreement between the appellants and the respondent dated April 1, 1949, which was to operate as from October 1, 1948, the respondent was appointed managing director of the appellants; no reference was made in this agreement to the earlier agreement of 1947.

It is unnecessary to express any opinion as to the impact of the later agreement upon the earlier agreement and I can confine myself to a consideration of the terms of the agreement of 1949. Clause 1 of that agreement was in the following terms: [His Lordship read the clause and continued:] Other clauses in that agreement provided that the respondent was to hold the said office for five years; that he was to devote his whole time and attention to his duties under the agreement and in all respects to conform to and comply with the directions and regulations of the board; and that he was to receive a salary of £2,500 per annum together with a commission on profits. By clause 7 of the agreement the appellants were given the right to determine the agreement forthwith by notice in writing if the respondent refused or failed to comply with any lawful orders or directions given him by the board.

Differences of opinion arose between the respondent and his fellow directors of the appellants and culminated in the passing of a resolution by the appellants' board in the following terms: "Management at Balne Mills: The board decided that the "managing director confine his attentions to British Textile "Manufacturing Co. Ld. only. Permanent arrangements for "management at Balne Mills will be made later. Meanwhile "the board requested Mr. R. P. Pitcher to assume respon- "sibility for local supervision. The managing director wished it "recorded that as a director he did not agree with the decision." The respondent regarded this resolution as a repudiation of the agreement and by letter of June 19, 1950, intimated to the appellants that as they had so repudiated the agreement he regarded himself as no longer bound to give, and intimated that he would not give, his services to the appellants.

The respondent, as pursuer, brought his action against the appellants, as defenders: the record set out the relevant terms of the 1949 agreement and claimed that the passing of the resolution constituted a breach thereof. The defenders, the present appellants, stated a preliminary plea that the averments of the pursuer were irrelevant. The action came before Lord Strachan in procedure roll discussion. He decided on November 28, 1952, that there should be a proof before answer. The

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matter first came before the First Division of the Court of Session on February 24, 1953: during the argument counsel for the pursuer indicated that he desired an opportunity of considering whether it would be possible for him by way of amendment to add averments of surrounding facts and circumstances. The court were willing to allow this opportunity and accordingly the case was continued for a limited period, but the court unanimously expressed the view that save for this application they would have recalled the Lord Ordinary's interlocutor and dismissed the action. The case came on again before the same judges of the First Division in June, 1953, when additional averments as to surrounding facts and circumstances had been inserted. On this occasion the judges took a view differing from that which they had taken in February. They accordingly affirmed the interlocutor of the Lord Ordinary but granted leave to appeal to your Lordships' House.

The first question raised before us was therefore whether in the light of the averments as to surrounding circumstances, which must be taken pro veritate, the passing of the resolution constituted a breach of the contract. It was further contended that even if the passing of such resolution did constitute a breach, it was not a breach of such a nature and quality as to entitle the respondent to accept it as a repudiation of the entire contract. A further contention was advanced concerning the measure of damages if it was decided that a breach had been committed.

My Lords, in the view which I take it is unnecessary to express any opinion on these two latter contentions since I am clearly of the opinion that the resolution did not constitute any breach of the agreement. I think that upon the true construction of clause 1 of the agreement of 1949 the respondent was to perform such duties and exercise such powers in relation to the business of the appellants and to perform such duties and exercise such powers in relation to the business of the textile company and the other subsidiaries as might from time to time be vested in him by the appellants' board. In directing the respondent on May 10, 1950, to confine his attention to the textile company the board of the appellants were, in my opinion, merely exercising the right given to them by the agreement.

The Lord President took a different view because he considered that the appointment of managing director was "a well "recognised title in company administration, carrying respon- "sibilities of a familiar nature and involving sundry obligations "and liabilities under the Companies Act. The pursuer was not "appointed to perform such duties, if any, as the board might "assign to him." The Lord President, having formed this view, no doubt considered that the resolution which called upon the respondent to devote his whole time to the affairs of the

textile company prevented him from carrying out those responsibilities, obligations and liabilities which on this view he had the right to perform for the appellants by virtue of his office as their managing director.

My Lords, with the greatest respect for the Lord President, I do not think that the respondent by the mere fact that he was appointed managing director of the appellants had any responsibilities, obligations or liabilities which would prevent the appellants ordering him to devote his full time to a subsidiary: and I am of the opinion that the appellants had by clause 1 of the agreement expressly preserved their right to call upon the respondent to devote his time to the affairs of the textile company if they judged this course desirable.

Being of the opinion that there was no relevant breach of contract averred, I think the action should have been dismissed without proof, and accordingly I would allow the appeal.

LORD MORTON OF HENRYTON. My Lords, the events leading up to this appeal have already been stated, and I shall only repeat them so far as may be necessary to enable me to express my opinion.

The first question arising for your Lordships' decision is whether the averments of the pursuer (the respondent to this appeal) in his condescendence, accepting for this purpose that his averments of fact are accurate, establish a breach of contract by the defenders, the present appellants.

The only breach of contract alleged is that the directors of the defenders passed a resolution at a meeting of directors on May 10, 1950, in the following terms: [His Lordship read the resolution and continued:]

The pursuer alleges that he had rights under an agreement of April 1, 1949, whereby he was appointed to be "a managing "director" of the defenders, which were infringed by the resolution in question. That agreement has already been read, and it must, of course, be construed as a whole, with due regard to the surrounding circumstances at the date of its execution.

The events leading up to the 1949 agreement are set out in the pursuer's condescendence, and the history begins with the agreement of sale of November 3, 1947, whereby the defenders bought from the pursuer the whole of the issued share capital of the British Textile Manufacturing Co. Ld. (hereafter called "British Textile") and of David Allan (Knitwear) Ld. By that agreement it was provided (inter alia) as follows, the "company" referred to being British Textile:—"4. (*c*) If so "required by Holdsworth Mr. Caddies shall procure all directors "of the company and Knitwear (other than Mr. Caddies) to "resign and waive any claims against the company in respect "of their directorships or other offices and procure the appoint-"ment of nominees of Holdsworth as directors of the company "and Knitwear in his or their stead . . . (*e*) Holdsworth shall

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" procure Mr. Caddies to be appointed to the board of directors " of Holdsworth and also as managing director of the company " upon the terms of the agreement set out in the second " schedule hereto in place of any other office under the company " held by him."

The agreement set out in the second schedule provided for the appointment of the pursuer as " a managing director " of British Textile for a period of five years, and clause 3 thereof was as follows:—" Mr. Caddies shall (unless prevented by ill- " health) throughout the period of this agreement devote the " whole of his time attention and abilities to his duties hereunder " and shall obey the orders from time to time of the board of " directors of the company and in all respects conform to and " comply with the directions and regulations made by such Board " and shall well and faithfully serve the company and use his " utmost endeavours to promote the interests thereof. Mr. " Caddies shall not during the continuance of this agreement " (without the previous consent in writing of the company " which the company shall be under no obligation to give) be " engaged concerned or interested either directly or indirectly " and whether solely or jointly with others in any other occupa- " tion or business whatsoever provided that nothing herein con- " tained shall prohibit Mr. Caddies from holding shares securities " or obligations of any other company by way of bona fide " investment only or from being a director of or shareholder in " Harold Holdsworth & Co. (Wakefield) Ld. or any of its " subsidiaries."

Under the agreement of April 1, 1949, already mentioned, the pursuer's appointment as a managing director of the defenders was to date from October 1, 1948, and in his condescendence 4 the pursuer says: " From October 1, 1948, to May 10, " 1950, the pursuer normally spent from early afternoon on " Monday to about noon on Friday each week at Wakefield and " visited Irvine at weekends to supervise the conduct of the " British Textile Manufacturing Co. Ld.'s business there, *pend- " ing the appointment of a managing director to succeed him " there.*" From this sentence it would appear likely that the parties regarded the pursuer's appointment as managing director of the defenders by the agreement of 1949 as superseding his appointment as managing director of British Textile by the agreement of 1947, but it seems to me unnecessary, for the present purpose, to form a concluded view whether, on the true construction of the two documents, one superseded the other.

With these facts in mind I turn to consider the terms of the agreement of 1949 and in particular the terms of clause 1. This clause has already been read. It contains both the appointment of the pursuer as a managing director—not, be it observed, as *the* managing director—of the defenders, and the definition of the duties and powers which he is to perform and exercise " as such " managing director," namely the duties and powers " in relation

" to the business of the company and the businesses (howsoever " carried on) of its existing subsidiary companies at the date " hereof which may from time to time be assigned to or vested " in him by the board of directors of the company."

My Lords, this clause refers to a group of companies consisting of the defenders and their existing subsidiary companies. I cannot read the clause as compelling the board to assign duties to the pursuer in relation to the business of every company in the group. Nor can I read it as compelling the board to assign him duties in relation to the business of the defenders. That business is not treated as being on a different footing from the business of British Textile or of another subsidiary of the defenders, Whalley & Appleyard Ld., which is mentioned in the pursuer's condescendence 3. As I read the clause, it leaves the board of the defenders free to assign to the pursuer duties in relation to the business of one only, or two only or all of the companies in the group, and to vary the assignment and the duties from time to time. Further, I think the clause leaves the board free to appoint another person to be " a managing " director " and to divide the duties and powers referred to in the clause between the pursuer and the other managing director in such manner as they think fit.

It is true that each company in the group is in law a separate entity, the business whereof is to be carried on by its own directors and managing director, if any; but there is no doubt that the defenders, by taking any necessary formal steps, could make any arrangements they pleased in regard to the management of the business of (for instance) British Textile. They owned all the issued capital and the directors were their nominees.

I turn now to the resolution of May 10, 1950. I am prepared to assume in favour of the pursuer that this resolution was intended to exclude him permanently from any share of the management at Balne Mills, whence, as the pursuer avers, " the " whole business of the pursuers was administered," although it would of course have been open to the board at any time to rescind the resolution. Even on the assumption just mentioned, I fail to see that the defenders committed any breach of the 1949 agreement by deciding that the pursuer should " confine his " attentions " to British Textile only. If the resolution were carried out, the pursuer would go to Irvine as a managing director of the defenders, and would there perform such duties and exercise such powers in relation to the business of British Textile as the board of the defenders might from time to time assign to or vest in him. He was already a director of British Textile, and if his appointment as a managing director thereof in 1947 should be regarded as having been superseded by the agreement of 1949, the defenders could easily procure his reappointment thereto by the exercise of their controlling interest in British Textile. The resolution of May 10, 1950, did

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not purport to remove the pursuer from his position as a managing director of the defenders. In that capacity he would presumably go from Irvine to Wakefield from time to time, to attend meetings of the defenders' board and to report upon progress at Irvine.

If the pursuer had accepted the resolution as binding on him, he would have retained all his rights under the agreement of 1949 and would have been entitled to receive all the remuneration, by way of salary and commission, provided for by that agreement. I can quite appreciate that the pursuer bitterly resented being told to confine his attentions to British Textile, and he no doubt thought that his management at Balne Mills would have increased the profits of the group of companies and would consequently have increased the amount of his yearly commission. In my opinion, however, he was bound by his contract to comply with the resolution.

I have not overlooked the averments which were inserted in the pursuer's condescendence by amendment, but in my opinion neither these averments nor the original averments, if they were all proved, would establish that the board of the defenders committed a breach of contract by passing the resolution in question. As no other breach is alleged, it follows that no proof is necessary.

In my view the defenders' first plea in law should have been sustained, and the action should have been dismissed. I would allow the appeal.

Lord Reid. My Lords, the respondent was in 1947 the owner and he acted as the managing director of British Textile Manufacturing Co. Ld. In that year he sold the whole share capital of the company to the appellants, who are worsted spinners, carrying on their business at Balne Mills, Wakefield. On April 1, 1949, the respondent and the appellants made an agreement whereby it was provided that the respondent "is hereby appointed "a managing director of the company" (the appellants) "and "as such managing director he shall perform the duties and "exercise the powers in relation to the business of the company "and the businesses (howsoever carried on) of its existing sub-"sidiary companies at the date hereof which may from time to "time be assigned to or vested in him by the board of directors "of the company." This appointment was for the term of five years from October 1, 1948, and there were two existing subsidiary companies, the British Textile Manufacturing Co. Ld. and Whalley & Appleyard Ld. Under this agreement the respondent was paid a salary of £2,500 per annum and an annual commission dependent on the combined net profits of the appellants and the subsidiary companies, the minimum commission payable in any year being £1,500, so that the respondent obtained a minimum remuneration of £4,000 per annum.

The respondent thereafter appears to have acted both as managing director of the appellants and as managing director of British Textile Manufacturing Co. Ld.: but disagreements arose and on May 10, 1950, the following resolution was passed at a meeting of the directors of the appellant company: [His Lordship read the resolution and continued:] The respondent regarded this resolution as a breach of the terms of his agreement with the appellants and as a repudiation of it, and on June 19, 1950, he intimated to them that as they had repudiated the agreement he was no longer bound to give and would not give his services to them. Thereafter he took no part in the executive management of the appellants' business, but he continued to act as a director until October 25, 1950, when he resigned, as he says at the request of his co-directors. It was admitted that after the resolution of May 10, 1950, the appellants were willing to continue to pay remuneration to the respondent in terms of the 1949 agreement but after the intimation made by the respondent on June 19, 1950, they ceased paying him any remuneration.

On October 10, 1950, the respondent raised the present action concluding for payment of £25,000 damages. The appellants pleaded inter alia that the respondent's averments were irrelevant. On November 28, 1952, Lord Strachan, after hearing counsel in the procedure roll, allowed proof before answer. On February 24, 1953, the First Division heard counsel on a reclaiming motion and on the respondent's motion allowed amendments to be tendered. Finally, on June 25, 1953, the First Division pronounced an interlocutor allowing the record to be amended, refusing the motion for review of Lord Strachan's interlocutor, and remitting the cause back to the Lord Ordinary to take the proof. The respondent then presented a petition for leave to appeal to this House, and on November 12, 1953, the First Division granted leave as craved.

The points which are now before the House are no doubt difficult, but they are short and they can be simply stated. In the first place, were the appellants in breach of contract in requiring the respondent to confine his attention to their subsidiary company, British Textile Manufacturing Co. Ld.? And secondly, if they were, was the respondent justified in treating that breach as a repudiation of the contract?

Admittedly the respondent cannot succeed in his action unless on a true construction of the agreement of 1949 and of the resolution of the appellants' board of directors of May 10, 1950, this resolution involved a breach of contract. Of course, each of these documents must be construed in light of all relevant circumstances at its date, and if there were any such circumstances which could influence its construction and which are averred by the respondent but not admitted by the appellants, then a proof would be necessary before the true meaning of these documents could be determined. But I cannot find any averments of this

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kind in the respondent's condescendence. As regards the agreement, counsel could not even suggest any, but as regards the resolution he founded on the averments in the earlier part of condescendence 4. These are detailed averments of disagreements between the respondent and his co-directors, of attempts by them to induce him to resign and of a deliberate policy on their part to prevent him from carrying out any executive or managerial functions of the appellant company. In reply the appellants admit differences of opinion but otherwise deny these averments. For reasons which I shall explain later, I am of opinion that it can make no difference to the decision of this case whether these averments of the respondent are true or not.

It follows that the agreement can be construed now just as well as it could be after a proof and if, on the construction of the resolution most favourable to the respondent's case, it discloses no breach of contract then proof is unnecessary and the respondent's action fails. I shall therefore proceed to consider the construction of the agreement of 1949. This agreement must be construed in light of the admitted agreement of November 3, 1947, by which the respondent sold to the appellants the whole share capital of his company, British Textile Manufacturing Co. Ld. I need only notice those provisions in it which appear to me to be relevant. The respondent undertook if so required to procure the appointment of nominees of the appellants as directors, and the appellants undertook to appoint the respondent managing director for five years. The agreement provided that he should devote his whole time to his duties as managing director of that company provided that these should not prevent him from being a director of the appellant company, and it provided that his remuneration should be £2,200 per annum together with a commission based on the profits of British Textile Manufacturing Co. Ld.

The agreement of 1949 appears to have superseded the 1947 agreement in so far as it provided for the respondent's remuneration and it plainly superseded this agreement in so far as it required the respondent to devote his whole time to the affairs of British Textile Manufacturing Co. Ld. for the 1949 agreement provided by clause 3 that he should devote his whole time to his duties under this agreement and obey the orders of the appellants' board of directors provided that nothing should prohibit him from being a director of the appellants' subsidiary companies, which were British Textile Manufacturing Co. Ld. and Whalley & Appleyard Ld. There is nothing to indicate and no averment to the effect that the respondent's appointment as managing director of British Textile Manufacturing Co. Ld. was terminated or that he ceased to act in that capacity.

Clause 1 of the agreement of 1949 appoints the respondent a managing director (not the managing director) of the appellant company. The law does not specify the duties of a managing director and there is no averment that they were specified in the

articles of association. But clause 1 proceeds to deal with this matter: it provides that as such managing director he shall perform the duties and exercise the powers in relation to the business of the appellant company and the businesses of its subsidiary companies which may from time to time be assigned to or vested in him by the appellants' board of directors.

On this clause two questions arise. First, what was the nature of the duties in relation to the subsidiary companies which could be assigned to the respondent; and, secondly, were the appellants entitled to require him to devote his whole time to duties in relation to the business of the subsidiary companies and to assign to him no duties of a managerial character in relation to the business of the appellant company?

It was common ground that it would have been a breach of contract to assign to the respondent duties of a wholly subordinate character in relation either to the appellants' business or to the businesses of the subsidiary companies and that the contract contemplated that any duties assigned must be of a managerial character. But there is no averment that there was any breach of contract of this kind. The respondent's contention on this question was that the only duties in relation to the businesses of subsidiary companies which could be assigned to him under the 1949 agreement were duties which would come directly within the ordinary scope of duties of a managing director of the appellant company—duties such as co-ordinating its business with the businesses of the subsidiary companies or making an investigation of the affairs of the subsidiary companies for the information of the appellants' board of directors. It was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies and that therefore the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment this is too technical an argument. This is an agreement in re mercatoria and it must be construed in light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Manufacturing Co. Ld. and under the agreement of 1947 the directors of this company were to be the nominees of the appellants. So, in fact, the appellants could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellants' board fully effective. Moreover, before the 1949 agreement the respondent was under obligation to act as managing director of British Textile Manufacturing Co. Ld. and he avers that after the making of that agreement he continued to supervise the conduct of that business. It is true that he qualifies this by averring that this was pending the appointment

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of a managing director to succeed him there, but there is no averment that the appellants had undertaken to relieve him of his duties as managing director of the subsidiary company and I cannot infer from the 1949 agreement that the appellants were under any obligation to do that. On the contrary I read clause 1 of this agreement as entitling the appellants to assign to him as duties under that agreement any duties in relation to British Textile Manufacturing Co. Ld. which were of a managerial and not of a subordinate character. But it was argued that any duties assigned to the respondent must be duties which he could perform as a managing director of the appellant company and that he could not perform internal duties of management of a subsidiary company in that capacity. I think that this argument is not only technical but unsound. As I have already said, the law does not prescribe the duties of a managing director, the parties are left to define his duties, and I can see nothing inconsistent in an agreement that a person shall be a managing director of a company but shall devote his attention to managing subsidiary companies. I am therefore of opinion that the agreement of 1949 entitled the appellants to require the respondent to devote his time to managing the businesses of the subsidiary companies.

But then it was argued that even if that be so and if the agreement entitled the appellants to assign to him extensive duties in relation to the business of the subsidiary company, it did not entitle them to require him to devote his whole time throughout the agreement to such business, but required them to assign to him at least some duties of a managerial nature in relation to the business of the appellant company. I cannot agree with this argument. To begin with it is extremely vague. It was admitted that as the respondent was only appointed *a* managing director, the appellants would have been within their rights in appointing a second managing director and assigning to him at least the greater part of the managerial functions of their company. And it was not disputed that duties in relation to subsidiary companies which might be assigned to the respondent might occupy his whole time and attention for a period. But the contention was, I think, that he must have sufficient duties in relation to the affairs of the appellant company to make his position as a managing director of that company a reality.

The respondent supported this contention by a further argument. His remuneration depended on the profits of the appellant company and its subsidiary companies; and the minimum commission of £1,500 was in fact exceeded during the first year and would, he avers, have become still greater in subsequent years if he had been allowed to exercise the functions of management. Therefore he says that he had a right to exercise those functions. But, in my opinion, the short answer to that argument is that he was only appointed *a* managing director and admittedly the greater part of those functions could have been

taken from him. Even if he were right in saying that some managerial functions in the appellant company must be assigned to him, it does not follow that the exercise of a comparatively small part of the management would have any appreciable influence on the profits of the company. And, further, the respondent's commission depended on both the profits of the appellant company and the profits of the subsidiary company and the success of his work in managing this company would therefore be reflected in the amount of his remuneration. I am therefore unable to agree with the respondent's arguments on the construction of the agreement, and I pass to consider the resolution of May 10, 1950.

It was argued that there must be a proof of the averments in condescendence 4, to which I have already referred, because if proved they would show that the resolution of May 10, 1950, was in effect a dismissal of the respondent from his position of managing director of the appellant company. At this stage, when dealing with the case on relevancy, I must of course assume that all these averments would be fully established by proof, but, if I am right in my interpretation of the agreement, I cannot see how proof of these averments would assist the respondent's case. The resolution is not capable of meaning that the respondent was dismissed, but it is I think capable of having the meaning that the arrangement set out in it was to be permanent and that the respondent was not at any time to take any further part in the management of the appellant company's business but was to confine his attention in future to the business of British Textile Manufacturing Co. Ld. It may be that the facts averred would show that that was its meaning. I am not sure that that is so, but I shall assume that it is. But that is not, in my opinion, a breach of the agreement of 1949. The parties in that agreement provided what the duties of the respondent should be: he was to perform the duties from time to time assigned to him in relation to the business of the appellants and the businesses of the subsidiary companies. This cannot mean that all duties assigned to him must be in relation to all the businesses: some duties might relate solely to one and some solely to another. It was not disputed that all the duties assigned to him might have related to the appellant company's business so that he had nothing to do with managing the subsidiary businesses. And similarly, in my opinion, the agreement authorised the appellants to require him to devote his whole attention to the business of one or both of the subsidiary companies so that he had no share in the management of the appellant company's own business. I have already said that, in my opinion, that is not inconsistent with his position of managing director as defined in the agreement. He would, of course, have remained a director of the appellant company with all his rights as a director, but his managerial duties would have been solely in relation to the subsidiary company. I do not think that the

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resolution is capable of a construction more favourable to the respondent's case than that, and that, in my opinion, involves no breach of contract. I am therefore of opinion that this appeal should be allowed with the result that the appellants' first plea in law must be sustained and the respondent's action dismissed.

LORD KEITH OF AVONHOLM. My Lords, the view which commends itself to your Lordships in this case is one with which I regret I am unable to agree. I shall express my difficulty briefly.

The appellants and the respondent entered into an agreement dated November 3, 1947, by which, inter alia, the appellants purchased from the respondent the whole share capitals of the British Textile Manufacturing Co. Ld. and of David Allan (Knitwear) Ld. The latter company need not be further noticed. As part of the agreement the appellants undertook to have the respondent appointed a director of their board and also managing director of British Textile Manufacturing Co. Ld. (which I shall call " the textile company ") upon terms scheduled to the agreement which included appointment as managing director for a term of five years from the date of the agreement and thereafter until the agreement was determined by not less than three months' notice in writing by either party. It is admitted that the respondent became managing director of the textile company.

On April 1, 1949, a second agreement was made between the appellants and the respondent by which the respondent was appointed a managing director of the appellant company on certain terms and conditions. This agreement operated as from October 1, 1948, and was to last for five years from that date and, if not then determined by three months' notice in writing by either party, was to continue thereafter till determined by such a notice.

It is to be observed that both under this agreement and under the agreement of 1947 the respondent was taken bound to devote the whole of his time and attention and abilities to his duties under the respective agreements and to obey the orders from time to time of the boards of directors of the respective companies. It would seem obvious that this was an impossible situation. A man cannot serve two masters, not at least so as to give full time to each.

The only conclusion I can come to is that, as the appellant company controlled the textile company as a subsidiary company of which it owned all the shares, the agreement of 1947 was regarded by all parties as superseded so far as the appointment of a managing director was concerned. Were it otherwise the respondent would be drawing salary and commission under each agreement and there is no suggestion that this was the case. That this seems also to have been the respondent's view would appear from his averment that: " From October 1, 1948, " to May 10, 1950, the pursuer normally spent from early

"afternoon on Monday to about noon on Friday each week "at Wakefield and visited Irvine at weekends to supervise the "conduct of the British Textile Manufacturing Co. Ld.'s busi- "ness there, pending the appointment of a managing director "to succeed him there."

I assume then that from October 1, 1948, or at least from April 1, 1949, the respondent had ceased to be managing director of the textile company and that he was a whole-time managing director of the appellant company, and in fact the sole managing director of the latter company. If this does not represent the true position then it is material, in my opinion, to ascertain the true facts by proof.

In this situation the appellants' board passed the resolution of May 10, 1950. It records, inter alia: "The board decided "that the managing director confine his attentions to British "Textile Manufacturing Co. Ld. only." What does this mean? It is not clear to me, and in the course of the hearing I was unable to get from the appellants' counsel any clear indication of what it meant. But it seems to me to be at least capable of meaning that the respondent should become again managing director of the textile company, albeit with the remuneration agreed to be paid to him as a managing director of the appellant company.

The averments of the respondent are relevant to cover this point. In article 4 of the condescendence it is averred: "The "other members of the defenders' board were opposed to these "proposals and thereafter attempted to induce the pursuer to "relinquish his appointment as managing director and to return "to Irvine to act as managing director of the British Textile "Manufacturing Co. Ld. only, on the basis of the defenders "continuing to pay the pursuer the remuneration provided in "the agreement of April 1, 1949." And later: "The pursuer "believes and avers that the said resolution was passed in "implement of the deliberate policy of the other directors on "the defenders' board to prevent the pursuer taking any further "part in the executive control and practical management of "the defenders' business. The resolution was intended to have "and did in fact have the result that the pursuer was prevented "from carrying out any executive or managerial functions of the "company," *i.e.*, the appellant company.

In my opinion, it is relevant and material to know what was meant by that part of the resolution which I have quoted, unless it can be said that it was no breach of agreement to insist on the respondent serving as managing director of the textile company.

It is said that the agreement covers this case. I quote the words relied on: ". . . as such managing director he shall perform "the duties and exercise the powers in relation to the business "of the company and the businesses (howsoever carried on) of "its existing subsidiary companies at the date hereof which

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"may from time to time be assigned to or vested in him by "the board of directors of the company." But I cannot read these words as empowering the directors to force another master on the respondent. Ex hypothesi he had ceased to be managing director of the textile company. It is no answer to say that the textile company is a subsidiary of the appellant company, controlled entirely as regards policy and personnel of its board by the latter company.

In law the companies are separate persons and it has been held in a number of cases that a breach of contract is committed when a servant, under a contract of employment for a fixed term, finds that his employer during that term has effected a change of partnership or transformed a personal business into that of a private or public limited company.

It is, in my opinion, fundamental to know what the appellant company's board meant by their resolution. It is not a resolution that speaks for itself. What the parties said and thought and did, the way they understood it was to be enforced, the way they acted, or proposed to act on it, the whole surrounding facts and circumstances, must be assessed before the question of breach can be properly decided, and this cannot be done without a proof. Until this has taken place it is premature, in my opinion, to consider some of the other questions of law that have been argued.

I would dismiss the appeal.

Appeal allowed.

Solicitors: *Slaughter & May for Dundas & Wilson W.S., Edinburgh, and Maclay, Murray & Spens, Glasgow; Allen & Overy for J. & R. A. Robertson W.S., Edinburgh, and McGrigor Donald & Co. Glasgow.*

F. C.

[QUEEN'S BENCH DIVISION.]

1955
Mar. 10.

*TRICKERS (CONFECTIONERS) LD. *v.* BARNES.

Lord Goddard C.J., Ormerod and Gorman JJ.

Food and Drugs—Bread—Deficiency in weight—Deficiency due to action of some person over whom retailers had no control—Not necessary for retailer to show due diligence used or reasonable precautions taken—Considerable variation in weight—Information correctly laid in respect of individual loaves—Wrapped sliced loaves—Weight of wrapper to be included in the weight of bread—Bread Order, 1953 (*S.I.* 1953, *No.* 1283), *arts.* 1, 3—*Sale of Food (Weights and Measures) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 6.

The defendants sold by retail bread which was delivered to them daily by bakers and over the baking of which they had no control. An inspector of weights and measures entered their shop and weighed 24 (18 of them wrapped and sliced) out of the 14 oz. loaves then in the shop for the purpose of sale, and found all the loaves

weighed to be deficient in weight to some extent. Seven informations were preferred against the defendants, each alleging that they had in their possession for sale a certain loaf of bread or roll its weight not being 14 oz. or a multiple of 14 oz., namely, 10 drams (or in some cases 8 or 9 drams) deficient of 14 oz., contrary to article 3 (1) of the Bread Order, 1953. On appeal by the defendants against conviction on each information:—

Held, (1) that the magistrate was entitled to convict on an information in respect of a deficiency in such a single loaf, for under article 3 (2) (*a*) of the Bread Order, 1953, it was only where the variation in the weight of a single loaf was inconsiderable that regard should be had to the average weight of a reasonable number of loaves;

(2) but that the wording of article 3 (2) (*b*) was disjunctive and, therefore, although in cases where a deficiency was due to a bona fide mistake or accident or to causes beyond his control a retailer had to show that he had taken all reasonable precautions and had used due diligence, where the deficiency was due to the action of some person over whom the retailer had no control he did not have to show those things and the court did not have to consider the question of his diligence and precaution; and that, accordingly, the defendants were entitled to be discharged from the prosecution.

M'Intyre v. *Laird*, 1943 S.C.(J.) 96 followed.

Held, further, that, in view of the definition of "loaf" in article 1 as including "wrapped sliced bread," the weight of the wrapper must be included in the weight of a wrapped sliced loaf.

CASE STATED by the Cardiff stipendiary magistrate.

On August 30, 1954, an information was preferred by the chief inspector of weights and measures for the city of Cardiff against the defendants, Trickers (Confectioners) Ld., that on July 28, 1954, they had in their possession for sale at their shop at 33 Bridge Street, Cardiff, a certain loaf or roll of bread its weight not being 14 oz. or a multiple of 14 oz., to wit, 10 drams deficient of 14 oz., contrary to article 3 (1) of the Bread Order, 1953,[1] made under the Supplies and Services (Transitional

[1] Bread Order, 1953, art. 2: "In "this Order . . . 'loaf' includes "wrapped sliced bread."

Art. 3: "(1) No person shall sell "or have in his possession for sale "any loaf or roll of bread (including "any bap) unless its weight is 14 "ounces or a multiple of 14 ounces "or is 10 ounces or less.

"(2) Where in any proceedings a "person is charged with a contravention of this article in respect of the "weight of any bread—(*a*) the court "shall disregard any inconsiderable "variation in the weight of a single "loaf or roll of bread, and shall have "regard to the average weight of a "reasonable number of loaves or rolls "of the same kind (if any) sold by "the person so charged, or in his "possession for the purpose of sale, "on the same occasion, and generally "to all the circumstances of the case; "and (*b*) if the person so charged "proves to the satisfaction of the "court that such deficiency was due "to a bona fide mistake or accident, "or to other causes beyond his control, and that it occurred in spite "of all reasonable precautions being "taken and all due diligence being "exercised by him to prevent its "occurrence, or that it was due to "the action of some person over whom "he had no control, the person so "charged shall be discharged from "the prosecution.

"(4) During the continuance in "force of this Order, paragraphs (2) "and (3) of section 6 of the Sale of "Food (Weights and Measures) Act, "1926, shall not have effect."

Sale of Food (Weights and Measures) Act, 1926, s. 1: "A per- "son shall not, in selling any article "of food by weight . . . deliver or

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Powers) Act, 1945, as extended by the Supplies and Services (Defence Purposes) Act, 1951, and continued in force by the Supplies and Services (Continuance) Order, 1953. On the same day, six further informations in similar terms were also preferred, of which two alleged that two other 14 oz. loaves were each 10 drams deficient, one alleged that another 14 oz. loaf was 9 drams deficient and three alleged that three other 14 oz. loaves were each 8 drams deficient, each alleged offence being contrary to the Bread Order, 1953.

The following facts were found by the magistrate: The defendants were the occupiers of a retail shop at No. 33 Bridge Street, Cardiff, where they sold bread, cakes and confectionery. At 7.30 a.m. on July 28, 1954, a bakery called The Welsh Country Maid Ld. delivered 228 loaves, of which 102 purported to be 14 oz. loaves, at the defendants' shop. At 8.45 a.m. on the same day the defendants' manageress opened the shop and, in accordance with the usual routine, the loaves were put into the shop window by the shop assistants. It was the custom of the manageress to weigh some of the loaves picked at random from the daily delivery so that she might find out if there were any deficient and, if so, to put all deficient loaves on one side, but on the day in question, on account of the rush of customers, she did not carry out her usual routine of weighing a number of specimen loaves.

At 11.15 a.m. the inspector of weights and measures for the city of Cardiff entered the shop in the course of his duty, with a duly appointed and qualified assistant, and weighed twenty-four of the 14 oz. loaves which were then in the shop for the purpose of sale. Of the twenty-four loaves weighed, six were wholemeal, eleven were wrapped and sliced wholemeal of the brand known as "Honeywheat," and seven were wrapped and sliced white of the brand known as "Sunbeam"; and all were found to be deficient in weight to some extent. The total deficiency in weight of the first six wholemeal loaves amounted to 4 oz. 7 drams, which was an average deficiency of 12 drams per loaf. Of these six loaves, two were each 14 drams deficient, another three were each 11 drams deficient, and one was 10 drams deficient. The total deficiency in the weight of the eleven "Honeywheat" loaves amounted to 5 oz. 2 drams, which was an average deficiency of $7\frac{1}{2}$ drams per loaf. Of these loaves two were each 12 drams deficient, two were each 11 drams deficient, one was 9 drams deficient, one was 7 drams deficient, two were each 6 drams deficient, one was 4 drams deficient and two were each 2 drams deficient. The weight of one wrapper was $3\frac{1}{2}$ drams, and was not

"cause to be delivered to the purchaser a less weight . . . than is purported to be sold."

S. 6: "(1) A person shall not sell or offer for sale any bread otherwise than by net weight. (2) A person shall not sell or have in his possession for sale . . . any loaf of bread unless its net weight is one pound or an integral number of pounds: . . ."

included in the weight of the bread. The total deficiency of the weight of the seven "Sunbeam" loaves amounted to 4 oz. 13 drams, which was an average deficiency of 11 drams per loaf. Of these loaves, one was 1 oz. 3 drams deficient, one was 14 drams deficient, two were each 10 drams deficient, and three were each 8 drams deficient. The weight of one wrapper was 4 drams, and was not included in the weight of the bread. The defendants had no control over the baking of the bread.

It was contended by the appellants that: (1) article 3 of the Order did not apply to a deficiency in weight of a single loaf of bread, but that it provided for the standardisation of an integral weight for bread, and if proceedings were to be taken under the article a number of loaves should be weighed and an average taken and a single summons issued; that the order in effect replaced section 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, except that the integral weight was now 14 oz. and not 1 lb., and proceedings for sale of a single loaf deficient in weight could and should be taken under section 1 of that Act, and that that contention was confirmed by article 3 (2) (*a*) of the order which directed the court to disregard any inconsiderable variations in weight. (2) Even if article 3 of the order were applicable to the proceedings, the seven informations should be dismissed having regard to the provisions of paragraph (2) (*a*) of article 3 as the variations in the present case were not considerable. (3) Having regard to article 3 (3) (*b*) of the order, the defendants were entitled to be discharged from the prosecution as the deficiencies were due to the action of some person over whom they had no control, namely, the bakers; and that it would be unreasonable and impracticable to expect retailers to weigh all bread received by them from bakers and if retailers had to do so it would cause them to cease to sell bread as it would not be worth the trouble involved. Further, in admitting that he would only expect retailers to weigh one loaf in every six or eight, the prosecutor was admitting that article 3 did not apply to single loaves, as a check of one in eight might well disclose one loaf of correct weight and seven deficient, or vice versa, and such weighing was not necessary on the true construction of article 3 (2) (*b*) if the deficiency was proved to be due to the action of some person over whom the defendants had no control and had occurred in spite of all reasonable precautions being taken and all due diligence exercised by the defendants.

It was contended by the prosecutor that (1) The seven informations were laid against the defendants in respect of seven loaves, on the ground that each of these loaves was short of 14 oz. in weight contrary to the provisions of article 3 (1) of the order; that the order of 1953 replaced section 6 of the Sale of Food (Weights and Measures) Act, 1926, and a distinction could be drawn between the provisions of section 6 and section 1 of that Act in that under section 1 the bread had to be sold,

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whereas under section 6 it was sufficient for the bread to be in the possession of the retailer for sale, and that if section 1 were the only method by which the weights and measures inspectors could verify the weight of bread and prosecute offenders, the Act would become unworkable in that the inspectors would be forced to buy a large number of loaves in order to get a fair average, whereas under section 6 of the Act, and under the order which replaced it, the inspectors had the right to enter a shop and weigh loaves of bread at random without buying them. (2) Section 6 related to deficiencies in the weight of bread and therefore the order which had now been substituted for section 6 also related to deficiencies and did not merely prescribe an integral weight for the size of the loaves; that the deficiencies found showed considerable variations amongst the loaves weighed and the retailer had had ample time between 7.30 a.m. when the loaves were delivered and the inspection at 11.15 a.m. to have weighed some of the loaves. (3) The defence had not endeavoured to prove to the satisfaction of the court, in accordance with article 3 (2) (*b*) of the order, that the deficiency was due to a bona fide mistake or accident, or to other causes beyond their control, and, in the absence of such evidence, the defence could not rely on due diligence having been exercised.

The magistrate was of opinion that: (a) the effect of the Bread Order, 1953, was not limited to prescribing integral weights for loaves generally, but that an information in respect of an alleged deficiency of weight in a single loaf might properly be laid thereunder, since article 3 (2) (*b*) of the order expressly referred only to such deficiency, in contrast with article 3 (2) (*a*) which referred to a variation, presumably to include a surplus. (b) He had to interpret article 3 (1) of the order in the light of the authorities relating to the interpretation and effect of section 6 of the Sale of Food (Weights and Measures) Act, 1926, since the order suspended the operation of section 6 (2) and (3) of the Act and substituted the provisions of article 3 of the order, and accordingly he was not permitted to follow or apply the reasoning of the High Court of Justiciary in *M'Intyre* v. *Laird*.[2] (3) Seven of the deficiencies proved corresponded to the deficiencies alleged in the seven informations, and as it was not possible to disregard any of those deficiencies as an inconsiderable variation of a single loaf, no question arose regarding the average weight of a reasonable number of other loaves. The weight of the wrapper should be excluded in weighing a wrapped loaf. (4) There was no evidence of a bona fide mistake or accident and, in so far as any such deficiency was due to other causes beyond the defendants' control, they had not proved to his satisfaction either that they had taken all reasonable precautions or that they had exercised all due diligence. (5) The defendants had not proved to his satisfaction that any such deficiency was due to the action of some person over whom they had no control, as the presence of some deficiencies could and should have been

detected by their manageress, thereby giving her warning and enabling her to put all deficient loaves on one side had she carried out the routine which she admitted was her usual practice.

Accordingly he convicted the defendants on each of the seven informations, fining them ten shillings on each.

The defendants appealed.

The questions set out in the case stated upon which the opinion of the court was desired by the magistrate were whether, upon the above statement of facts, he came to a correct determination and decision in point of law generally in convicting the appellants, and in particular whether he was right (a) to convict them on an information in respect of a deficiency in a single loaf, and (b) to hold the appellants liable as retailers for deficiency in weight of bread over the baking of which they had not had any control.

S. M. Noakes for the defendants.

A. P. Roberts for the prosecutor.

The following cases were cited in argument: *M'Intyre* v. *Laird* [2]; *Whittaker* v. *Collings* [3]; *Cave* v. *Dudley Co-operative Society Ltd.* [4] and *Marshall* v. *Matthews*. [5]

LORD GODDARD C.J. This is a case stated by the stipendiary magistrate for Cardiff, before whom the defendants, who are bakers and confectioners, in the sense that they sell bread and cakes but do not bake themselves, were charged with offences under the Bread Order, 1953, which was made in pursuance of various powers under the Supplies and Services Orders and deals also with the Sale of Food (Weights and Measures) Act, 1926.

[His Lordship read article 3 (1) and (2) (*a*), and continued:] The first point which arises is this: The magistrate asks whether he was right in convicting with regard to individual single loaves of bread. The answer, in my opinion, is "Yes," because it was found that the particular loaf of bread, the subject of the first information, was deficient by 10 drams. Ten drams is over half an ounce, and the magistrate has held, and if it was a matter for this court I should agree with him, that he cannot regard that as an inconsiderable variation, and it is only if there is an inconsiderable variation in regard to a loaf of bread which can be disregarded that the court shall have regard to the average weight of a reasonable number of loaves. In other words, if you find a loaf which has some small variation, say two or three drams, then you weigh several other loaves and see whether they all vary or whether it was just what I may call the luck of the draw that that loaf, which was a very small part of the whole, was picked on. I think that the magistrate in this case was entitled,

[2] 1943 S.C.(J.) 96.
[3] (1938) unreported.
[4] (1934) 103 L.J.K.B. 569.
[5] [1939] 1 All E.R. 156.

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subject to what I am going to say with regard to another point, to convict on individual loaves.

Another point has arisen in this case, upon which I think that we ought to express an opinion. In considering whether or not there was an inconsiderable variation, the magistrate had to consider wrapped sliced loaves, that is to say, loaves which have been cut into slices and wrapped in paper, and in considering whether there was a deficiency in weight in those loaves he ignored the wrapping. I think that that is wrong, because in the order which now takes the place of paragraphs (2) and (3) of section 6 of the Act of 1926, the word "net" weight no longer appears. "Net," of course, would rule out any question of wrapping and the definition of "loaf" in the Bread Order includes wrapped sliced bread, and therefore the words "no person shall have in his "possession for sale any loaf unless its weight is 14 ounces" must be read as "no person shall sell or have in his possession "any wrapped sliced bread unless its weight is 14 ounces." Wrapped sliced bread is, of course, sold in that way to avoid handling, and I have no doubt that the authorities in this matter would like to encourage the wrapping of bread because it tends to eliminate the chances of infection, and so forth, if it is wrapped and not unwrapped till it gets to the consumer. If either the inspector when he comes or the retailer when he receives it from his wholesaler unwraps the bread, then the whole object of wrapped sliced bread goes by the board. I think that is recognized by the department which is entrusted with legislating on this matter by Statutory Rule and Order because they have omitted in this Order the word "net." Therefore, if we had taken a different view on the third point, to which I am coming, we should have had to send the case back to the magistrate for him to reconsider those cases where the informations referred to wrapped sliced bread.

But there is another point taken by Mr. Noakes which seems to me to be unanswerable, though at first I thought that it was. Article 3 (*b*) of the order states: "if the person so charged proves "to the satisfaction of the court that such deficiency was due to a "bona fide mistake or accident, or to other causes beyond his "control, and that it occurred in spite of all reasonable pre-"cautions being taken and all due diligence being exercised by "him to prevent its occurrence, or that it was due to the action "of some person over whom he had no control, the person so "charged shall be discharged from the prosecution."

It seems to me clear when you read that and recognize that it is concerned with the deficiency, that the word "or" and the sentence "or that it was due to the action of some person over "whom he had no control," are entirely disjunctive, so that one does not have to consider whether the deficiency is due to the action of some person over whom the retailer had no control, and at the same time consider whether due diligence was being exercised by the retailer. If the deficiency is due to a bona fide

mistake or to other causes beyond his control, then the retailer has to show that he took all reasonable precautions and used due diligence, but if it is due to the action of some person over whom he has no control, he does not have to show those things. That was the view taken by the High Court of Justiciary in *M'Intyre & Son* v. *Laird*,[1] and there seems to be an unreported case in England, *Whittaker* v. *Collings*,[2] on which their Lordships of the Justiciary relied, although we have only the case and the endorsement on it of the result. But, in any case, if there is a decision of the High Court of Justiciary concerning these matters on the other side of the border, we always try in this court to decide in the same way; it would be very undesirable if bakers on one side of the border could do one thing and bakers on the other side of the border could not. It seems to me that the decision in *M'Intyre's* case[3] is precisely in point. The Lord Justice Clerk, Lord Cooper, said: "Further, in view of the "finding that the appellants had no connexion with the manufac- "turers of the loaves except as purchasers from them, and that "they had no control over the actions of these manufacturers in "the baking of the loaves, I am unable to understand the later "finding that the appellants did not exercise due diligence to "*prevent* the occurrence of the deficiency in weight, or the "further finding that the deficiency in weight was not due to a "cause beyond the control of the appellants. Indeed, the case "of *Whittaker* v. *Collings*,[4] shows that, if the present case were "to be disposed of on the basis adopted by the English courts, "the conviction could not stand, for it was held in that case that "section 12 (2) was satisfied by a finding that the retailer had no "control over the baking of bread." It seems to me that their Lordships had the advantage of a fuller report of the case of *Whittaker* v. *Collings*[4] than we have; at any rate, there is the decision, and I think we ought to decide in the same way so as to keep the decisions in line. That ground alone would be enough to upset the conviction, and the consequence is that the appeal must be allowed and the conviction quashed.

ORMEROD J. I agree, for the reasons given by my Lord.

GORMAN J. I agree.

Appeal allowed.

Solicitors: *Rhys Roberts & Co. for Hornby, Baker, Jones & Wood, Newport (Mon.); Theodore Goddard & Co. for Town Clerk, Cardiff.*

J. F. L.

[1] 1943 S.C.(J.) 96.
[2] (1938) unreported.
[3] 1943 S.C.(J.) 96, 104.
[4] (1938) unreported.

[COURT OF APPEAL.]

C. A.

1955
Mar. 4.

Hodson and Parker L.JJ.

* SMITH *v.* EAST ELLOE RURAL DISTRICT COUNCIL AND OTHERS.

[1954 S. No. 3024.]

Compulsory Purchase — Compulsory purchase order — Validity — Writ alleging order made in bad faith—Whether court has jurisdiction— Acquisition of Land (Authorisation Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch. I, Pt. IV, para.* 16.

Paragraph 16 of Part IV of the First Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946,[1] applies to compulsory purchase orders in general and is not confined to compulsory purchase orders in respect of land which forms the subject of the special procedure laid down in Part III of the First Schedule.

INTERLOCUTORY APPEAL from an order of Havers J.

In 1940 the plaintiff's residence, "Hall Hill House," Hallgate, Holbeach, Lincoln, was requisitioned for housing purposes by the East Elloe Rural District Council. In April, 1947, the premises were vacated and thereafter not used for the purpose for which they were requisitioned, but were left unoccupied. On August 27, 1948, a compulsory purchase order was served in respect of the house and surrounding land and buildings, all of which were the property of the plaintiff. On November 29, 1948, the order was confirmed by the Minister of Health and in December, 1948, an order to treat and a notice of entry were served. On January 12, 1951, the premises were derequisitioned and the defendant council entered upon the land. On October 17, 1952, the plaintiff obtained a judgment against the defendant council in the Queen's Bench Division for £850 for damages for trespass.

On July 6, 1954, the plaintiff issued a writ against four defendants, the East Elloe Rural District Council, the Ministry of Health, J. C. Pywell, and the Ministry of Housing and Local Government. Against the first defendants she claimed damages for trespass, an injunction to restrain further trespass and a declaration that the compulsory purchase order dated August 27, 1948, was wrongfully made and in bad faith; against the second defendants a declaration that the order was wrongfully confirmed and in bad faith; against the third defendant that he knowingly acted wrongfully and in bad faith in procuring the order and the

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

[1] Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. I, Part IV, para. 16: "Subject to the "provisions of the last foregoing "paragraph a compulsory purchase "order or a certificate under Part III "of this Schedule shall not, either "before or after it has been con- "firmed, made or given, be questioned "in any legal proceedings whatso- "ever."

confirmation thereof; and against the fourth defendants as having taken over the functions of the second defendants, a declaration that the order and confirmation were in bad faith.

On July 27, 1954, each of the defendants applied by summons for the writ to be set aside on the grounds that it was "invalid "for lack of jurisdiction, it being provided by paragraph 16 of "Part IV of the First Schedule to the Acquisition of Land "(Authorisation Procedure) Act, 1946, that save by the procedure "specified in the said Schedule, a compulsory purchase order "confirmed in accordance with the provisions of the said Act "(as was here the case) shall not, either before or after it "has been confirmed, be questioned in any legal proceedings "whatsoever. By reason whereof this Honourable Court has "no jurisdiction to grant the relief sought against the said "defendants."

On August 4, 1954, Master Clayton ordered that the writ should be set aside as against all four defendants. On October 4, 1954, Havers J. dismissed an appeal from this order, but gave leave to appeal to the Court of Appeal. The plaintiff appealed, contending that pargraph 16 was limited to compulsory acquisition of land under Part III of the First Schedule which did not include the land in question.

F. H. Collier for the plaintiff.

W. L. Roots for the East Elloe Rural District Council.

Rodger Winn and *Neil McKinnon* for the Ministry of Health and the Ministry of Housing and Local Government.

No cases were cited in argument.

HODSON L.J. I will ask Parker L.J. to deliver the judgment of the court.

PARKER L.J. This is an appeal by the plaintiff from an order of Havers J. dismissing two appeals from Master Clayton, the order being that the writ in the proceedings be set aside and the action stayed as against all four defendants on the ground, in effect, that it disclosed no cause of action. The actual summonses were not in the ordinary general form under R.S.C. Ord. 25, r. 4, but the defendants specifically stated the ground, namely, that as affects all the defendants, the writ of summons in the action is invalid for lack of jurisdiction for the reason that the court had no jurisdiction because of a provision in the Acquisition of Land (Authorisation Procedure) Act, 1946.

The court has not had to go into the facts of the case, but it is quite clear that the plaintiff in her claim against these defendants is seeking to allege that a compulsory purchase order made in respect of her land is invalid by reason of the fact that it was made in bad faith. The provision in the Act which was relied upon before the master and before the judge is paragraph 16 of

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Part IV of the First Schedule which provides that: "Subject to "the provisions of the last foregoing paragraph, a compulsory "purchase order or a certificate under Part III of this Schedule "shall not, either before or after it has been confirmed, made "or given, be questioned in any legal proceedings whatsoever. " . . . ."

Mr. Collier has urged on behalf of the plaintiff before us that that provision in paragraph 16 is limited to a case of the compulsory acquisition of land of the type dealt with under Part III of the Schedule. It is necessary to explain a little the scheme of this Act. By section 1 (1) authorization is provided for the compulsory purchase of certain lands by means of the well-known process of compulsory purchase orders. That is quite general. Subsection (2) provides: "The purchase, in a case falling within "the last foregoing section of land (*a*) which is the property of "a local authority" or land which forms a common or open space or an ancient monument, is to be subject not only to compulsory purchase orders, but to the special procedure laid down in Part III of the First Schedule. Amongst other things Part III of the First Schedule provides that there shall be no compulsory purchase order unless the Minister is satisfied as to certain matters, and certifies accordingly. Mr. Collier argues that this bar against questioning compulsory purchase orders provided for by paragraph 16 applies only in the case where the land being purchased is land of the character dealt with under Part III of the Schedule, and it is quite clear that the land in this case was not such land. Accordingly, Mr. Collier says that that being the sole ground, as appearing in the summonses, and that being the sole matter argued before the master and the judge, the plaintiff is entitled to succeed.

The point is a short one. I am perfectly clear that in paragraph 16 the reference to a compulsory purchase order is to all compulsory purchase orders and is not limited to a compulsory purchase order in respect of land which forms the subject of the special procedure laid down in Part III. It would be an absurd result if compulsory purchase orders generally could be challenged, but that a particular compulsory purchase order which had a special procedure attached to it, and provision for a certificate, could not be challenged. It seems to me that it is necessary to go back to the preceding paragraph (paragraph 15) which lays down the procedure (and an analogous procedure has been laid down in a number of other Acts for some time) whereby provision is made for compulsory purchase orders being challenged, and for their being quashed. That paragraph provides: "If any person aggrieved by a compulsory purchase order desires "to question the validity thereof, or of any provision contained "therein, on the ground that the authorisation of a compulsory "purchase thereby granted is not empowered to be granted "under this Act or any such enactment as is mentioned in "subsection (1) of section 1 of this Act,"—pausing there, that

is dealing with a case where a compulsory purchase order is said not to have been authorised. The paragraph goes on: "or if "any person aggrieved by a compulsory purchase order or a "certificate under Part III of this Schedule desires to question "the validity thereof on the ground that any requirement of "this Act or of any regulation made thereunder has not been "complied with," he may take certain action within six weeks.

That second part of paragraph 15 is dealing with the well-known case where some requirement of the Act has not been complied with—such as that the owner has not been served, or some notice has not been published in the local newspaper, and matters of that sort. That applies to all compulsory purchase orders whether they are of land which forms the subject of the procedure in Part III or not. On the other hand, the certificate under Part III naturally comes in there because there is no question of challenging a certificate because authorisation is not empowered; the certificate can only be challenged because some procedure relating to a public local inquiry has not been complied with.

Mr. Roots points out what is perfectly true, and what I think is conclusive—that in fact you do not get any authorisation for a compulsory purchase order under Part III. Of course, compulsory purchase orders have to be made in respect of land the subject of the special procedure set out in Part III, but you do not get authorization for a compulsory purchase order under Part III. Accordingly in my view the reference to compulsory purchase order in paragraph 16 is to compulsory purchase orders generally, whether in respect of land which forms the subject of the procedure in Part III or not.

Mr. Collier did faintly suggest that, even if he were wrong, by reason of the allegation of fraud in this case it would be open to the plaintiff to challenge the compulsory purchase order at any time. In my view, once paragraph 16 is construed in the sense against him, there is no room for challenging the compulsory purchase order thereafter on any ground, whether that of fraud or not. In my view, therefore, this appeal fails.

Appeal dismissed.

Solicitors: *Lucien Fior, for A. E. Hamlin, Sheringham; Lees & Co. for Mossop & Bowser, Holbeach (for East Elloe R.D.C.); B. O'Brien (for Ministry of Health and Ministry of Housing and Local Government).*

[PROBATE, ETC. DIVISION.]

1955
Jan. 28;
Feb. 2.

Lord Merriman P. and Collingwood J.

* HARTLEY *v.* HARTLEY.

Husband and Wife—Justices—Desertion—Defence of belief in deserted spouse's adultery—Husband's misconduct in promoting or bringing about the state of affairs inducing belief a defence.

Per curiam. A spouse cannot rely upon his belief in the other spouse's adultery as a defence to a charge of desertion or wilful neglect to maintain if he has actively promoted or brought about the state of affairs alleged to have induced that belief.

Glenister v. *Glenister* [1945] P. 30; [1945] 1 All E.R. 513 and *Chilton* v. *Chilton* [1952] P. 196; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322 applied.

Appeal by a wife against a decision of the justices of the Aylesbury petty sessional division of Buckinghamshire on November 9, 1954, dismissing her complaint that her husband had wilfully neglected to provide reasonable maintenance for her and for her infant child.

In 1946 the husband went abroad for two years. Whilst overseas he heard that a man called Palmer, whose name rumour had linked with his wife as early as 1942, had become a lodger of the wife's mother at a boarding-house which she owned next door to the matrimonial home. Whenever the husband had previously taxed his wife with her association with Palmer, a married man living apart from his wife, she had protested her innocence; and the wife's mother, to whom he wrote on hearing that Palmer had become her lodger, answered in the same strain.

Shortly after the husband's return home in 1948 the wife began to ignore the husband and cultivate the company of Palmer, with whom she spent her evenings either in the sitting room of the matrimonial home or out in his car. On more than one occasion the husband had found Palmer and the wife in the matrimonial home in the early hours of the morning, but there was no conclusive evidence of adultery. Marital intercourse ceased in 1951.

One evening in February, 1954, the husband, when about to enter the matrimonial home, looked through the curtains of the front room, which was unlighted save by the light from the hall, and saw his wife and Palmer kissing and embracing. He did nothing until a week later when he told his wife that she had better go and ask Palmer for money when she asked for some, and taxed her, in her mother's presence, with what he had seen, which she denied.

In late September or early October, 1954, the husband arrived home one evening to find a violent quarrel in progress between Mrs. Palmer, Palmer and his wife. In answer to a question from Mrs. Palmer, the husband said that he was aware of the association between his wife and Palmer. This was the signal for an

outburst of abuse by the wife against Mrs. Palmer, but she remained silent when Palmer said that he preferred her to his wife.

Shortly afterwards the husband ceased to pay any money to the wife and on November 2, 1954, after consulting his solicitor, he left the matrimonial home.

The wife issued a summons on the ground of the husband's wilful neglect to provide reasonable maintenance for her and for the infant child, which was dismissed on November 9, 1954. The justices accepted the evidence of the husband and held that he had a reasonable belief that his wife had committed adultery with Palmer, that he bona fide held that belief when he withdrew from cohabitation and that he was, therefore, justified in so withdrawing.

John Hazel for the wife.
D. R. Ellison for the husband.

The following cases were cited in argument, in addition to those referred to in the judgments: *Manning* v. *Manning* *; *Forbes* v. *Forbes* †; *Mudge* v. *Mudge and Honeysett* ‡; *Robinson* v. *Robinson and Dearden* §; *Marris* v. *Marris and Burke* ‖; *Lloyd* v. *Lloyd and Leggeri* ¶; *Timmings* v. *Timmings*.**

LORD MERRIMAN P. The husband's defence to the complaint was based upon the decision of this court in *Glenister* v. *Glenister*,[1] which was followed and applied in *Chilton* v. *Chilton*,[2] the headnote of which reads as follows:—"If the conduct of a "wife has been such as to create in the mind of her husband a "reasonable belief that she has been guilty of adultery, so long "as that reasonable belief, so induced, lasts the husband has a "sufficient defence to proceedings taken by her whether based "on desertion or a wilful neglect to provide reasonable main-"tenance." The decision in *Glenister* v. *Glenister*[3] related to the charge of desertion. The case of *Baker* v. *Baker*,[4] more recent than *Chilton* v. *Chilton*,[5] applied the same principle the other way round, and decided that a wife who could allege that she was driven to leave home because her husband had so conducted himself as to induce the same sort of belief, could base a charge of desertion thereon. But the husband's case is directly based upon the authority of this court in *Chilton* v. *Chilton*.[6]

The justices held that the husband established that defence, and for that reason dismissed the wife's summons. In their

* [1950] 1 All E.R. 602.
† [1954] 1 W.L.R. 1526; [1954] 3 All E.R. 461.
‡ [1951] P. 173; 66 T.L.R. (Pt. 1) 631; [1950] 1 All E.R. 607.
§ [1903] P. 155.
‖ (1862) 2 Sw. & Tr. 530.
¶ [1938] P. 174; 54 T.L.R. 735; [1938] 2 All E.R. 480.
** (1792) 3 Hag.Ecc. 76.

[1] [1945] P. 30; [1945] 1 All E.R. 513.
[2] [1952] P. 196; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322.
[3] [1945] P. 30.
[4] [1954] P. 33; [1953] 3 W.L.R. 857; [1953] 2 All E.R. 1199.
[5] [1952] P. 196.
[6] Ibid.

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reasons they do not expressly find that it was the conduct of the wife which induced the husband's belief, but Mr. Hazel for the wife admitted, very frankly and rightly, that the evidence showed that if the defence was appropriate at all—if the husband could rely on a reasonable belief—it was the wife's conduct which induced it. His contention on behalf of the wife is that the husband ought not to be heard to assert that he had a reasonable belief that his wife had committed adultery, because his conduct was such that, if there had been a substantive charge or a substantive defence that she had actually committed adultery, he ought to be held either to have connived at it or, at least, to have been guilty of misconduct which conduced to such supposed adultery. From that he argued, by analogy to one or other of those bars to setting up a positive charge of adultery, that by parity of reasoning the husband ought not to be permitted to assert that he believed that his wife had committed adultery, and still less that it was her conduct which induced him to believe it. The point is an interesting one but I do not think that I need to spend very much time on it, because in substance there has been no dispute about the principle. It may, however, be as well to see how it is sought to apply it, and for that purpose to take the simplest possible illustration of the principle laid down in *Glenister* v. *Glenister* [7] as it has been applied and approved in subsequent cases. That principle operates as a defence to a complaint by the wife of desertion or of wilful neglect to provide reasonable maintenance. The reason is that if the wife has induced that belief in her husband's mind and he leaves the matrimonial home to avoid the suggestion that by staying he is condoning the past adultery, or even, it may be, conniving at or conducing to any future repetition of the adultery, it could not be right to hold that the wife is entitled to complain of his departure as desertion. I need not go over the classes of case in which that has been dealt with, but it is important to remember that as a defence it may, and frequently does, run in double harness, so to speak, with a substantive charge of the adultery the belief in which, the husband says, induced him to leave the matrimonial home. It may be alternative or ancillary to a positive complaint on his part of the same adultery, with a view to obtaining, as he is now entitled to obtain from the justices, a separation order. The point is illustrated by taking the simple example, which has been used more than once in connexion with the *Glenister* v. *Glenister* [8] type of case—that of a wife who, with every circumstantial detail, has set out to convince her husband of her guilt—and by supposing, also, that this is the culmination of a relationship between the husband and the wife of which it could be said, and said with truth, that the husband's own misconduct had conduced to the very thing which the wife was persuading him to believe, or even,

[7] [1945] P. 30.

[8] [1945] P. 30.

perhaps, that he himself had promoted the very occasion on which he charges the offence as having occurred. By section 6 of the Summary Jurisdiction (Married Women) Act, 1895, "No "orders shall be made under this Act on the application of a "married woman if it shall be proved that such married woman "has committed an act of adultery: Provided"—(and I omit deliberately any reference to condonation, which does not come in question here)—"that the husband has not connived at, or "by his wilful neglect or misconduct conduced to such act of "adultery." Manifestly, if either of those two provisos were found to be proved, the husband would neither be entitled to succeed in his complaint in respect of that adultery nor would he be entitled to resist the jurisdiction of the court to make the order on the ground of that adultery. It is argued that those facts having been determined with regard to the substantive charge, by analogy it must be impossible for him to assert, of the same set of circumstances, that he was driven from home by a reasonable belief, induced by his wife's conduct, that she had committed adultery.

As a proposition, Mr. Ellison accepted that this is the law, and I think that in such circumstances, when the wife's conduct on which the husband relies as creating the alleged belief in her adultery has actually been brought about or actively promoted by himself, it would be impossible for any court to allow him to rely on that so-called belief. It does not matter whether that result is arrived at by analogy to the defences of connivance or misconduct conducing set out in section 6, or, more directly and simply, as an illustration of the maxim volenti non fit injuria, for, in the circumstances supposed he is in the main, if not entirely, the author of the alleged wrong, in respect of which he affects to believe himself to have a real grievance.

That point need not be pursued further, because the argument has proceeded upon the basis that the law is as has been stated. Mr. Ellison has, however, said with very great force, that first of all one looks in vain to see that any such point was ever raised in this case as a substantive issue at all; and, secondly, even if it was, that there is no evidence to support anything which could remotely be said to resemble either connivance or misconduct conducing, and, therefore, that there is no reason for interfering with the decision of the justices.

[His Lordship then considered the evidence relating to the marriage and to the association with Palmer and referring to the finding of the justices said:] The justices came to the conclusion that they preferred the evidence of the husband on the question whether or not he had reasonable grounds for believing that his wife had committed adultery with Palmer; that there had been a friendship between them (and emphasized the fact that Palmer was a married man separated from his wife) over a number of years, as was admitted by the wife; that there had clearly been ample opportunities for adultery to have been committed; that

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the husband had himself seen acts of affection between his wife and Palmer; and that not only had there been opportunity for adultery, but that the probability was that adultery had been committed. The justices found that the couple had been together in the house in the early hours of the morning and that it was obvious that Palmer had supplanted the husband in the wife's affections. Finally, as corroboration, they relied upon the interview which occurred in August or September, pointing out that the husband had not been cross-examined on the accuracy of his evidence on this point. Having heard all the evidence, they retired and directed their minds to the question whether the husband had a reasonable belief that his wife had committed adultery with Palmer. They found that he had such a belief, and that it was bona fide held at the time that he withdrew from cohabitation, that he was therefore justified in so withdrawing, and they accordingly dismissed the wife's complaint.

From this statement it is quite plain that the justices never directed their minds to any question such as the one with which I began this judgment, namely, whether it was open to the husband to put forward this reasonable belief if he had so demeaned himself as, in effect, to have been the author of his own wrongs. Mr. Hazel has told us, upon instructions, that in the reply the wife's solicitor did raise the point, and I am prepared to assume that it was so mentioned. I do not think that that is enough. That sort of answer if put forward should be put forward specifically and unmistakably, and evidence should be directed to the point. It is quite true, as Mr. Hazel has pointed out, that there were occasions in the course of this long history when the husband took no active steps. It is true that at one time, on one of his returns from abroad, he consulted solicitors, but nothing came of it. It is true that he might have gone to see his solicitors after the incident in February, 1954, but such comment as is made on his failure to do so is plainly discounted to some extent by the fact that it was after the incident at the end of September, 1954, that he went to see his solicitors, and was by them advised that the time had come for him to leave the matrimonial home. Then, it is said, he did not leave because he believed in his wife's adultery, but because he was advised to do so by his solicitors. There is a certain difficulty in reconciling those two arguments; but let that pass. At the end of it all I am quite satisfied that the husband was never really challenged on the basis that he had promoted the situation in which he affected to believe.

On the assumption that the point was raised and was not dealt with actually by the justices, we are entitled, indeed bound, to express our own opinion about it, and to draw any inference that ought to have been drawn. Accepting the husband's evidence, as the justices have done, and accepting as they have that it was the wife who, by her conduct throughout, culminating in the incident of September, 1954, induced the belief, which

the husband expressed in court that the wife had committed adultery though he could not prove it, I cannot see that there is anything in his conduct which any court ought to hold gets anywhere near connivance at that in which he affected to believe, or to misconduct conducing thereto. Whether, as I have said, one approaches the matter by analogy to connivance at, or misconduct conducing to, the actual offence of adultery or simply on the basis that the husband was the author of the very thing of which he affected to complain, I decline to draw any such inference, and I do not think that any court ought to draw it in the absence of something much more definite in the way of acquiescence, wilfulness, or wilful blindness than is here attributable to the husband. In my opinion the appeal fails.

COLLINGWOOD J. The justices' decision involves a finding of belief on the part of the husband, reasonably held and induced by the wife's own conduct, that she had committed adultery. That is the basis of the decision in *Glenister* v. *Glenister*,[9] to which Lord Merriman P. has referred. There is no express finding in the justices' reasons that the belief was induced by the wife's conduct, but it was conceded in limine by counsel for the wife that if the finding of the existence of the belief could be supported, then that belief was brought about by the conduct of the wife. On the basis that the husband's evidence was rightly accepted by the justices, however, it was submitted that they were not justified in finding that the husband did reasonably hold such a belief. That was the first submission put forward on behalf of the wife, and the basis of that submission was that the husband's actions throughout were wholly inconsistent with his believing in his wife's adultery. It was urged that the evidence showed that he took none of the steps which a man labouring under that belief would naturally take; whatever her conduct might be, he sat down under it all; and that when at last he did take action, on November 2, 1954, when he left the house, that was not because of any suspicion of adultery which he entertained but because he had had a summons served on him calling upon him to answer his wife's complaint of wilful neglect to maintain her and her child. That, as I say, was the first submission, and that would appear to be the one envisaged in the first ground of appeal in the notice of appeal in this case.

A second line of argument was put forward, namely, that this husband had throughout passively acquiesced in his wife's conduct over a very long period, and that it was a case, on his part, of voluntary blindness to what had been going on for years past, and it was submitted that just as he could not now be heard to complain of adultery by his wife at which he had connived or to which his misconduct had conduced, so also he cannot now rely on a mere belief in such adultery brought about in the same circumstances.

[9] [1945] P. 30.

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That proposition was acceded to by Mr. Ellison, on the part of the husband, and I agree that it would be illogical, indeed absurd, to hold that a husband who failed in his defence of adultery on the ground that he had connived at it could at the same time succeed on the ground of a belief in that adultery at which he had connived.

What is involved in connivance has been the subject of a number of cases, to which our attention has been directed. I do not propose to go through them in any detail, because I think that all of those that were quoted to us were considered in great detail, particularly *Gipps* v. *Gipps and Hume*,[10] by the Court of Appeal in *Churchman* v. *Churchman*.[11] In that case Lord Merriman P. delivered the judgment of the Court of Appeal, and I propose to read a short passage from his judgment, where he says [12]: "... much of the difficulty in dealing with the question "of connivance arises from the fact that in the past judges have "gone beyond the facts of the particular case in an attempt to "lay down general principles of wider application. In our opinion "it is of the utmost importance to bear in mind that the issue "is whether, on the facts of the particular case, the husband "was or was not guilty of the corrupt intention of promoting "or encouraging either the initiation or the continuance of the "wife's adultery." That decision was considered and applied in *Douglas* v. *Douglas*.[13] That, therefore, is the criterion to be applied in regard to this submission of connivance on the part of this husband. The first observation I make with regard to that submission is this, that it clearly must involve that the husband did believe in his wife's adultery. Indeed, the argument was that he had been believing in it for years past, and that he sat down and accepted the position, and had ceased to care.

With regard to that submission, in the first place the husband's evidence shows that throughout the whole of the material time the wife had consistently protested her innocence. He taxed her with her association with Palmer on a number of occasions, and on each occasion she protested that there was nothing in it. While he was away on his second visit abroad the wife's mother wrote to him in the same strain because he had written a letter based upon information which he had received from somebody while he was abroad.

The second point is this: he had no proof whatever. He had seen incidents of which he did not approve, which gave him cause for some doubt; but he had no proof of actual adultery.

[His Lordship considered the evidence and concluded:] On those facts it is, of course, impossible to deny that this husband might have taken a much firmer stand than he did, and that he might have taken it long before; but mere negligence on his part,

[10] (1863) 32 L.J.P.M. & A. 179.
[11] [1945] P. 44; 61 T.L.R. 464; [1945] 2 All E.R. 190.
[12] [1945] P. 52.
[13] [1951] P. 85; 66 T.L.R. (Pt. 2) 531; [1950] 2 All E.R. 748.

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mere inactivity, weakness, or a failure to take such steps as perhaps a more strong-minded man might have taken fall far short of the requirements of connivance.

One complaint that has been made against him is that he ought to have kept observation on them, or, if he could not do it himself, to have enlisted the services of some inquiry agent. Be that as it may. In my opinion nothing that he did or failed to do comes anywhere near justifying a court in finding that he was, to quote the passage in *Churchman* v. *Churchman*,[14] " guilty " of the corrupt intention of promoting or encouraging either the " initiation or the continuance of the wife's adultery." There was no evidence of knowledge or privity to any adultery by his wife, and there was evidence which justified the justices in reaching the conclusion that the husband honestly drew the inference, induced by the conduct of his wife, that she had committed adultery.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lowe & Co.; Cree, Godfrey & Wood, for Leather & Stevenson, Aylesbury.*

E. J.

[14] [1945] P. 44, 52.

[QUEEN'S BENCH DIVISION.]

1955
Mar. 7, 16.

Denning L.J.

* LAMDON TRUST LD. *v.* HURRELL AND ANOTHER.

[1954 L. 602.]

Hire-Purchase—Hire-purchase agreement—Motor-car—Hirer in arrears with payment of instalments — Breach of agreement — Agreement terminated by owners—Car returned to owners—Claim by owners under depreciation clause for sum equal to three-quarters of purchase price—Penalty.

Contract—Penalty.

The defendant, having entered into a hire-purchase agreement with the plaintiffs in respect of a motor-car, the purchase price of which was £558 8s., including hiring charge, and having paid a deposit and four instalments amounting in all to £302 16s., failed to pay the fifth instalment. The plaintiffs terminated the agreement, retook possession of the car and resold it for £270. They then claimed from the defendant £122 4s. under a clause of the agreement which required the hirer, if the owners terminated the hiring, to pay a sum sufficient to bring up his total payments to £425 by way of compensation for depreciation:—

Held, that the figure of £425, which was approximately three-quarters of the purchase price, could not be regarded as a genuine pre-estimate of damage, but was an extravagant and extortionate sum held in terrorem over the head of the hirer; it was a penalty and as such was not recoverable in law.

Cooden Engineering Co. Ld. v. *Stanford* [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915 applied.

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ACTION.

The plaintiffs, Lamdon Trust Ld., entered into a hire-purchase agreement, dated August 28, 1953, in respect of a motor-car, the purchase price of which was £525, plus £33 8s. hiring charge, with the first defendant, William Hurrell, a partner in the firm of Hurrell & Partners, as hirer, and the second defendant, Muriel Patricia Hope, as guarantor. Under the agreement the first defendant agreed by clause 1 to pay £175 cash down, and by clause 2, monthly instalments of £31 9s. until the total sum of £558 8s. was paid. The hirer agreed by clause 3: "To keep the "motor in good order, repair, and working condition . . ." and by clause 6: "To pay, should he return the motor under clause 15 "(*a*) hereof or should the owners give notice terminating the "hire of the motor and/or retake the motor under clause 8 hereof "before the expiration of nine months from the date hereof, such "further sum (in addition to any sum payable under clause 8 "hereof) as, with the total amount previously paid under clauses "1 and 2 hereof, will equal the sum of £425 by way of compensa-"tion for depreciation of the said motor." It was provided by clause 8 that if the hirer fell into arrears or committed any breach of the agreement, the owners could terminate the hiring and retake possession of the car, and such termination and/or retaking of possession should not prejudice the owners' right to recover "rent . . . and/or other moneys payable under this agreement, "including damages for breach thereof." By clause 15 (*a*) the owners agreed that "The hirer may terminate the hiring at any "time by returning the motor to the owners . . . but the hirer "shall remain liable for rent up to the date of such return . . . "and damages, if any, for any breach of this agreement, compen-"sation, if any, under clause 6 hereof, and also any other moneys "payable under this agreement."

The first defendant paid £175 and four instalments. He failed to pay the instalment due on January 28, 1954, and on February 10 the plaintiffs gave notice terminating the hire of the car and took possession of it. They resold it for £270.

The plaintiffs claimed against Hurrell, as principal, and Hope, as guarantor, £122 4s., as the balance due under clause 6 of the agreement as compensation for depreciation, which sum was the difference between the payments made to the company and £425 stipulated in the clause.

The defendants denied that £122 4s. was owing to the plaintiffs, and by their defence stated that they would contend that the sum was a penalty and irrecoverable.

Bernard Finlay appeared for the plaintiffs.

The first defendant appeared in person.

The second defendant was not represented and did not appear.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

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March 16. DENNING L.J. read the following judgment: In August, 1953, Hurrell & Partners wished to get a second-hand car for use in their business. They found one they liked, an Armstrong Siddeley, at a price of £525, but they had not the money to pay for it cash down; so they arranged to acquire it on hire-purchase terms. A finance company called Landom Trust Ld. bought the car for £525 and let it to William Hurrell on instalment terms payable over 12 months. The instalments were £175 cash down and £31 19s. a month until a total of £558 8s. was paid. This total of £558 8s. was made up of £525 purchase price and £33 8s. financing charge.

Hurrell signed the agreement as hirer and Mrs. Hope as guarantor. The agreement was dated August 28, 1953. The £175 was paid that day and the instalments of £31 19s. were payable on the 28th of each succeeding month. The first four instalments were paid, but not with punctuality, down to and including December 28, 1953. The instalment due on January 28, 1954, was, however, not paid. On February 10, 1954, the finance company gave notice terminating the hire of the car and took possession of it. It was then in a dirty condition, but they resold it for £270. This meant that they had received by that time a total sum of £572 16s., made up of the original cash of £175, four instalments of £31 19s., making £127 16s., and proceeds of resale, £270. They were, therefore, already better off than if the hire-purchase agreement had been fulfilled, for then they would only have got £558 8s., whereas they in fact received £572 16s., a profit of £14 8s. They are not content, however, with this profit, but they have brought this action to recover another £122 4s. as compensation for depreciation.

They say that they are entitled to this sum by reason of clause 6 of the agreement, which says that, if the owners terminate the hiring or retake the motor, the hirer will pay a sum sufficient to bring up his total payments to £425 by way of compensation for depreciation. Now, the hirer had already paid £175 plus £127 16s., making £302 16s. That left £122 4s. to make up the £425 which they claim. In short, they have got the car back and also claim £425 in cash.

I was told by the secretary of the plaintiff company that it is the usual practice of hire-purchase finance companies to stipulate for compensation for depreciation at the rate of 75 per cent. of the price. This means, therefore, that, if the hirer should fail to pay the first instalment or any later instalment, the owners can not only retake the car and resell it for their own benefit, but also compel the hirer to pay three-quarters of the price. This seems to me to be altogether exorbitant. The facts of this case show how unfair it is; and, as the first defendant was not represented, I asked counsel for the finance company to justify the clause if he could.

At one time it was thought that the courts of this country were powerless to interfere with clauses such as this, but I am glad

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to say that in *Cooden Engineering Co. Ld.* v. *Stanford* [1] the Court of Appeal held that if the clause imposes a penalty (as opposed to liquidated damages) it is invalid and unenforceable. The sole question for me is, therefore, whether this clause is a penalty clause. I reserved my decision on this question because of the large number of cases which will be affected by it. In considering this question, I take into account these circumstances: (1) The £425 is three-quarters of the total price. It is inserted by the hire-purchase companies by rule of thumb without regard to the make of car, its age, the market conditions or anything of the kind. It is the same for all. (2) The £425 payment for compensation for depreciation is payable on the footing that the car, when it is retaken, is in good order, repair and condition. If it is in bad condition, the owners can recover damages for breach of agreement under clauses 3 and 8 and 15 (*a*), and these damages are payable in addition to the £425. (3) Assume that the car is kept in good condition, and at the end of the first month the hirer makes default and the owners retake the car. Can anyone suppose that in that time the value of it will have dropped by three-quarters so that it will be worth only one-quarter of what it was worth a month before? It is an altogether extravagant thing to imagine. (4) Next assume that the car is kept in good condition and at the end of six months the hirer makes default and the owners retake the car. One can understand that it might have dropped to one-half its value, but not as much as three-quarters. Indeed, when the matter was put to the test, the drop was only one-half. (5) Lastly, suppose that the car was let on a simple hiring (without a purchase clause) and the hiring was for one month, or even for six months. The hiring charge would be quite modest—nowhere near £425—and yet it would have to cover depreciation.

In these circumstances, I cannot regard the figure of three-quarters as a genuine pre-estimate of damage. If the parties had genuinely tried to estimate the depreciation of this particular car at this particular time, the figure would have been much less.

I was referred to two previous cases in the courts where owners have recovered three-quarters for depreciation. In 1926, in *Elsey & Co. Ld.* v. *Hyde*,[2] a new tricycle was let on hire-purchase for £30 4s. The owners retook the machine and also recovered £25 as compensation for depreciation. In 1941 in *In re Apex Supply Co. Ld.*,[3] some second-hand factory machinery was let on hire-purchase for £1,360 16s. The owners retook the goods and also recovered £1,020 12s. as compensation for depreciation. Each of those cases was decided, however, on the ground that no question of penalty arose, which has since been held to be wrong. The

[1] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915.

[2] (1926) Jones & Proudfoot's Notes on Hire Purchase Law, 2nd ed., at p. 107.

[3] [1942] Ch. 108; [1941] 3 All E.R. 473.

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judges also expressed the view that the sum for depreciation was a genuine pre-estimate of damage; but, if this was so, it must have been because of the absence of any market at that time for goods of that type. The cases cannot be regarded as establishing that three-quarters is reasonable for all goods at all times.

I was also referred to a motor-car case in 1927 in the Court of Appeal, where a sum of £100 payable for depreciation on a car was held to be a genuine pre-estimate of damage (*Roadways Transport Development Ld.* v. *Browne & Gray* [4]), but it is not very helpful, because no details are given. I do notice, however, that Atkin L.J. said [5] that in that particular case the car did depreciate by more than £100; so that the sum was shown ex post facto to be reasonable. That is not the case here. *Chester & Cole Ld.* v. *Wright* [6] in 1930 is also unhelpful, because not sufficient details are given.

In the present year, 1955, I must, I think, approach the matter afresh in the light of the different circumstances which now exist from the time at which those earlier decisions were given. Looking at this agreement and the conditions under which it was made, I am of opinion that the sum of £425 was not a genuine pre-estimate of damage but was an extravagant and extortionate sum held in terrorem over the head of the hirer. It is a penalty and, as such, it is not recoverable in these courts. There will be judgment, therefore, for the defendant.

Judgment for the defendants.

Solicitors: *Darling & Taylor.*

C. J. E.

[4] (1927) Jones & Proudfoot, at p. 118.
[5] Ibid. 123.
[6] (1930) Jones & Proudfoot, at p. 124.

[PROBATE, ETC., DIVISION.]

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Feb. 18.

Wallington J.

Legal Aid—Costs—Taxation—Barrister—Brief fee—Case heard out of London—Appropriate fee—Undefended divorce case—Assize town—Legal Aid and Advice Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *3rd Sch. Barrister—Fees.*

On the taxation of the costs of an undefended divorce suit heard at Reading, in which the petitioner was an assisted person, the taxing registrar taxed off the sum of £2 2s. from the charge of £7 12s. for counsel's fee on brief of £7 7s. and the clerk's fee both from the party and party costs and from the solicitor and client costs. (No question arose concerning the conference fee.)

Objection was taken on the grounds that counsel had to travel

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to Reading, and that there was no local Bar, and reliance was placed in the objections to the decision in *Self* v. *Self* [1954] P. 480; [1954] 3 W.L.R. 119; [1954] 2 All E.R. 550.

The registrar in reply said that that decision was to be distinguished, for Reading was an assize town as well as a divorce town, and that there was no limitation placed on the petitioner in his choice of counsel from the circuit:—

Held, that the registrar had acted on wrong principles, and that the sum of £2 2s. should be reinstated in the costs allowed both as between solicitor and client and party and party.

Self v. *Self* (supra) applied.

SUMMONS (adjourned into court for judgment).

The petitioner, who was an assisted person, filed a petition for divorce in the Oxford district registry in March, 1954, on the ground of his wife's adultery with a named co-respondent. Both the wife and co-respondent were served with the petition, which included a prayer for costs against the co-respondent; but neither of them filed an answer nor took any part in the hearing on June 24, 1954, when Mr. Commissioner Gallop Q.C., sitting at Reading, granted a decree nisi and ordered the co-respondent to pay the costs. The order for costs included in the decree was in the terms ". . . and condemn the co-respondent in the costs incurred " on behalf of the petitioner in the cause and such further costs " to be incurred on behalf of the petitioner as the court shall " direct to be costs in the cause, such costs incurred and to be " incurred to be taxed between party and party." The decree also ordered that " the costs of the petitioner be taxed as between " solicitor and client in accordance with the provisions of the " Third Schedule to the Legal Aid and Advice Act, 1949."

The decree nisi was made absolute on August 9, 1954, and in due course the petitioner's solicitors carried in their bill of costs for taxation. The form of the bill provided for particulars of the charges, with their dates, between red ink lines in the centre of the sheet. On the right-hand side of the space for particulars of charges there were four money columns, two of them headed " solicitor and client " and the other two " party and party." One of those two columns under each heading was for the insertion of payments, and the other of charges. On the left-hand side of the centre of the sheet there were four similar money columns which were prepared to receive separate indications of any amounts for payments or charges which might be disallowed on taxation in respect of either solicitor and client or party and party items.

Mr. Registrar Eldridge, the Oxford district registrar, when taxing the bill, inserted in the party and party payments column on the left-hand side of the sheet "£2 2s." opposite the charge for " paid his fee and clerk "—in the party and party payments column—" £7 12s." At the end of the bill of costs the registrar left blank and struck out the form of certificate in which provision was made for the insertion of (*a*) the amount of the party and party taxation and (*b*) the amount of the solicitor and client

taxation. Following this, and on the same page, was a typewritten form of certificate which had been completed by the registrar as follows:—" I certify that the costs in this cause have " been taxed as between solicitor and client and account as " follows:—Disbursements £14 18s. 4d. Counsel's fee £12 6s. " Profit costs £48 16s. 9d.:—Total £76 1s. 1d." These amounts were all " after certificate," indicating that they included taxation and allocatur and order fees, and the taxation fee.

Objection was taken by the petitioner to the taxation by the Oxford district registrar of the bill of costs, " in respect of the " disallowance of £2 2s. for counsel's fee and clerk in respect of " the brief," and gave the following reasons:—

" (1) That counsel had to travel to Reading from London to " deal with the case which was in the list at Reading;

" (2) That there is no local Bar at Reading;

" (3) That the case of *Self* v. *Self*[1] lays down the principle " that in cases where the above conditions exist counsel is, in " an undefended divorce suit, entitled to charge and be allowed " on taxation a fee of £7 7s. plus clerk's fee."

The answer of the registrar to these objections was contained in a letter from him dated December 13, 1954, to the petitioner's solicitors in the following terms:—

" Dear Sirs,

" George Henry Young v. Evelyn Constance Young—Divorce

" In reply to the objections in this case, it may be more convenient if I put my answers in the form of a letter.

" In the first place, I am satisfied that on the merits of this " particular case, which was a short undefended case, a fee of " £5 5s. and £2 7s. is adequate, and I understand that there is " no contention to the contrary, the objection to the reduction I " have made being based entirely on the decision in *Self* v. *Self*.[1] " With all due deference, I submit that a distinction can be " drawn between the circumstances in this case and those in " *Self* v. *Self*.[1] One of the grounds on which Sachs J. based " his decision was that owing to the limited number of counsel " practising at Brighton, a litigant was deprived of his right of " choice of counsel from the panel. Brighton is a divorce town, " not an assize town, Reading is both, and I submit that this " being so the petitioner was not limited to a choice of three " counsel, but had the right to make his choice from any one " of the counsel on the Oxford Circuit who are on the panel of " those willing to undertake legal aid divorce cases. As Sachs " J. points out, the reference to the local Bar is irrelevant, the " action being tried in the High Court. If there is substance in " my suggestion that a counsel accepting a brief in a divorce " case tried at an assize town does so as a member of the " circuit which comprises that town, I submit it is relevant to " enquire, in the interest of uniformity, what is the practice on

[1] [1954] P. 480; [1954] 3 W.L.R. 119; [1954] 2 All E.R. 550.

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"circuit as to the assessment of fees by Clerks of Assize and "Clerks of the Peace. Is the distance from London travelled "by counsel taken into consideration? For instance, is a "counsel a member of a circuit who travels from London "allowed a bigger fee at, say Gloucester or Hereford than he is "at Reading or Oxford on the ground of the extra expense of "travel from London, and is it contended that a counsel on the "Oxford Circuit who undertakes an undefended divorce case at "Shrewsbury is entitled to more than £7 7s. because of the "greater distance from London? I submit that these are "matters to be taken into consideration in order that a uniform "scale of fees may be arrived at. It is right to add that since "the decision in *Self* v. *Self*[1] I have had several bills of costs "brought in for taxation in which a fee of no more than £5 5s. "and £2 7s. on the brief has been asked for. I shall welcome a "ruling, not only for the sake of uniformity but so that I may, "on taxation, allow adequate remuneration for counsel while not "laying an undue burden on those who have to pay the costs, "wholly or in part, in a great many instances the general public, "who are not interested parties to the proceedings. I am much "obliged to you for the loan of your papers and the report of "*Self* v. *Self*,[1] which I return herewith.

"Yours faithfully,

"J. M. Eldridge, registrar."

A review of the taxation was sought and the following summons issued: "Let the co-respondent or his solicitor attend "one of the judges of the Division at his chambers . . . on the "hearing of an application by the petitioner for an order that the "taxation of costs herein by Mr. Registrar Eldridge be reviewed "and that the objections made by the petitioner to the dis-"allowance of the several items [sic] specified in the said "objections be allowed and the said items allowed and the "costs of and occasioned by the application be paid by the "co-respondent." This summons was duly served on the co-respondent, who took no part in the hearing of the summons.

R. J. A. Temple Q.C. and *T. G. Guest* appeared for the petitioner.

Argument was in chambers, and the matter was adjourned into court for judgment.

Cur. adv. vult.

Wallington J., reading his judgment, stated the facts and, after referring to the nature of the bill of costs and the taxation in the terms set out above, continued: I suppose that this taxation on its face is intended by the registrar to be treated both as between solicitor and client and between party and party; in

[1] [1954] P. 480.

fact the order contained in the decree nisi provides for the taxation of costs both as between party and party and solicitor and client, and in my view it has not been complied with, in that the taxation is certified as being between solicitor and client.

The co-respondent did not appear before me on the hearing of the summons, but proof of personal service of the summons upon him was before me on affidavit. His name was called outside the court, but he did not attend. I therefore proceeded to hear the summons in his absence.

Mr. Temple Q.C., with his junior, Mr. Guest, argued the matter, and relied upon the three following submissions:

(1) That the registrar failed to tax counsel's fee on the brief on the basis of a solicitor and client taxation, but restricted himself to a party and party basis, which, he argued, is wrong in principle.

(2) That the registrar failed to recognize and give effect to the general and proper practice of including in counsel's fee in a country case something for time and expense.

(3) That the registrar attempted to draw a distinction between counsel attending at a divorce town and counsel attending at an assize town. For this distinction, he argued, there is no warrant in practice or principle.

[His Lordship read the reasons given in the objection to the taxation, and the letter from the district registrar at Oxford, and continued:] It follows from what I have said that upon this taxation the registrar has made no distinction between the two forms of taxation, namely, that for the purpose of the Legal Aid and Advice Act, 1949, as between solicitor and client, and party and party taxation. In my opinion the difference between a solicitor and client taxation and one between party and party is well established. In my view Mr. Temple was amply justified in relying upon the decision of Roxburgh J. in *Read* v. *Gray*.[2] I doubt whether the registrar in an ordinary case (that is to say, one in which there is no legal aid) would dissent from the proposition which I accept, that, shortly and broadly put, a "solicitor and client taxation is substantially a party and party "taxation on a more generous scale."

Mr. Temple also relied upon the judgment of Sachs J. in *Self* v. *Self*.[3] My learned brother in that case dealt with a similar question of counsel's fees in relation to a divorce case tried at Brighton by a special commissioner in divorce. In that case, as in this, the petitioner in the suit was represented by counsel whose chambers are in London. Strangely enough, the reduction in that case was from seven guineas to five guineas, and the registrar in that case made it on the ground that there were counsel with chambers in Brighton willing to accept briefs on

[2] [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

[3] [1954] P. 480.

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undefended petitions, and that it would be wrong to allow a higher fee because counsel came from London.

With great respect to the registrar, my opinion is that he has misunderstood the effect of the judgment of Sachs J. in the case to which I have just referred.

I have reached the clear conclusion that the registrar in taxing off the two guineas to which I have already referred in this case has acted on a wrong principle, and I am, therefore, bound to undertake a review of the taxation. Having done so, I reinstate the sum of two guineas in the bill of costs as between solicitor and client. I respectfully identify myself entirely with the judgment of my learned brother, Sachs J., and fully agree with all the reasons upon which his decision is based.

Moreover, I conceive it to be my duty to review the taxation from the party and party standpoint, having regard to the order for party and party costs contained in the decree nisi, and accordingly I reinstate the sum of two guineas which the registrar has taxed off the party and party bill of costs.

I direct that the costs incurred in and about this application be "costs in the cause," which means that the co-respondent must pay them. The case is fit for counsel for the petitioner.

Appeal allowed.

Solicitors: *Burton, Yeates & Hart for Andrew Walsh, Lightfoot & Co., Oxford.*

J. B. G.

[PROBATE, ETC., DIVISION.]

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Jan. 31;
Feb. 1, 2, 3, 4, 7, 8.

Barnard J.

*GALLER v. GALLER.

Husband and Wife—Divorce—Evidence—Admissibility of signed statement of witness overseas—"Person interested"—Husband alleged to have lain on bed with nursemaid with trousers undone—No allegation of adultery—Nurse not "interested"—Evidence Act, 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1.

Evidence—Evidence Act, 1938.

A wife in a contested divorce suit based a charge of constructive desertion upon the husband's alleged impropriety with a nursemaid who had since returned to her home in Denmark. No allegation of adultery was founded on the incident. On a submission that the woman's signed answers to a questionnaire sent to her by the husband's solicitors were admissible under section 1 of the Evidence Act, 1938:—

Held, that she was not a "person interested" within the meaning of section 1 (3) of the Evidence Act, 1938, and that the questionnaire was, therefore, admissible.

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DEFENDED divorce suit.

On March 25, 1952, the husband presented a petition for divorce on the ground of desertion in 1948, when the wife had left the matrimonial home. The wife by her answer denied the allegation and cross-prayed for a divorce on the grounds of (constructive) desertion, cruelty, and adultery. The matter originally came before a divorce commissioner in October, 1953, when the issue of adultery with one Gladys Florence Thompson was by consent tried first. The evidence of adultery (which was denied) rested upon the uncorroborated evidence of the woman concerned; her evidence was accepted by the commissioner and a decree nisi was accordingly pronounced. That decree was set aside by the Court of Appeal on February 4, 1954, and a new trial was ordered.[1]

The wife's charge of desertion was based upon the alleged impropriety of the husband with a Danish nursemaid who had since returned to Denmark and got married, and by paragraph 6 of her answer she alleged: "That on a Sunday evening at about "the end of the month of October, 1948, at [the matrimonial "home] the [wife] discovered [the husband] in bed with the "children's nurse whose name the [wife] believed to be K— "W—." Further and better particulars of that paragraph stated that the couple were discovered lying together "on [sic] the "nurse's single bed." No allegation was made of adultery with K— W—.

The husband's solicitors had written to K— W—, sending her a questionnaire concerning the alleged misconduct; she had replied to that questionnaire in her own handwriting and had signed the document. During the hearing counsel for the husband sought to put the document in evidence under section 1 of the Evidence Act, 1938.[2] The allegations and answers contained in the questionnaire were as follows:

[1] [1954] P. 252; [1954] 2 W.L.R. 395; [1954] 1 All E.R. 536.

[2] Evidence Act, 1938, s. 1 (1): "In any civil proceedings where direct "oral evidence of a fact would be "admissible, any statement made by a "person in a document and tending to "establish that fact shall, on production of the original document, be "admissible as evidence of that fact "if the following conditions are satisfied, that is to say—(i) if the maker "of the statement either—(*a*) had "personal knowledge of the matters "dealt with by the statement; or "(*b*) where the document in question "is or forms part of a record purporting to be a continuous record . . . "and (ii) if the maker of the statement is called as a witness in the "proceedings: Provided that the condition that the maker of the statement shall be called as a witness "need not be satisfied if he is dead, "or unfit by reason of his bodily or "mental condition to attend as a "witness, or if he is beyond the seas "and it is not reasonably practicable "to secure his attendance, or if all "reasonable efforts to find him have "been made without success . . . "(3) Nothing in this section shall "render admissible as evidence any "statement made by a person interested at a time when proceedings "were pending or anticipated involving "a dispute as to any fact which the "statement might tend to establish." S. 2 (1): "In estimating the weight, "if any, to be attached to a statement "rendered admissible as evidence by "this Act, regard shall be had to "all the circumstances . . . to the "question whether or not the maker "of the statement had any incentive "to conceal or misrepresent facts."

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"1. Q. That Mrs. Galler was suspicious of her husband's "behaviour with K— W— and that on many occasions he asked "Mrs. Galler to stay in bed and that he would bring her breakfast "in bed, so that he could have a chance to be alone with K— W—.

"A. I cannot possibly remember if Mr. Galler ever brought "Mrs. Galler breakfast in bed.

"2. Q. That there were signs of affection between Mr. Galler "and K— W—.

"A. Never the slightest affection.

"3. Q. That Mr. Galler gave K— W— a mackintosh worth "about £10 and bought her a pair of shoes.

"A. On a rainy day Mrs. Galler lent me an old mackintosh "of Mr. Galler's (military brown-yellow colour). A few days "later on Mrs. Galler asked her husband if I could have it, so it "was given to me. About a week after I arrived to Mr. Galler's "house—having received my first weekly salary—I bought a pair "of shoes myself. Mr. Galler has never bought me shoes.

"4. Q. That Mr. Galler used to walk about the house with "his dressing gown open and his privates showing. That Mr. "Galler was a very vulgar person in the house.

"A. I only saw Mr. Galler fully dressed (but when shaving "Mr. Galler did not wear his shirt). Mr. Galler did not seem "to be vulgar.

"5. Q. That Mr. Galler would drink with K— W— on many "occasions.

"A. Mrs. Galler very often offered me a drink when we were "alone, but I cannot possibly remember Mr. Galler ever did.

"6. Q. That on a Sunday evening in October, 1948, Mrs. "Galler went to K—'s room and opened the door and found "Mr. Galler and K— in bed together. That Mr. Galler had his "shirt open and his trousers undone and that K—'s blue coat "was undone.

"A. This is absolutely wrong and I deny having seen Mr. "Galler in the above-mentioned situation, and I also deny that "I have ever been in bed together with Mr. Galler.

"7. Q. That Mr. Galler was so cross and annoyed when Mrs. "Galler came into the room that he went over to her and tore "her jumper and slapped her in the face.

"A. This is wrong too. I have never seen Mr. Galler neither "using violence to Mrs. Galler nor seen Mr. Galler tearing his "wife's clothes.

"8. Q. That Mr. Galler called Mrs. Galler filthy names, threw "open the bedroom door and said 'Get out of here.'

"A. I have never noticed anything about these allegations.

"9. Q. That on the following day Mrs. Galler decided it was "impossible to live with Mr. Galler any longer and that she left.

"A. From the very first day when I was alone with Mrs. "Galler she confided to me that she had decided to go. So it "was a sort of every day occurance [sic] to hear about it, until "she really did go from her family."

The document was signed by the nurse. Counsel for the wife objected on the ground that the nursemaid K— W— was "a "person interested" within the meaning of section 1 (3) of the Evidence Act, 1938.[2]

The case is reported upon the issue of the admissibility of the document in evidence.

J. E. S. Simon Q.C. and *Philip Panto* for the husband.
David Karmel Q.C. and *Guy Willett* for the wife.

Simon Q.C. The nurse is in Denmark and it was felt that a request to take her evidence on commission was not justified; but it is submitted that all the prerequisites of admissibility under the Evidence Act, 1938, have been satisfied. The weight to be attached to the evidence must of course be a matter for the court, and it would have been of greater assistance if she could have been cross-examined.

Karmel Q.C. I object to the admission of the document on the ground that the nurse is a "person interested." It is appreciated that she is not charged with adultery, but it is submitted that where a woman is said to have been found in the circumstances alleged, those circumstances would make her an interested party within the meaning of the proviso to the subsection. *Holton* v. *Holton*[3] is to be distinguished, for the alleged interest in that case was the natural interest of the petitioner's deceased mother. A charge of this nature against a young woman would give her an interest such as would exclude the statement: her interest is a material one. If she is to deny the allegations she should do so in the witness-box.

She is charged with misconducting herself with a married man, and it is submitted that that should suffice to make her materially interested so as to exclude her evidence. The legislature had in mind when making the proviso that persons who have reason for bias, that is, a material interest, should not be allowed to express themselves through a document ex parte, thus excluding the possibility of cross-examination. This is not a case as in *Holton* v. *Holton*,[3] where the person has merely a sentimental interest: the nurse is charged with impropriety. If she had been charged with adultery she would have had a material interest, and it is submitted that her statement would not have been admissible; and

[2] See p. 401.

[3] [1946] W.N. 208; 62 T.L.R. 683; [1946] 2 All E.R. 534. "The "mother of a petitioner in a divorce "suit wrote and signed a state- "ment at a time when the pro- "ceedings were contemplated. The "mother died before the hearing of "the suit. On a submission that the "statement was admissible in evi- "dence by virtue of section 1 of the "Evidence Act, 1938, it was objected "that the statement was made by "'a person interested' and was "inadmissible. *Held*, that the peti- "tioner's mother was not 'a person "'interested' within the meaning of "the section; that the statement was "accordingly admissible, but that the "court must consider what weight it "would attach to the statement when "it saw what it contained": 62 T.L.R. 683.

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it is submitted that a statement is similarly inadmissible if made by a woman named in a petition not as an adulteress, but as a person who has misconducted herself by lying on a bed in circumstances from which adultery might be inferred. The Act was not intended to apply to a person who was almost a party to the proceedings, but rather to deal with matters such as medical reports where calling a doctor or commanding officer to produce a record might be avoided.

Simon Q.C. The Act is not concerned solely with such matters. In the present case the nurse is neither charged with adultery nor is it alleged that her conduct was such as to give rise to a reasonable suspicion of adultery. It is stated in Phipson on Evidence [4]: "It will not be sufficient to exclude the statement to show merely that he had a bias in favour of one party "rather than another. Section 2 (1) makes it quite clear that "an 'incentive to conceal or misrepresent facts' goes to the "weight of the evidence only." While the nurse may have had a bias—"an incentive to conceal or misrepresent the facts"—that is a matter which goes merely to the weight which the court will place upon the document if it is admitted.

Barnard J. The document should be admitted subject to proof of signature.

The signature was proved, and the document read. His Lordship subsequently granted a decree nisi to the husband on the ground of desertion, and dismissed the cross-prayer of the answer, holding that the evidence of Gladys Florence Thompson, upon which the wife again rested her case of adultery, was not to be accepted, and rejecting the allegations of cruelty and constructive desertion. His Lordship referred in his judgment to the statement which had been admitted, and said that as the nurse had not been available for cross-examination a great deal of importance could not be attached to it, but that there was no reason to doubt the indignant denial of the husband that any incident such as that alleged had occurred.

Solicitors: *Bernard Oberman & Co.; Walmsbury & Stansbury for E. W. Marshall Harvey & Dalton, Bournemouth.*

J. B. G.

[4] p. 287.

[PRIVY COUNCIL.]

*RAJASOORIA . . . . . APPELLANT; J. C.†

AND

DISCIPLINARY COMMITTEE . . . . RESPONDENT. 1955 *March* 16.

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA.

Malaya—Solicitor—Discipline—"Grossly improper conduct"—Intention to deceive—Requisition for company meeting—Signatures from original document pasted on to new amended document—Some signatories no longer shareholders—No intention to deceive—Advocates and Solicitors Ordinance, No. 4 of 1947, *ss.* 26, 27.
Solicitor.

The appellant, an advocate and solicitor practising in the Federation of Malaya, was instructed to act for certain shareholders in a company incorporated in Malaya who, being dissatisfied with the conduct of an annual general meeting of the company, desired to call an extraordinary general meeting of the company with a view to removing the directors and secretaries and replacing them by their own nominees. For that purpose a requisition was prepared, consisting of three documents in identical terms, which were signed by 24, 29 and 37 shareholders respectively, totalling 90, and handed to the appellant. It appeared that pursuant to section 115 of the Malayan Companies Ordinance, 1940, the requisition should have stated the names of the dissatisfied shareholders' nominees for appointment as directors and secretaries, and a new requisition was prepared, again in three sheets in identical terms, to effect that amendment. The appellant cut off the signatures from the original requisition and attached them by pasting them on to the sheets of the new amended requisition, and signed his name across the joint of each of the three composite documents. At the date of the later purported requisition certain of the alleged 90 signatories were in fact, and contrary to the appellant's belief, no longer members of the company.

The Disciplinary Committee appointed under section 27 of the Advocates and Solicitors Ordinance, 1947, were of opinion that the appellant had been guilty of grossly improper conduct within the meaning of section 26 (2) (*b*) of the Ordinance, but that he did not act with intention to deceive. That finding was accepted by the Supreme Court, who suspended the appellant from practising for a period of six months. On appeal:—

Held, dismissing the appeal, that for an advocate and solicitor knowingly and deliberately to submit a false document intending it to be acted upon was grossly improper conduct as being, in the words of Lord Esher in *In re Cooke* (1889) 5 T.L.R. 407, dishonourable both to himself and to his profession. The submission of such a document with such intention in itself involved an element of "deceit." There could not be read into Lord Esher's words in *In re Cooke* a statement that a finding that intention to deceive was always an essential element in grossly improper conduct.

Had the Board felt any hesitation in the matter, they would have required a very strong case before they substituted their own

† *Present*: LORD TUCKER, LORD COHEN, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

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opinion of what was professional misconduct in the Federation of Malaya for the conclusion reached by the Disciplinary Committee and the Supreme Court: *In re A Solicitor, Ex parte Law Society* [1912] 1 K.B. 302, 312; 28 T.L.R. 50.

Order of the Supreme Court of the Federation of Malaya affirmed.

Appeal (No. 5 of 1954) from an order of the Supreme Court of the Federation of Malaya (August 27, 1953) suspending the appellant from practice as an advocate and solicitor for a period of six months in respect of each of two charges brought against him.

The facts appear fully from the judgment of the Judicial Committee, and the question was whether on those facts the appellant had been guilty of grossly improper conduct in the discharge of his professional duty so as to render him liable to suspension under section 26 (1) of the Advocates and Solicitors Ordinance, 1947.

1955. Feb. 21, 22. *Bernard B. Gillis Q.C.* and *Colin Duncan* for the appellant.

D. A. Grant for the respondent.

In addition to the cases cited in the judgment, the following case was referred to: *In re Iles, a Solicitor.*[1]

Mar. 16. The judgment of their Lordships was delivered by Lord Cohen: The appellant is an advocate and solicitor practising in the Federation of Malaya. He appeals against an order of the Supreme Court of the Federation dated August 27, 1953, suspending him from practice for a period of six months in respect of each of two charges brought against him, but directing that in each case the period of suspension was to commence from the date of the order.

The order was made under section 26 of the Advocates and Solicitors Ordinance, 1947 (No. 4 of 1947). It is, so far as material, in the following terms: "Section 26.—(1) Every advocate and solicitor shall be subject to the control of the Court "and shall be liable on due cause shown to have his admission "revoked and to be struck off the roll of the court or to be "suspended from practice for any period not exceeding two "years or to be censured. (2) Such due cause may be shown "by proof that such advocate and solicitor— . . . (*b*) has been "guilty of fraudulent or grossly improper conduct in the discharge of his professional duty. . . ."

The question at issue is as to the meaning to be placed on the words "grossly improper conduct in the discharge of his "professional duty." It is unnecessary to set out in full the other provisions of the Ordinance. Suffice it to say that under section 27 any complaint of the conduct of an advocate and

[1] (1922) 66 S.J. 297.

solicitor in his professional capacity must be made in the first place to the appropriate Local Bar Committee who, if they consider that a full investigation of the complaint is necessary, have to apply in writing to the Chief Justice to appoint a Disciplinary Committee to hear and investigate the complaint.

Under section 29 the Disciplinary Committee have to record their findings as to the facts of the case and their opinion as to the conduct of the advocate and solicitor and as to whether the facts of the case constitute due cause for disciplinary action under section 26. They draw up their findings in the form of a report, a copy of which is forwarded to the Chief Justice and to the Bar Council. The advocate and solicitor concerned and the person who made the complaint are entitled to a copy of the report on application.

By section 31 it is provided that an application for an order under section 26 should be made by originating motion ex parte for an order calling upon the advocate and solicitor to show cause why an order should not be made under the section. The order is served on the practitioner concerned and the application is then heard by a court of three judges, of whom the Chief Justice must be one. From the decision of that court there is no appeal to any court in the Malayan Union, but it is provided that for the purposes of an appeal to this Board an order made under the subsection is to be deemed an order of the Court of Appeal.

The complaint in the present case arose out of the affairs of the Foh Hup Omnibus Company, a company incorporated under the Malayan Companies Ordinance, 1940 (No. 49 of 1940). On June 2, 1952, there were held the annual general meeting and an extraordinary general meeting of the company at which a number of shareholders expressed dissatisfaction with the conduct of its affairs.

Between June 2 and June 10 three undated documents in identical terms were prepared calling for an extraordinary general meeting of the company to enable the signatories of the documents "to protest against the unconstitutional manner in which "the general meeting on June 2 was held and to pass a vote of "no confidence on the secretaries, Messrs. Lim Tam Chong & "Company, and the directors holding office at present and hold "a general meeting constitutionally for election of office "bearers." The three documents were signed by 24, 29 and 37 shareholders respectively. A copy of the three documents was produced before the Disciplinary Committee, the original not being available, and is referred to in its report as exhibit A.

On or about June 10, 1952, fifteen of the said signatories brought the three documents to the appellant's office. The appellant, who according to his evidence before the Disciplinary Committee had no previous experience with company work, went to the office of the Registrar of Companies in Kuala Lumpur accompanied by three of his clients and taking with him the said three documents. According to the appellant the Registrar or

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someone in his office called the appellant's attention to section 115 of the Companies Ordinance and advised him to tell his clients to decide among themselves who were to be the new directors and secretaries. Neither the Registrar nor anyone from his office gave evidence at the hearing by the Disciplinary Committee.

It is convenient here to mention that section 115 imposes on the directors of a company the obligation, on the requisition of members of the company holding at the date of the deposit of the requisition of not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, to proceed duly to convene an extraordinary general meeting. Subsection (2) of the section provides that the requisition must state the objects of the meeting and must be signed by the requisitionists and must be deposited at the registered office of the company, but adds that it may consist of several documents in like form, each signed by one or more requisitionists.

Having received this advice from the Registrar, the appellant asked the three requisitionists who had accompanied him to get for him the names of the proposed new office holders. They in due course handed to him documents containing this information.

On June 16 the appellant wrote to the secretaries of the company stating the instructions he said he had received from the dissatisfied shareholders and asking, among other things, for a copy of the minutes of the meetings held on June 2. He concluded by saying that he would forward the requisitions signed by 90 shareholders on receiving such minutes. His letter appears to have been handed to the company's solicitors, Messrs. Shearn, Delamore & Co., who on June 17 wrote confirming that on receiving proper documents the directors would comply with their obligations under section 115.

In view of the advice that, according to the appellant, he had received from the Registrar, the appellant then prepared a revised requisition (exhibit C (4) of the documents before the Disciplinary Committee). This set out four resolutions, (1) to remove the then board of directors; (2) to appoint a new board consisting of the persons named to him as mentioned above; (3) to appoint a sub-committee to inquire into and investigate certain irregularities; and (4) to remove the then secretaries and replace them by the proposed new secretaries. This document was unsigned, but there was inserted at the bottom the following "(Sgd.) Kong Sin Kee and 89 other shareholders, Foh Hup "Omnibus Co., Ld., (owning between them share i.e. not less "than one-tenth of the issued capital of the company)."

On August 5 the appellant wrote to the then secretaries of the company stating that he had been instructed by ninety shareholders to forward a copy of the signed requisition for an extraordinary general meeting of the company and adding that the secretaries might have inspection of the requisition at the

Registrar of Companies to whom he was forwarding the original list. The letter contained at the bottom a statement "Copy to "Registrar of Companies, Kuala Lumpur." It is not clear exactly what documents were sent to the secretaries and the Registrar respectively, but this much is, their Lordships think, established—namely, that the appellant sent to the company a copy of C (4) and to the Registrar the original of the documents comprised in exhibit A, i.e., the original documents signed by the requisitionists. Whether or not he also sent to the Registrar a copy of C (4) is not clear.

On August 8 the Registrar returned the requisition, i.e., the original of exhibit A and requested the appellant to deposit it at the registered office of the company, once more calling his attention to section 115 of the Companies Ordinance. On August 11 the appellant sent the original requisition to the secretaries of the company, who again handed the correspondence to the company's solicitors.

On August 20 the solicitors wrote to the appellant pointing out that document C (4) did not comply with section 115 as it was only a copy of the alleged requisition and that the documents enclosed in the appellant's letter of August 11 in no way made good the omission since they bore no relation to the copy requisition C (4).

On August 22 the appellant wrote to the company's solicitors stating that it was never intended that the extraordinary general meeting should be called on the resolutions set out in the original documents signed by the requisitionists. His letter continued as follows: "I sent a copy of the resolution in prescribed form to "the registered office of the company concerned but overlooked "enclosing the original signatures and forwarded them to the "Registrar of Companies for reasons which are no doubt obvious "to you. The motive for so doing were doubts in my clients' "minds but not in mine. The resolutions in my letter of the "5th instant is to be the basis of the resolution and not what is "contained in the documents containing the signatures. If this "explanation and clarification is not sufficient may I request "the return of all the documents and I shall get the signatures "anew. This you will no doubt agree will be prolonging the "'agony' for all parties concerned."

On August 25 the company's solicitors returned to the appellant the original documents signed by the requisitionists and stated: "The present position is therefore that no valid requisi-"tion is outstanding but if a valid requisition is served in the "future it will be complied with."

Their Lordships consider that reading this answer in the light of his letter of August 22, the appellant must have understood that the solicitors were calling upon him to get the signatures of the requisitionists to document C (4) and relodge it if he wished the directors of the company to act on it.

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On August 27 the appellant wrote to the company's secretaries as follows: "I am forwarding herewith a signed requisition "for an extraordinary general meeting of Foh Hup Omnibus Co., "Ld., by 90 shareholders for favour of necessary action." What was enclosed were three documents the wording of each of which above the signatures was identical with that in C (4) save that the date instead of "July, 1952" was the "27th August, 1952." Each of these documents was made to appear to be signed by some of the ninety shareholders. This was effected by cutting from the original documents of requisition the signatures affixed thereto and pasting one of them on to each of the new documents. The appellant himself signed his name across the joint of each of the three composite documents.

The appellant stated that before depositing the said documents he obtained the assurance from five shareholders that all the ninety signatories were still shareholders of the company.

It was these composite documents which formed the basis of the complaint against appellant.

On September 13 the company sent out a notice of an extraordinary general meeting to consider the resolutions set forth in the documents of August 27.

On September 26 the company's solicitors wrote to the appellant calling attention to the fact that the portion of the document which bore the signatures of the shareholders who were supposed to have signed the requisition had been pasted on to the sheets on which the requisition was typed. This, they said, made it appear that the portions on which the signatures appeared had been cut off some other document. For this reason they asked the appellant to confirm that all the persons who signed the piece of paper which had been pasted on to the requisition signed the paper only after it was pasted on to the sheet which contained the requisitions. They added that this was a serious matter because investigation showed that on the date of the requisition, August 27, 1952, certain of the signatories were not members of the company. The last paragraph of their letter was in the following terms: "We cannot imagine that you would "paste signatures on to a document and we are sure that you "will confirm that the signatures were definitely fixed to the "requisition after it had been typed, this supposition is "strengthened by the fact that Mr. Rajasooria himself has "signed across the place where the pieces of paper containing "the signatures are joined on to the requisition."

The appellant replied to that letter on September 29, 1952. The material portion of his reply is as follows: "Reference your "letter of the 26th the signatures on the requisition were "obtained after I was instructed to act and call for an extra-"ordinary meeting. I saw the Registrar of Companies and "showed him the original requisition. It was on his advice that "the amended form of requisition was typed and attached to "the original documents. I am satisfied that each and every

" signature appearing on the documents was affixed with the sole " purpose of requisitioning an extraordinary meeting."

On October 1, 1952, the company's solicitors wrote to the appellant stating that they read the first paragraph of the appellant's letter of September 29 as meaning, (1) that a requisition convening an extraordinary general meeting was prepared and signed; (2) that it was decided to amend this requisition whereupon a new form was prepared and the signatures to the old form were detached from the old and attached to the new form; (3) that this was done on the advice of the Registrar of Companies.

Their Lordships think that this construction was the only reasonable construction that could be placed on the first paragraph of the appellant's letter of September 29. No answer was received by the company's solicitors to their letter of October 1. Accordingly on October 27 they wrote to the Registrar of Companies enclosing copies of the letters of September 26 and 29 and October 1 and asking the Registrar if he was in a position to confirm that it was on his advice that the amended form of the requisition was typed and attached to the original documents. To this letter the Registrar replied on October 29 stating that so far as he could trace his department had nothing to do with the second requisition, i.e., the requisition of August 27.

On November 4 the secretaries of the company wrote to the secretary of the Bar Committee of Selangor and Negri Sembilan lodging a complaint against the appellant. The substance of the complaint was the formation of the composite documents and the statement which the complainant said the appellant had made in his letter of September 29 that his action in pasting the signatures to the new requisition had been taken on the advice of the Registrar, a statement which was denied by the Registrar. The Bar Committee notified the appellant of this complaint, and on December 11 the appellant wrote answering the charge. Their Lordships do not find it necessary to refer to the details of that answer. The Bar Committee, after completing its investigation, applied to the Chief Justice to appoint a Disciplinary Committee under section 27 of the Advocates and Solicitors Ordinance, and on March 12, 1953, the Chief Justice appointed a Disciplinary Committee. On May 7, 1953, the Disciplinary Committee held a hearing into the complaint. The appellant was present and gave evidence. During the opening statement by counsel for the complainants, the appellant admitted that the composite documents were made by cutting out the signatures at the bottom of the original requisitions and affixing copies of C (4) to each of the portions thus obtained. He also admitted that this was not done on the Registrar's advice, but in his opening statement he said that it was done bona fide and after obtaining the assurance of five shareholders who acted as spokesmen of the whole ninety signatories that everyone of the signatories was still a shareholder on August 27. He added on

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oath that four of the five shareholders who gave him this assurance were actually present and witnessed the excision and pasting.

He was cross-examined as to his failure to answer the company's solicitors' letter of October 1. His evidence on this point is not quite clear, but it would appear that his explanation was (a) that he did not feel any obligation to defend himself against a firm of solicitors who chose to be insulting and to accuse him of unprofessional conduct, and (b) that his instructions were withdrawn and given to Lovelace and Hastings on October 1 or 2. Their Lordships pause here to observe that at the hearing before this Board an application was made for leave to adduce further evidence directed to establishing that the letter in question, though dated October 1, was not delivered at the appellant's office until October 4, that on that date the appellant was away from Kuala Lumpur on other business and did not return until October 7, before which date the file containing all the papers had been handed to Messrs. Lovelace and Hastings.

On June 11, 1953, the Disciplinary Committee made their report and forwarded a copy to the Chief Justice and to the Bar Committee in accordance with section 29 of the Advocates and Solicitors Ordinance. They pointed out that the complaint was really a double one, (a) that the appellant cut off the signatures from the original requisitions and later attached them by pasting on to the new or amended requisitions (complaint No. 1); and (b) that he informed the company's solicitors that he had done this on the advice of the Registrar of Companies who, on inquiry being made from him, denied having given any such advice (complaint No. 2). After setting out the material facts and recording the appellant's evidence as to the cutting off of the signatures and pasting them below the new wording, and his statement that he had done so in the bona fide belief that nothing unprofessional was being done and that was why he signed across the joint in the documents, the Disciplinary Committee expressed their conclusions as follows: (1) in relation to the matters alleged in complaint No. 1 the appellant was guilty of grossly improper conduct as an advocate and solicitor, but he did not act with intention to deceive; and (2) with regard to complaint No. 2, that the letter was written with the intention of justifying the action the subject of complaint No. 1, and that it was definitely intended to mislead. The Disciplinary Committee therefore found that the appellant's conduct in writing it and further in not replying to the letter of October 1 from the company's solicitors amounted to grossly improper conduct and that he had given no satisfactory explanation thereof. They concluded by expressing the opinion that the facts proved or admitted constituted due cause for disciplinary action under section 26.

An originating motion was duly issued pursuant to section 31 and on July 20, 1953, an order was made summoning the appellant to appear before a court of three judges on August 10,

1953, to show cause why an order should not be made against him under section 26 (1) of the Advocates and Solicitors Ordinance, 1947. The case was heard before Pretheroe, Ag. C.J. of the Federation of Malaya, Murray-Aynsley, C.J. of Singapore and Briggs J. On August 27, 1953, they gave judgment accepting the findings of the Disciplinary Committee and suspending the appellant from practising for a period of six months on each charge as stated in the order to which reference has already been made.

Pretheroe C.J. first considered the meaning of the expression "grossly improper conduct" in section 26 and accepted as the test the definition that it means conduct which is dishonourable to the appellant as a man and dishonourable in his profession. He took this test from the judgment of Lord Esher M.R. in *In re Cooke*,[1] and added that it seemed to him perfectly clear that for an advocate and solicitor knowingly and deliberately to submit a false document, and intend it to be acted upon, was both dishonourable to himself and to his profession. Dealing with the first complaint, he accepted the finding of the Disciplinary Committee that the appellant did not act with the intention to deceive when sending to the secretary of the company on August 22 the composite documents to which their Lordships have already referred, but said that it seemed to him probable that the appellant adopted this course in order to avoid the labour necessarily required to obtain the signatures of between eighty and ninety persons living in different parts of two States. The judge, however, added: "But even if there was "no intention to deceive the plain fact remains that the docu- "ment was a false document and might have deceived both the "Registrar of Companies and the company itself if the signatures "of three persons, who had recently ceased to be shareholders, "had not been observed." On complaint No. 2 Pretheroe C.J. expressed his agreement with the Disciplinary Committee that the statement in the letter of September 29 was definitely intended to mislead. He says: "Having carefully considered "the whole of the correspondence exhibited in this case I regret "to say that I have reached the same conclusion. Even when "the matter was put to the respondent with complete clarity in "the letter addressed to him by Messrs. Shearn, Delamore & "Co. on the 1st of October, 1952, he did not even answer the "letter."

Murray-Aynsley C.J. agreed. As regards the first complaint he says: "As regards the first charge, I do not think that it is "possible to deny the seriousness of the matter. The document "sent in on August 27 was one intended to have legal conse- "quences and it was a false document. Though the matter was "done with a complete lack of contrivance and was obvious to "anyone examining the document, and the Committee have

[1] (1889) 5 T.L.R. 407, 408.

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" found that there was not an intention to deceive, I agree with " the finding of the Committee that it constituted grossly " improper conduct on the part of an advocate and solicitor and " that it brings the respondent within section 26 (2) of Cap. 41 " (Ordinance No. 4 of 1947)."

As regards the second charge, it is to be observed that he does not place any reliance on the failure to reply to the letter of October 1. He says: " I do not think that any reasonable " person reading the letter of September 29 could have construed " it as meaning anything but that the Registrar of Companies " had advised the pasting together of the two pieces of paper " and I think it is impossible to resist the inference that it was " intended to convey that impression."

Briggs J. also accepts the findings of the Disciplinary Committee. As regards the first complaint, he says that to cut a signature from one document and affix it to another might in very special circumstances be permissible, but no such circumstances existed in this case. On the other hand, he says that the appellant must have been aware that in the interval of two months some at least of the original signatories might have changed their minds and not wish to sign the new requisition. He considered that the precautions taken in this respect by the appellant were wholly insufficient and that it was grossly improper conduct in his behalf to transfer the signatures unless each and every one of the signatories had expressly authorized him to do so. As regards the second charge, he places a benevolent construction on the appellant's letter of September 29, saying that it was not literally untrue but was likely to mislead the solicitors for the company, and he bases his agreement with the Disciplinary Committee on the failure of the appellant to correct the misapprehension after receiving the letter of October 1, 1952.

It is from this order of August 27, 1953, that the appellant appeals to this Board. While the appeal to this Board was being prepared it was discovered that the letter dated October 1, 1952, had not in fact been delivered to the appellant's office until October 4, 1952. In view particularly of the judgment of Briggs J., who bases his judgment on complaint No. 2 entirely on the failure to answer this letter, the appellant's counsel applied for leave to adduce further evidence to establish the facts to which their Lordships have already referred. Those facts, if established, would necessarily involve that the appellant had never seen the letter in question and could not therefore be blamed for failure to deal with it. Before their Lordships could admit this evidence they would require to be satisfied on two points: (1) that it could not with reasonable diligence have been made available either before the Disciplinary Committee or before the Supreme Court, and (2) that it would have formed a determining factor in, or had an important influence on, the result. Their Lordships do not find it necessary to consider whether the

first of these conditions is complied with, since they are satisfied that the evidence, if produced, would not have affected the result either before the Disciplinary Committee or in the Supreme Court. Their Lordships are unable to place on the letter of September 29 the benevolent construction adopted by Briggs J. They agree with Murray-Aynsley C.J. that no reasonable person reading that letter could have construed it as meaning anything but that the Registrar of Companies had advised the pasting together of the two pieces of paper, and they agree with him that it is impossible to resist the inference that it was intended to convey that impression. Mr. Gillis suggested that the evidence might have affected the sentence even if it did not affect the finding of grossly improper conduct, but their Lordships are satisfied, for the reason they have stated, that this is not a case where they should admit fresh evidence and they see nothing to lead them to the conclusion that the sentence imposed was unduly severe.

Their Lordships turn therefore to complaint No. 1. Mr. Gillis argued with force that once the Disciplinary Committee had found that there was no intention to deceive it necessarily followed that the Supreme Court could not properly find that there was grossly improper conduct. He relied on the passage already cited from the judgment of Lord Esher in *In re Cooke*.[2] He suggested that the appellant could not be said to have done anything dishonourable to him as a man if he did what he did without any intention to deceive. Their Lordships, however, agree with Pretheroe C.J. that for an advocate and solicitor knowingly and deliberately to submit a false document intending it to be acted upon, is dishonourable both to himself and to his profession. This in itself involves an element of "deceit." The Committee no doubt meant that the appellant believed his clients would have signed the new requisition if given the opportunity. Their Lordships do not read into Lord Esher's words a statement that a finding that intention to deceive is always an essential element in grossly improper conduct. It is to be observed that in *Allinson* v. *General Council of Medical Education and Registration*,[3] dealing with the case of a medical man, Lord Esher approved the test suggested by Lopes L.J. as follows: "'If it is shown that a medical man, in the pursuit of "'his profession, has done something with regard to it which "'would be reasonably regarded as disgraceful or dishonourable "'by his professional brethren of good repute and competency' "then it is open to the General Medical Council to say that he "has been guilty of 'infamous conduct in a professional "'respect'."

For the reasons they have stated their Lordships find themselves in complete agreement with the Supreme Court, but they would add that had they felt any hesitation in the matter they would require a very strong case before they substituted

[2] 5 T.L.R. 407, 408.

[3] [1894] 1 Q.B. 750, 760.

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their own opinion of what is professional misconduct in the Federation for the conclusion reached by the Disciplinary Committee and the Supreme Court. As Darling J. said in relation to England in *In re A Solicitor, Ex parte Law Society*[4]: "The Law Society are very good judges of what is professional "misconduct as a solicitor, just as the General Medical Council "are very good judges of what is misconduct as a medical man."

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

C. C.

[4] [1912] 1 K.B. 302, 312; 28 T.L.R. 50.

[LIVERPOOL ASSIZES.]

1955
Feb. 4, 7, 8.
Ashworth J.

*HUGHES *v.* McGOFF & VICKERS LD.

[1953 H. No. 4841.]

Building—Safety regulations—Application—"Building"—Installation of electrical apparatus in workshop in course of construction—Whether "construction . . . of a building"—Scaffold—Breach of statutory duty by employer—Consequent shifting of onus of proof—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 2, 22, 24.

The defendants were engaged under subcontract to instal electrical apparatus in a large workshop which was in the course of construction. The electrical installation involved the fixing of conduit pipes to the steelwork of the workshop by means of saddles and required the use of scaffolding which was used also by joiners who were engaged in putting insulating boards on the roof. An electrician employed by the defendants received fatal injuries when he was struck by a length of conduit pipe which fell on him from the lowest tier of the scaffolding, some 30 ft. above the floor level. The pipe had been placed lengthwise on a platform of the scaffolding, which was not provided with toe-boards, by another of the defendants' servants. The manner in which it came to fall from the platform was wholly unexplained and the cause of its fall was a mystery:—

Held, (1) that the installation of electric lighting in the workshop was an operation which formed part of the construction of a building and the regulations applied.

[Reported by E. Somerset Jones, Esq., Barrister-at-Law]

Principle in *Elms* v. *Foster Wheeler Ld.* [1954] 1 W.L.R. 1071; [1954] 2 All E.R. 714 applied.

(2) That the defendants were in breach of regulation 24 which breach could have been the cause of the electrician's death, and, in the absence of any other explanation, it must be concluded that such breach was the cause of his death.

Vyner v. *Waldenberg Bros. Ld.* [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R. 547 applied.

ACTION.

The plaintiff brought this action under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, on behalf of the estate of Owen Hughes who on March 23, 1953, received fatal injuries in the course of his employment by the defendants as an electrician. The defendants, a firm of electrical contractors, were at the material time engaged under subcontract in installing electrical apparatus in a large workshop which was not, at the time the deceased received his injuries, complete, there being certain work remaining to be done to the roof. The work to be done by the defendants consisted of the fitting of electric lighting, power and light switches, laying out of cables and the installation of distribution boards, and involved the installation of conduit pipes which were to be fixed to the steelwork of the workshop by means of saddles. This work required the use of scaffolding which was moved as and when the work required and, on March 23, 1953, was also being used by joiners engaged in putting insulating boards on the roof.

The actual cause of the deceased's death was that he was struck by a length of conduit pipe which fell from the lowest tier of the scaffolding, a height of some 30 ft. above floor level. The pipe, which was made of steel, was slightly over 1 inch in diameter and about 12 feet long and had been placed on the scaffolding by one Collict, another of the defendants' servants, about one hour before it fell. He had placed the pipe lengthwise on the lowest tier of the scaffolding which consisted of a platform between 5 feet and 6 feet wide, formed by boards supported at intervals of between 3 feet 6 inches and 4 feet by horizontal cross pieces of scaffolding. The platform inclined inward rather than outward and on its outer side there were vertical scaffold tubes at horizontal intervals of about 4 feet. Although there was no direct evidence of there being any gap in the part of the platform where the pipe was laid, the boards forming the platform were not laid uniformly flush, there being gaps in places varying from 1 inch to 3 inches. The sides of the platform were not provided with toe-boards. At a height of 3 feet above the platform there was another platform forming the second tier of the scaffolding and it had been the practice of Collict over a period of at least 3 months prior to the accident to place a pipe in a similar position without mishap. The manner in which the pipe came to fall from the platform was wholly unexplained and the cause of its fall remained a mystery.

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The plaintiff's case was that the Building (Safety, Health and Welfare) Regulations of 1948 [1] applied and that the defendants had committed a breach, inter alia, of regulations 22 (a) and 24 (1). The defendants, whilst conceding at the hearing that they had not complied with the regulations, denied that the regulations applied and further contended that if the regulations did apply their breach of statutory duty had not caused the fatal injuries sustained by the deceased. The plaintiff failed to establish his allegations that the defendants and/or their servants were guilty of negligence at common law and the case is reported only on the claim based upon breach by the defendants of their statutory duty.

A. L. Petch for the plaintiff.
Andrew Rankin for the defendants.

The following cases in addition to those referred to in the judgment were cited in argument: *Aylward* v. *Matthews* [2]; *Street* v. *British Electricity Authority* [3]; *Hutchison* v. *Cocksedge & Co. Ld.* [4]; *R. & H. Green and Silley Weir* [5]; *Knight* v. *Demolition and Construction Co. Ld.* [6]; *Potts (or Riddell)* v. *Reid.* [7]

Ashworth J., after stating the facts and stating that the cause of the pipe's fall remained a mystery, reviewed the evidence, and stated that he was compelled to draw the conclusion that the pipe fell from the inner side of the platform, having rolled down the very slight incline to that side and, in some way which remained wholly unexplained, had succeeded in penetrating through a gap between the edge of the boards and whatever may have supported the platform on the inner side and so descended to the ground. He continued: The claim

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 2: "(1) These regulations shall apply "to the following operations where "undertaken by way of trade or business or for the purpose of any industrial or commercial undertaking, or "by or on behalf of the Crown or "any municipal or other public "authority, namely, the construction, "structural alteration, repair or maintenance of a building. . . ."

Reg. 4: "It shall be the duty of "every contractor and employer of "workmen who is undertaking any of "the operations to which these regulations apply (i) to comply with such "of the requirements of regulations "5–30 . . . as affect any workman "employed by him. . . ."

Reg. 22: "Every working platform from which a person is liable "to fall more than 6ft. 6ins. shall "be (a) closely boarded, planked, or "plated."

Reg. 24: "(1) . . . every side "of a working platform or working "place, being a side thereof from "which a person is liable to fall a "distance of more than 6ft. 6ins., "shall be provided with . . . toe-"boards up to a sufficient height "being in no case less than 8ins. and "so placed as to prevent so far as "possible the fall of persons, mate-"rials and tools from such platform "or place."

[2] [1905] 1 K.B. 343; 21 T.L.R. 196.

[3] [1952] 2 Q.B. 399, 402; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.

[4] [1952] 1 All E.R. 696n.

[5] [1954] 2 Lloyd's Rep. 315.

[6] [1953] 1 W.L.R. 981; [1953] 2 All E.R. 508.

[7] [1943] A.C. 1; 58 T.L.R. 335; [1942] 2 All E.R. 161.

under the building regulations gives rise to three separate questions: (*a*) Do they apply? (*b*) Was there a breach? and (*c*) Was the breach a cause? The answer to the first of these questions involves a consideration of regulation 2 (1), the material part of which provides: "These regulations shall apply to the "following operations where undertaken by way of trade or "business or for the purpose of any industrial or commercial "undertaking, . . . namely, the construction, structural altera- "tion, repair or maintenance of a building. . . ." When one approaches the problem of construing that paragraph, it is important to keep in mind the fact that the regulations apply not to persons nor to premises but to operations. The question amounts to this: what was the nature of the operations which were being carried out at the proper time? Did such operations fall within the words "construction of a building"? The building was one of considerable height, of a very large size, and it was one which required electrical installations. For reasons which I will give in a moment, it is obviously desirable that, in a problem of this sort, one should not be tempted to stray outside the particular facts of particular cases, and the Court of Appeal have so laid it down in *Elms* v. *Foster Wheeler Ld.*[1] I would only say that, while I consider that the installation of electric lighting in this particular building formed part of the construction of the building it may well be that some form of lighting, for example the installation of special lighting in a film studio, might not form part of the construction of a building. In the present case I have come to the conclusion without hesitation that the work on which the defendants were engaged was an integral part of the construction of that building.

In *Elms* v. *Foster Wheeler Ld.*[1] it is perhaps pertinent to note that what were being installed were four large steam generating plants consisting of boilers which, when assembled, reached the height of something over 100 feet. It was not a case of the defendants carrying out what I have described as an integral part of the building, although, as the case shows, the work involved was the completion of the very task for which the building was originally designed. In other words, the present case is a stronger case of the applicability of the regulation than *Foster Wheeler*[1] is. Somervell L.J. there[2] quoted Ormerod J. as follows: "The judge put it in this way, 'I have to decide on "'the facts of this case whether it is right to say here that "'the defendants were engaged on the construction of a building "'or whether they were merely putting something into a "'building which had been, or was in the process of being, con- "'structed.' He decided, on the model which he saw and on "the evidence, that the defendants were engaged on the con- "struction of a building and the regulations therefore applied.

[1] [1954] 1 W.L.R. 1071; [1954] 2 All E.R. 714.

[2] Ibid. 1074.

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"I agree with that." Those words show that the test applied by Ormerod J. was whether the defendants were engaged on the construction of a building or whether they were merely putting something into a building. Romer L.J. appears to have taken the matter somewhat further. Having agreed with the other Lords Justices that it was quite impossible to say in a general way that the building regulations apply on the one hand and do not apply on the other to work which includes the installation of plant, because it must depend on the circumstances of each particular case whether such an operation includes the regulations or not, Romer L.J. went on to state the manner in which, in his view, the question might be posed[3]: "I think that in the "present case the kind of way the question may be posed is "whether at the time of the accident a building was being "constructed and whether the defendants were contributing to "its construction. I say 'contributing' because it is quite "plain that the words in regulation 2, 'the construction of a "'building,'' should be read 'the construction of a building or "'any part thereof.' . . . The question then arises, did the work "which the defendants undertook form part of that operation? "The evidence showed, and I think the judge found, that what "the defendants or their sub-contractors did was a contribution "to the construction of the power station, inasmuch as they were "installing the essential apparatus which it was the object of the "outer walls and roof to house and shelter and which was indeed "united to those walls and to the outer walls as well as to the "foundations of the structure."

Whether one applies the broader test indicated by Romer L.J. or the somewhat narrower test adopted by Somervell L.J., approving Ormerod J., this case falls within the regulations. The building was not complete; the construction was not complete; joiners were still engaged on the roof; and it is quite impossible to say that the defendants' task in this case was merely putting something into a building which had been or was in the process of being constructed as opposed to being engaged on the construction of a building. I therefore hold that the building regulations applied to the work on which the defendants were engaged, relying for that purpose on regulation 4 when read with regulation 2.

Assuming, therefore, that the regulations apply, was there a breach? Mr. Andrew Rankin conceded that if the regulations were applicable the evidence did disclose a breach or breaches. [His lordship referred to the requirements of regulations 22 (a) and 24 (1), stating that the platform was not closely boarded, and that there were no toe-boards at the material place, and continued:] It is clearly established that the defendants were in breach of the regulations. That does not decide the matter, because Mr. Rankin went on to contend that, assuming the

[3] Ibid. 1077.

breach, it was not shown that the breach was in any sense a cause of the fatal injury to Mr. Hughes. So far as the breach of regulation 22 is concerned, namely the failure to provide close boarding, I accept his submission. On the findings which I have made it is quite clear that that breach was not the cause of the accident, because I have found that the pipe did not descend between the planks.

There remains, however, the breach of regulation 24. It is said that nobody saw this pipe roll, or that the absence of toe-boards played no effective part in the unhappy event, but on that issue I was referred to the decision of the Court of Appeal in *Vyner* v. *Waldenberg Bros. Ld.*[4] The written judgment of the court was delivered by Scott L.J., who said[5]: "The judge at "the trial found that there had been a number of breaches by "the defendants with regard to both the riving knife and the "guard of this circular saw, and he indicated that had the case "stopped there it would have meant judgment for the plaintiff. "We agree with him, but we go further. If there is a definite "breach of a safety provision imposed on the occupier of a "factory, and a workman is injured in a way which could result "from the breach, the onus of proof shifts on to the employer "to show that the breach was not the cause. We think that "that principle lies at the very basis of statutory rules of abso-"lute duty. As Lord Goddard said in the Court of Appeal in "*Lee* v. *Nursery Furnishings Ld.*[6]: 'The only point that has "'given me some hesitation in this case is whether or not the "'evidence was sufficient for us to say that it was due to this "'gap or breach of the regulation that the accident happened. "'I have already said that one difficulty in the case is the "'evidence which the young lady gave herself, in which on "'certain points obviously she was mistaken. In the first place "'I think one may say this, that where you find there has been "'a breach of one of these safety regulations and where you find "'that the accident complained of is the very class of accident "'that the regulations are designed to prevent, a court should "'certainly not be astute to find that the breach of the regula-"'tion was not connected with the accident, was not the cause "'of the accident.'" After describing the evidence Scott L.J. continued[7]: "We therefore assume that in this case something "unexpected did happen, and that it was that which caused the "plaintiff's left hand suddenly to go forward and come into touch "with the descending teeth. But that is just the sort of case "where Parliament has intended the employer to bear the risk, "and it is obviously one which, as Parliament realised, by the "practice of insurance is distributed over the cost of the articles "supplied and thus enters into the consumer's price."

[4] [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R 547.

[5] Ibid. 54.

[6] (1945) 61 T.L.R. 263; [1945] 1 All E.R. 387.

[7] [1946] K.B. 50, 55.

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Applying the principle laid down in those two cases, it seems to me that not only is it open to me to find that the breach of regulation 24 was a cause of this accident, but that I am driven to that conclusion in the absence of any other explanation. I therefore hold that the answer to the third question is that the breach was a cause of this accident, and that if there had been toe-boards at the material spot the probability is that this pipe would never have fallen. The claim therefore succeeds.

[His Lordship awarded the plaintiff damages of £350 which, with agreed funeral expenses amounted to a total of £392 6s. 6d. It was then disclosed that this was the exact sum paid into court.]

Judgment for the plaintiff.

Solicitors: *Rowley, Ashworth & Co., Manchester; Geoffrey Warhurst & Co., Liverpool.*

[PROBATE, ETC., DIVISION.]

1955
Feb. 21, 22, 23.

Barnard J.

* CARR *v.* CARR.

Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree based on domicile at time of desertion—Similar English jurisdiction—Validity—Declaration—Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 Geo. 6 (N.I.), c. 13), s. 26—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 18 (1) (a).

A wife was granted a decree nisi of divorce on the ground of desertion by the High Court of Justice in Northern Ireland in February, 1954, which was made absolute in November, 1954. At the date of the petition, which had been filed in 1948, the husband had acquired a domicile of choice in England; but the Northern Irish court assumed jurisdiction under section 26 of the Matrimonial Causes Act, 1939, on the basis that the parties had been domiciled in Northern Ireland when the husband deserted the wife in 1942:—

Held, that the Northern Irish court had jurisdiction to dissolve the marriage under section 26 of the Act of 1939, and that the marriage had accordingly been validly dissolved.

The English courts will respect the validity of a foreign decree of divorce granted on the basis of a jurisdiction which is similar to that claimed for the English courts by section 18 (1) (*a*) of the Matrimonial Causes Act, 1950.

Travers v. *Holley* [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794 applied.

Husband's petition for divorce.

Wife's petition for a declaration.

The parties were born and spent the early part of their lives in Northern Ireland. In March, 1936, the husband joined the Royal Navy for a period of three years' service on the termination of which he obtained work at the dockyard at Portsmouth. In

June, 1939, the parties were married, the wife coming from Northern Ireland to set up home near Portsmouth, in a house rented and furnished by the husband. In April, 1940, the husband rejoined the Royal Navy and about that time it was agreed that the wife, who was pregnant, should return to her parents.

In February, 1941, the husband, who had been discharged from the Royal Navy as medically unfit, rejoined the wife in Northern Ireland. The home near Portsmouth had been destroyed by bombing and they set up a new home in a cottage at the village where the wife's parents lived. In September, 1941, the husband obtained work at Preston in England and in November, 1941, the wife, who was again pregnant, gave up the cottage and returned to live with her parents. The husband returned to Northern Ireland in March, 1942, to spend a fortnight's holiday with the wife and again in May, 1942, when his work at Preston ceased. In October, 1942, he left Northern Ireland to join a government training scheme in England and did not return to Ireland again. In March, 1945, the wife received a letter from solicitors acting on behalf of the husband seeking a formal arrangement for a separation; but she refused to accede to this request.

Some time in 1945 the husband set up a home in Devonport in which, it was alleged, he had asked the wife to join him. This was denied by the wife. In that year the husband also met and started to live with the woman in respect of whom he asked in his petition filed in the present proceedings for the exercise of the court's discretion.

On December 15, 1948, the wife presented a petition to the High Court of Justice in Northern Ireland for the dissolution of her marriage on the ground that the husband had deserted her in March, 1942. An acknowledgment of service was signed on January 15, 1949. On November 26, 1953, the husband was personally served with notice that the wife intended to proceed with her petition and on February 18, 1954, in an uncontested suit, the High Court of Justice in Northern Ireland granted a decree nisi of divorce. The court accepted jurisdiction under the provisions of section 26 of the Matrimonial Causes Act, 1939, of Northern Ireland.[1]

On September 7, 1953, the husband had presented a petition in England for the dissolution of his marriage on the ground of

[1] Matrimonial Causes Act, 1939, of Northern Ireland, s. 26: "Where "a wife has been deserted by her "husband . . . and the husband was "immediately before the desertion ". . . domiciled in Northern Ireland, "the court shall have jurisdiction for "the purpose of any proceedings "taken by the wife in a matrimonial "cause or matter, notwithstanding "that the husband has changed his "domicile since the desertion. . . ."

Matrimonial Causes Act, 1950, s. 18: "(1) . . . the court shall by "virtue of this section have jurisdiction to entertain proceedings by a "wife in any of the following cases, "notwithstanding that the husband "is not domiciled in England, that "is to say:—(a) . . . if the wife has "been deserted by her husband . . . "and the husband was immediately "before the desertion . . . domiciled "in England."

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the wife's desertion since 1941. The wife, by her answer of May 14, 1954, denied that the husband was domiciled in England at the date of his petition and denied that she had deserted him. She further alleged that the husband was domiciled in Northern Ireland at the commencement of his desertion as had been established by the decree of the High Court of Justice in Northern Ireland of February 18, 1954, and that he was estopped by that decree from making the allegations contained in his petition. She alleged in the alternative that, if the court had jurisdiction to hear the petition, the husband had deserted her.

On November 15, 1954, the decree of the High Court of Justice in Northern Ireland was made absolute and the wife, on January 15, 1955, presented a petition for a declaration that the decree thus obtained was a valid decree.

The petitions were consolidated by an order of February 10, 1955.

James Stirling for the husband.

John Mortimer and *Elaine Jones* for the wife.

All cases cited in argument are referred to in the judgment.

Barnard J. referred to the pleadings and the nature of the Northern Ireland decree and continued: It is clear that there are various issues raised between the parties, but the issue of domicile, which lies at the threshold of the dispute, must be considered first. The relevant part of the Matrimonial Causes Act of 1939 of Northern Ireland, s. 26, reads as follows: [His Lordship read the section.] There was a similar section in our Matrimonial Causes Act, 1937—section 13—which has been re-embodied in the Matrimonial Causes Act, 1950, in section 18 (1) (*a*). Although it was always considered by the courts of this country that we would only respect a decree which was granted in a foreign court where the parties were domiciled in the country of that court at the institution of the proceedings, it is now quite clear, and only seems to me to be common sense, that, by the decision of the Court of Appeal in *Travers* v. *Holley*,[2] the courts of this country will respect a foreign decree based on the section which I have just read by reason of the fact that we ourselves will grant a decree in those circumstances.

There is no dispute here that the husband's domicile of origin was in Northern Ireland. It is equally clear that the husband is alleging a change of domicile and, therefore, the burden of proof in satisfying this court that he has changed his domicile is on him. I do not think that I can do better than refer to a few very short passages from the judgment of Jenkins L.J. in the Court of Appeal in *Travers* v. *Holley*.[3] Jenkins L.J. says: "It is

[2] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.

[3] [1953] P. 251.

"further not in dispute that the onus of proving the abandonment of a domicile of origin in favour of a domicile of choice is upon the person alleging the change of domicile; and that to discharge such onus it must be clearly shown that the individual whose domicile is in question removed from the country in which he had his domicile of origin to the country alleged to have become his chosen place of domicile with a definite and fixed intention . . . then or subsequently formed of making the latter his permanent home in substitution for and to the exclusion of the former." Jenkins L.J. in that passage interpolates a reference to what Lord Westbury said in *Bell* v. *Kennedy*,[4] and what Lord Halsbury said in *Winans* v. *Attorney-General*.[5]

Jenkins L.J. continues[6]: "Change of domicile, particularly where the change is from the domicile of origin to a domicile of choice (as distinct from a change from one domicile of choice to another) has always been regarded as a serious step which is only to be imputed to a person upon clear and unequivocal evidence," and as authority for that exposition of the law Jenkins L.J. again quotes *Winans* v. *Attorney-General*[7] and *Bell* v. *Kennedy*.[8] It is true that Jenkins L.J.'s judgment in the Court of Appeal was a dissenting judgment, but nobody can possibly quarrel with that very clear exposition of the law, and Jenkins L.J. dissented from the other two Lords Justices only because he did not consider the evidence sufficient to warrant an abandonment of the domicile of origin and the acquisition of a domicile of choice.

[His Lordship then considered the facts relevant to the issue of domicile and held that the husband had been domiciled in Northern Ireland until October, 1942, and that at a subsequent date, which was probably 1945, he had acquired a domicile of choice in England, and continued:] I do not think that there can be any doubt that the decree pronounced in the court of Northern Ireland was a decree of a court of competent jurisdiction and, therefore, a decree which will be regarded as a good decree in this country. That being so, and that decree having been made absolute in November, 1954, the marriage was already dissolved before the case came before me and there is not any marriage left for me to dissolve. I, therefore, declare that the decree pronounced in the Court in Northern Ireland on February 18, 1954, was a valid decree.

Declaration accordingly.

Solicitors: *Ward, Bowie & Co; Law Society (G. E. C. Dougherty).*

E. J.

[4] (1868) L.R. 1 Sc. & Div. 307, 320, 321.

[5] [1904] A.C. 287, 288; 20 T.L.R. 510.

[6] [1953] P. 246, 252.

[7] [1904] A.C. 287.

[8] (1868) L.R. 1 Sc. & Div. 307.

[COURT OF APPEAL.]

1955
Mar. 14.

Singleton and Romer L.JJ.

* *In re* BRIXHAM URBAN DISTRICT COUNCIL.
In re TOTNES URBAN DISTRICT COUNCIL.

PRACTICE NOTE.

Rates and Rating—Practice—Appeal—Appeal by valuation officer to valuation court — Rating authority in agreement with valuation officer's proposal—No steps taken by rating authority in reliance on valuation officer's proposal—Withdrawal of appeal by valuation officer—Rating authority's claim to be heard refused—Application for order of mandamus — Local Government Act, 1948 (11 & 12 *Geo.* 6, *c.* 26), s. 48.

APPLICATION ex parte for leave to appeal by Brixham and Totnes Urban District Councils from the refusal by the Divisional Court (Hilbery, Lynskey and Parker JJ.) of leave to apply for orders of mandamus to Plymouth and South Devon Valuation Court.[1]

Harold Williams Q.C., who appeared with *G. D. Squibb* for the councils, said that his initial difficulty was that the application to the Court of Appeal should have been made within four days. The delay was due to negotiations with the county council and the Ministry of Housing and Local Government, and to the indecision of the Salcombe Urban District Council (a party to the first application) whether to take part in the appeal. The matter was of importance and had been the subject of prolonged consideration. Under the Act which nationalized the electricity industry in 1947 a contribution was made by the undertakings instead of rates, but when gas undertakings were nationalized in the following year they continued to be rated. The valuation officer made proposals for putting the South Devon gas undertakings into the valuation list for the years 1951 to 1953. The rating authorities were satisfied with the proposals. They had a right to appear and be heard before the valuation court when the proposals were considered, but as a result of negotiations, to which the applicants were not parties, the valuation officer had withdrawn his proposals shortly before they were due to be considered. The applicants attended the valuation court, but were refused leave to be heard because the valuation officer had withdrawn his appeals. They asked for an order of mandamus to the valuation court to hear and determine. Brixham Council, who otherwise would not get rates for the years 1951 to 1953, would lose over £5,000.

SINGLETON L.J. We both think that the application is made too late, but speaking for myself alone I think it would have been

[1] [1955] 1 W.L.R. 5; [1954] 3 All E.R. 561.

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better, in the ordinary course, if the councils had been heard. I think that that which took place was a hearing at which they were entitled to be heard, but as they have taken so long about it we do not think that we should accede to the application.

Application refused.

Solicitors: *Sharpe, Pritchard & Co. for T. Owen Davies, Brixham.*

A. W. G.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION.

1955 *Mar.* 28.

(POWERS OF MASTERS UNDER R.S.C., ORD. 55, R. 15.)

Practice and Procedure—Chancery Division—Master—Powers—Amendment of R.S.C., Ord. 55, *r.* 15.

The following is published by permission of the judges of the Chancery Division for the information of the profession.

The Rules of the Supreme Court (Chancery Division), 1954, introduce a number of changes and, in particular, substitute a new rule 15 for rules 15 and 15A of Order 55, with the result that the masters of the Chancery Division have now all the powers of a judge in chambers except such as the judges of the Division may direct, or as are prescribed by rule, to be dealt with by a judge in person.

The judges of the Division do not propose at present to give any directions under that rule limiting the powers thereby conferred upon masters, but issue the following memorandum for their guidance in exercising their powers.

1. Before the new rules came into force the masters were, by virtue of Ord. 55, rr. 15, 15A and 35A, unable to make the following orders:—

(*a*) for service of process out of the jurisdiction;

(*b*) for appointment of a new trustee (except a judicial trustee);

(*c*) vesting property or appointing a person to convey land or to make or join in making a transfer of stock or a share in a ship;

(*d*) for general administration (except in a creditor's action where there was evidence of insolvency) or for execution of a trust;

(*e*) for accounts and inquiries concerning the property of a deceased person;

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PRACTICE DIRECTION (POWERS OF MASTERS UNDER R.S.C., ORD. 55, R. 15).

(*f*) to bind persons on whom service of a notice of judgment or order for accounts and inquiries has been dispensed with.

2. The power of the masters as deputies for the judge in chambers to make orders in matters other than those falling within paragraph 1 has long been limited by a well-settled practice: that practice is to be maintained. For example, a master should not sanction any compromise, arrangement or transaction.

3. In cases falling within paragraph 1 the masters should not make orders:—

(*a*) for service out of the jurisdiction except in clear cases;

(*b*) for the appointment of a trustee except (1) a judicial trustee, (2) in the case of incapacity, or (3) where the fund is small;

(*c*) for the administration of the estate or execution of the trusts in a beneficiary's action;

(*d*) vesting property (save on incapacity or in consequence of an appointment of a trustee or a previous order of the court) or directing some person to assign or convey (save where the transaction has been previously approved or directed by a judge);

(*e*) for inquiries relating to the next-of-kin of an intestate.

Before exercising his extended powers a master should consider in every case whether it is one in which it would be more appropriate that the judge should make the order.

4. Order 14A in its new form gives to the plaintiff an extended right to apply for summary judgment in a specific performance action. Masters should not make such orders (except by consent) unless the following conditions are satisfied:—

(i) the agreement sued upon is a formal written contract, and

(ii) the defendant is in default of appearance or does not appear at the hearing of the summons or there is clearly no defence.

5. Order 55, r. 2, as amended by the new rules, provides that applications for payment or transfer out of court of any amount of cash or securities may be made in chambers. Masters should not make orders where the value of the fund exceeds £2,000 at the date of the issue of the summons.

M. G. WILLMOTT,
Chief Master,
Chancery Division.

March 30, 1955.

[COURT OF APPEAL.]

C. A.

1955
Mar. 17.

Evershed M.R., Jenkins and Romer L.JJ.

* *In re* FOLLETT, DECD.
BARCLAYS BANK LD. *v.* DOVELL AND ANOTHER.

[1953 F. No. 1829.]

Will — Construction — Omission — Clause ungrammatical and illogical unless words supplied from precedent — Judicial notice that precedent available.

A testatrix bequeathed her residuary estate, subject to two life interests, on trust as to the income thereof to B.E. for life and directed that on B.E.'s death "my trustees shall hold my residuary "trust fund and the future income thereof in trust for all or such "one or more exclusively or others of her child or children or "remoter issue or any other person or persons as she should by deed "or deeds revocable or irrevocable or by will or codicil without "transgressing the rules against perpetuities appoint and in default "of or subject to any such appointment in trust for her next-of-"kin."

The testatrix died in 1932. In 1953, the two prior life interests having determined, B.E., who had no children, purported to appoint by deed the whole of the residuary trust fund to herself absolutely.

On the hearing of a summons taken out to ascertain whether the power conferred had been properly exercised, Roxburgh J. read into the clause words which had the effect of making the power conferred on B.E. a special power to appoint to her children or remoter issue only, on the ground that these words were to be found in a precedent form, which in his opinion had clearly been used in framing the relevant clause, and that the court was compelled to the conviction that they had been inadvertently omitted:—

Held, (1) that there were clearly omissions in the clause, but (2) that the nature and wording of what had been left out was not sufficiently certain to enable the court to supply words, and still less to transform what, accordingly to the letter of the clause, was a general power of appointment into a special power; (3) that, accordingly, the clause must be taken as conferring a general power of appointment on the donee.

In re Smith [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708 applied.

Decision of Roxburgh J. [1954] 1 W.L.R. 1430; [1954] 3 All E.R. 478 reversed.

APPEAL from Roxburgh J.[1]

Georgina Sarah Follett made her will on August 31, 1923, and the codicil thereto on March 14, 1924. After creating two life interests in her residuary estate in favour of two nieces, she provided in clause 5: "(c) Upon the death of both my said two "nieces I direct my trustees to pay the total income from my "residuary trust fund . . . to . . . Beryl Edmonds [the first "defendant, now Mrs. Dovell] during her life . . . (d) On and "after the death of the said Beryl Edmonds my trustees shall "hold my residuary trust fund and the future income thereof in

[1] [1954] 1 W.L.R. 1430; [1954] 3 All E.R. 478.

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" trust for all or such one or more exclusively or others of her " child or children or remoter issue or any other person or persons " as she should by deed or deeds revocable or irrevocable or by " will or codicil without transgressing the rules against per- " petuities appoint and in default of or subject to any such " appointment in trust for her next-of-kin."

By the codicil she made the following disposition: " Whereas " I have made no provision in my said will in the event of " Beryl Edmonds dying before she becomes entitled to her share " of my estate now therefore in the event of the said Beryl " Edmonds dying before she becomes entitled to any share in my " estate I give devise and bequeath the share or interest to which " had she lived she would have been entitled to my two nephews " Cecil Biddell Follett and Wilfred Howell Follett in equal shares " absolutely. . . ."

The testatrix died on July 21, 1932. The two nieces died in 1950 and 1951 respectively, and the first defendant, who had no children, thereafter received the income from the residuary estate. In purported exercise of the power of appointment conferred by the will she appointed by deed dated January 16, 1953, the whole of the residuary trust fund to herself absolutely. A summons was taken out by the trustees to determine whether on the true construction of the will and codicil, and in the events which had happened, the power of appointment conferred on the first defendant in clause 5 of the will was: (1) a general power of appointment enabling her to appoint the fund to herself absolutely, or (2) a special power enabling her to appoint the fund in favour of her children or remoter issue, and in default thereof in favour of any persons (i) including herself, or (ii) not including herself. Roxburgh J. declared that the will conferred on the first defendant a special power of appointment enabling her to appoint the fund in favour of her children or remoter issue only.

That construction of the will involved reading into clause 5 words found in the following conveyancing precedent in Key and Elphinstone's Precedents in Conveyancing, 11th ed. (which was published in 1923 and was, therefore, current at the time when the will was made), vol. 2, pp. 901–2; and the words so read into the clause of the will are for the purpose of this report indicated by italics: " [After the death of my wife] my trustees " shall stand possessed of the capital and future income of the " trust fund in trust for all or such one or more exclusively of the " others or other of my children or remoter issue, *at such age or " time, or respective ages or times, if more than one in such " shares, and with such trusts for their respective benefit and " such provisions for their respective advancement (either during " the life of my wife or after her death) and maintenance and " education at the discretion of my trustees* or any other person " or persons, as my wife shall from time to time by any deed " or deeds revocable or irrevocable or by will or codicil without " transgressing the rule against perpetuities appoint, and in

" default of and subject to any such appointment as aforesaid, " etc."

The first defendant appealed.

I. J. Lindner Q.C. and *G. H. Crispin* (*C. D. Lush* with them) for the first defendant, Beryl Dovell.

Mark Cockle for the trustees, Barclays Bank Ld.

J. L. Arnold for the second defendant, who was interested in default of appointment.

In addition to the cases referred to in the judgments the following were cited in argument: *Coryton* v. *Helyar* *; *In re Ridge's Trusts.*†

EVERSHED M.R. In this rather curious case I have come to a different conclusion from that of Roxburgh J., though I confess to a feeling of sympathy with him in the attempt which he made to remedy what I think may fairly be called a manifest error by what has to be found to be a no less manifest corrigendum. In that sentence, I think, lies the difficulty. I will follow Vaisey J. in *In re Smith*,[1] in citing as the proper principle in cases of this character a passage which the judge took from Jarman on Wills, 7th ed., vol. 1, p. 556: " Where it is clear on the face of a will " that the testator has not accurately or completely expressed his " meaning by the words he has used, and it is also clear what " are the words which he has omitted, those words may be " supplied in order to effectuate the intention, as collected from " the context."

As I ventured to observe during the argument, there is, perhaps, some analogy, and, if so, a natural analogy, to the jurisdiction of the equity courts in rectifying instruments, a jurisdiction exercised when it is established not only that the instrument as it has been executed does not accord with the intention of the parties to it, but when it is also shown what exactly their true intention was.

I must, however, first lay a foundation for my conclusion by a reference to the facts, though the reference is not of any length. We are concerned with the will dated in August, 1923, of one Georgina Sarah Follett. She made elaborate provisions to benefit various collateral relations, including two nieces, for she was herself a spinster. One of the nieces was a Mrs. Ella Edmonds. In clause 5 (c) she provided that the first defendant, Beryl Dovell, being the daughter of the niece whom I have last mentioned, Mrs. Edmonds, should have a protected life interest after the deaths of the two nieces; and then, in sub-clause (d) of the same clause, she made the disposition which has caused the present difficulty: " On and after the death of the said Beryl Edmonds [now Beryl

* (1745) 2 Cox 340.
† (1872) 7 Ch.App. 665.
[1] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.

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" Dovell, the first defendant] my trustees shall hold my residuary " trust fund and the future income thereof in trust for all or such " one or more exclusively or others of her child or children or " remoter issue or any other person or persons as she "—that is, Beryl Dovell—" should by deed or deeds revocable or irrevocable " or by will or codicil without transgressing the rules against " perpetuities appoint and in default of or subject to any such " appointment in trust for her next-of-kin."

That paragraph shows at its beginning and at its end strong marks of affinity to the elaborate formulae which form part of the stock-in-trade of the conveyancer; but in the middle it falls far short of any such elegance. Indeed, as I have already indicated, it is obviously wrong in two respects. In the first place, the words " or others " immediately after " such one or more " exclusively " which I emphasized in reading, are obviously there by mistake for something else. Secondly (though this error is not quite of the same quality), it seems equally plain that, with regard to the words which next ensue, " of her child or children or " remoter issue or any other person or persons as she should by " deed or deeds revocable or irrevocable," etc., something has also gone amiss; either some provisions have been accidentally omitted in copying; or in the course of the actual building up of the final form of this will something originally in it has been struck out, and the strikings out have not been properly carried out or sufficiently extensive.

Roxburgh J. came to the conclusion (and he called it a compelling conviction) that he was not only able to discern the errors but also to discern exactly what it was that had gone wrong and what were the words which should have been and were intended to have been incorporated; and my brother was correct in saying that only upon the basis that he could entertain such a compelling conviction could he do the work, in effect, of remodelling this disposition. Otherwise, as he would be the first to agree, he would plainly be going beyond the permitted limits of judicial interpretation, however tempting it may sometimes be for a judge to improve upon the performance of testators.

The solution which the judge accepted was this. He said that these words " or others " were a plain slip for the well-known formula " of the other or others." He was referred to the form which is to be found in Key and Elphinstone's Precedents in Conveyancing, 11th ed., vol. 2, pp. 901–2. It seemed to him that at its beginning and at its end this clause so clearly followed the precedent in that book, and the one error which I have already mentioned was so plainly caused by a slip, an accidental omission of some of the words to be found in that precedent, that he was able to go on to what he felt to be not only the compelling but also the logical conclusion that this sub-clause (d) was intended to be a reproduction (with only the essential changes, having regard to the personality of the donee of the power of appointment) of the precedent clause which I have mentioned. When

he had reached that stage in the argument, all else followed; he was able to read in words which entirely transformed this subclause (d) and resulted in the power of appointment given to the first defendant being a strictly limited power to appoint among children or issue.

In the absence of some such emendation, it seemed to the judge (and I agree with him, and, indeed, Mr. Arnold has not contended to the contrary in this court) that the words as they stand, and if they must be construed without further additions, can only mean that the first defendant has a general power of appointment. In that event, of course, the reference to the "children or remoter issue" was quite unnecessary and otiose. And as Jenkins L.J. pointed out during the course of the argument, if this was really intended to confer a general power of appointment, then, indeed, it was a slavish following of an inappropriate precedent to include the caution against transgressing the rule against perpetuities; for the real necessity to put in that caution is, of course, referable to a special power of appointment which must take effect, for the purposes of the perpetuity rule, as though the appointee's directions were written into the instrument conferring the power. But, after all, that again, as I think, is merely to say in other words what I have already more than once said, namely, that something clearly has gone wrong.

I must now examine whether it is really a case in which the necessary compelling conviction emerges from the material which is before the court. I confess that I am not so convinced myself.

In the first place, I feel some doubt about the reference to Key and Elphinstone. We have not been referred to the numerous alternative precedents which can be found in the books. Conveyancers of experience will have in mind the general shape of powers of appointment of this kind. But, as Mr. Lindner pointed out in the course of his argument, if this clause is put alongside the passages from pp. 901 and 902 of Key and Elphinstone, it will be found that there is no precise verbal correspondence; and in the absence of precise verbal correspondence I am not satisfied that it is right to assume that it was this textbook which the testator, or those who were doing this testamentary work for her, had by their elbows.

I do not propose to take time by pointing out the verbal differences, save in the one important instance of the first error, namely, the words "or others." It is not the fact that this precedent states "exclusively of the other or others"; it puts it in fact the other way round, "exclusively of the others or other." The point is, of course, a small one; but it suffices to show that this defect cannot be remedied by the expedient of a mere writing-in, and no more, of words which are omitted. It seems to me that it would be perfectly legitimate to treat the error here as being no more than the error of transcribing or typing "o–r" for "o–f," and that what should have been said was "such one or

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"more exclusively of others." Unless the words used are so firmly tied, so to speak, to this particular precedent, it seems to me that the most compelling reason for treating the rest of this clause as an erroneous and accidental transcription of this precedent is absent.

I observe, further, that the words which, according to the judge's view, have been omitted are not few. According to the argument, the omitted words which the court must supply are: "at such age or time, or respective ages or times if more than "one in such shares, and with such trusts for their respective "benefit, and such provisions for their respective advancement "(either during the life of" [the first defendant] "or after her "death) and maintenance and education at the discretion of "my trustees"; and then one has got back on to the permanent way, so to speak, of the clause in the will. That is a very considerable and very elaborate addition. Putting the matter interrogatively, can the court be absolutely sure that those precisely were the words which were somehow omitted? Might there not have been at some stage, for example, the introduction of a further general power? In that connexion emphasis was rightly put by Mr. Lindner upon the final trust in default of appointment; for it is a trust in default for the next-of-kin of the donee of the power and not of the testatrix. Though I have followed the argument of Mr. Arnold that in actual practice there would perhaps be nothing so very startling about it, since, if the first defendant did have issue and omitted to appoint, those issue would prima facie be the next-of-kin, it is nevertheless a very surprising thing that a testatrix who starts by limiting the scope of the benefit which she is conferring to a particular person and her issue only, if that is the apparent limit of her testamentary wish for that family, should then, in default of appointment, let the property go to persons who might be far more remotely connected with the person in question.

These arguments, however, are really only by way of showing that to my mind the necessary assurance, both as to the nature and wording of what has been left out, as well as to the fact of there having been an error or omission, are not really to be found in the present case.

We have not been referred to all the cases, and I do not myself think that cases are of much assistance, except to express or enshrine a principle; and for that reason I have already made sufficient reference to *In re Smith* [2]; but I venture to add one other point. In *In re Smith* [2] what had plainly gone wrong was that there had been a total omission of a disposition. It was a case in which a lady who was, as the judge observed, living on terms of normal affection with her husband and who was making, as regards particular items of her property, gifts to her husband and her husband's relations, made a provision for the disposition

[2] [1948] Ch. 49.

of her estate in the event of her husband dying within a month of her own death or predeceasing her, but omitted to make any disposition at all in favour of anybody in the event of the husband surviving her by more than a month. What, therefore, the court did in that case (and it could do it in very few words) was to fill a striking and obvious gap.

In the present case, if the argument of Mr. Arnold were to prevail, the court would not be filling an obvious gap; it would be so remoulding a particular clause as entirely to transform the effect of the clause which, as it stands, gives a general power of appointment. I asked Mr. Arnold whether he had found any case in which the court had felt so convinced of the error that had been made that it had transformed and produced an effect wholly contrary to, a provision which was, upon its fair construction, effective according to the will as it stood; and Mr. Arnold told me that he was not aware of any such case. I do not say that, if the error is obvious enough and if it also appears precisely what it is that has gone wrong, there might not be such a case; but, in my judgment, it would need a very much stronger case than the present to justify the court in taking a step as bold as that.

I have already given sufficient reasons for showing that, however one may suspect the nature of the error (and I am putting it rather higher than I feel is quite justified), there still seems to me to be far too much to be said on the other side to make that first suspicion free from reasonable doubt. The cases referred to in *In re Smith*,[3] included the case [4] in which Bacon V.-C. made his well-known allusion to the error of the blundering attorney's clerk. In fact, the full quotation as appears from the report, is "clerk or law stationer"; and it may indeed be that the Vice-Chancellor really meant the attorney's blundering clerk. It may be that someone here has blundered; but, to borrow from the happy phrase of Knight Bruce L.J. in *Key* v. *Key*,[5] I am not here satisfied that the spirit has been made clear enough to justify the court in overcoming, and, indeed, in entirely transposing the letter.

The matter is, in the end, a short one; but such is my regard for Roxburgh J. in a matter of this kind that I have thought it appropriate that I should give at a little length the reasons why I have not felt able to follow his opinion. It may be that I am a little less bold; but I think that I have, perhaps, approached the problem somewhat differently. If I had felt the same assurance that he did, then I think the court would have been entitled and bound to have given effect to the conviction; but the suggestions to which I have referred and which do not, I think, find a place in the judgment of Roxburgh J., are, in my opinion, such

[3] Ibid.
[4] *In re Redfern* (1877) 6 Ch.D. 133, 138.
[5] (1853) 4 De G.M. & G. 73.

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as to make it really impossible, consistently within the well-established limits of the judicial interpretation of documents, to do other than say that this will must take effect according to its terms; that is to say, as Roxburgh J. himself observed, to hold that clause 5 (d) of this will conferred upon the first defendant a general power of appointment and not one limited to a particular class. I would, therefore, allow the appeal.

Jenkins L.J. I agree. It is possible to give effect to clause 5 (d) of the will as it stands as a clause conferring upon the first defendant a general power of appointment. On the other hand, the clause undoubtedly contains language which would be suitable to the creation of a special power of appointment amongst her children or remoter issue, and which is not appropriate to a general power. These indications suffice to satisfy me that something has gone wrong with the drafting of clause 5 (d). Nevertheless the clause, unusual as its form is, must be construed and given effect to as it stands unless the court can be satisfied, as the Master of the Rolls has said, not only that something has gone wrong, but also what are the words which have been inadvertently omitted.

The theory which commended itself with compelling conviction to Roxburgh J. was to the effect that when the draftsman reached clause 5 (d) of the will he set about providing, in accordance with instructions which he presumably had obtained, a special power of appointment for the first defendant amongst her children or remoter issue; and with that object in view the draftsman was either copying from, or making use of his recollection of, the precedent in Key and Elphinstone, 11th ed., vol. 2, p. 901; and that in the process of copying out, or writing out from memory, that precedent, he reached without mishap the words "children or remoter issue," and then, for some unexplained reason, omitted the passage which my Lord has read in extenso beginning "at such age or time" and ending "at the "discretion of my trustees," and went straight on, after writing "children or remoter issue," with the words "or any other "person or persons," thus turning the persons who in the precedent were persons to whom the various discretionary powers of maintenance, education and so forth might be delegated, into objects of the power of appointment. By that process, it is said, the draftsman inadvertently converted what was intended for a special power of appointment amongst children and remoter issue into a power of appointment amongst that class together with any other person or persons, thus inadvertently converting it, in effect, into a general power of appointment.

I confess that I find that theory attractive, and it provides an interesting exercise in textual criticism; but I find it impossible to be satisfied that this theoretical explanation is the right one, that is to say that the words to which I have referred in the precedent which find no place in clause 5 (d) of the will were, in

truth, words intended to be inserted (with certain admittedly necessary modifications) in this part of the will, and inadvertently omitted. It seems to me, with all respect to the judge, that this theory, attractive though it may be, is no more than speculation.

It is possible to suggest other reasons for the draftsman's departure from the form which he very possibly had in mind. It might have been intended to insert a general power in default of objects of, or of appointment under, a preceding special power. It might have been intended to insert a trust in default of appointment for the primary objects of the special power, namely, the child or children of the first defendant. It might be, as I think my Lord suggested, that the form of this clause had been a matter of discussion between the testatrix and the draftsman, and that the first intention was to make it a special power, but that in the end it was thought better to make it a general power, and words were struck out with that object in view, but inadvertently the reference to children or remoter issue was left in the draft and thus found its way into the will. There are far too many possible explanations of the curious form of clause 5 (d) to make it possible for us, in construing this will, to alter its effect by adding the very considerable number of words, and the somewhat elaborate provisions which the judge found able to incorporate in it, on the ground that the testatrix must have intended their inclusion.

I agree, therefore, that the clause must be construed as it stands, and that there is no sufficient justification for incorporating the words which Roxburgh J. found it possible to incorporate in it. Accordingly, I agree with my Lord that this appeal should be allowed.

ROMER L.J. I also agree. I only wish to add a very few words for myself, as we are arriving at a different conclusion from that which commended itself to Roxburgh J.

The principle which is applicable to cases of this kind was accepted by Vaisey J. in *In re Smith*[6] as being accurately formulated in Jarman on Wills, 7th ed., vol. 1, p. 556, in the following terms: "Where it is clear on the face of a will that "the testator has not accurately or completely expressed his "meaning by the words he has used, and it is also clear what "are the words which he has omitted, those words may be "supplied in order to effectuate the intention, as collected from "the context."

The rule as so expressed has two limbs. The first is that the court must be satisfied that there has been an inaccurate expression by the testator of his intention, and the second is that it must be clear what words the testator had in mind at the time when he made the apparent error which appears in the will. It is the second part of the rule that, I think, presents the greatest

[6] [1948] Ch. 49.

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obstacle to the respondents in this case. Unless one can be reasonably certain from the context of the will itself what are the words which have been omitted, then one cannot apply the principle at all, and one has to take the language as one finds it. Roxburgh J. found that the difficulty was capable of solution in this way. He found that the words "exclusively or others" were obviously the result of a mistake. He was then referred to the edition of Key and Elphinstone which was current at the time when the testatrix made her will, in which the words appeared "exclusively of the others or other." He then regarded that as a sufficient guide to the conclusion at which he arrived that this will was being drawn by a draftsman who was using Key and Elphinstone as a precedent, and that the draftsman, through inadvertency or mistake, departed from the text of that work. Therefore, having satisfied himself that that was the position, he was able to find with precision what the words were which the testatrix had subsequently omitted, namely, the words in the relevant form in Key and Elphinstone.

It is primarily with that view that I find myself unable to agree with the judge. It appears to me, in the first place, from the internal evidence of the document itself, that the form in Key and Elphinstone was not in fact the form of precedent which was being used. There are differences, to which the Master of the Rolls has referred, in phraseology between the form in Key and Elphinstone and the phraseology here, apart altogether from the words which were suggested as being omitted. I do not repeat them; Mr. Lindner drew our attention to them in detail. Further, the words "exclusively of the others or other" are to be found, I imagine, in dispositions of this character in every precedent book that has ever been published, and they are not the monopoly of Key and Elphinstone. Therefore, I think that the starting point from which the judge began is open to considerable question and I am not convinced that Key and Elphinstone's form was that which the draftsman of the will was using. Therefore, in my opinion, one is deprived of the certainty as to what the words were which had been omitted. It may well be that most of the well-known books of precedent follow in substance the same or similar dispositions as appear in the form in Key and Elphinstone. On the other hand, it is at least possible that this firm of solicitors had precedents drawn up by themselves, containing other or different dispositions. Again, it is possible that, even if the draftsman was using a form like Key and Elphinstone's, he desired to depart from it in some ways, but there is no certainty about the precise manner in which he did intend to depart from it. All kinds of difficulties follow upon this uncertainty to which the Master of the Rolls and Jenkins L.J. have drawn attention, with the result, as I think, that one cannot say that the second requirement of this rule or principle as stated in Jarman has been satisfied in the present case. Effect can be given to this language as it stands, although one may suspect

that it does in some way or other depart from what was intended. But what we are asked to do, notwithstanding this want of certainty in the matter, is to cut down a power which, on the face of it, is a general power, to a limited or special power; and, in my judgment, there is no warrant for doing so in the present case.

I agree, for these reasons, that the appeal must be allowed.

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Appeal allowed (cost of parties, as between solicitor and client, to be paid out of residue).

Solicitors: *Moon, Gilks & Moon for Campion, Symons & Co., Exeter; Terence O'Shea, Lake & Co.*

E. D.

[CHANCERY DIVISION.]

* *In re* WEST FERRY ROAD, POPLAR.
In re PADWICK'S ESTATE.

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Mar. 24, 25.
Harman J.

Solicitor—Costs—Taxation—Compulsory purchase—Registered land—Vendors' costs payable by purchasers — Scale fee allowed — Lands Clauses (Consolidation) Act, 1845 (8 *&* 9 *Vict. c.* 18), *ss.* 81, 82, 83 *— Solicitors' Remuneration Order,* 1883 † (*S.R. & O.,* 1882) — *Solicitors' Remuneration Order,* 1953 (*S.I.* 1953, *No.* 117/*L.*1)— *Solicitors' Remuneration (Registered Land) Orders,* 1925, 1944 *and* 1953 (*S.R. & O.,* 1926, *No.* 2/*L.*2; *S.R. & O.,* 1944, *No.* 204/*L.*6; *S.I.* 1953, *No.* 118/*L.*2).

The costs of the vendors' solicitors payable by the purchasers on a compulsory purchase of registered land are (in default of agreement between the parties) where the Lands Clauses (Consolidation) Act, 1845, applies, taxable according to the Land Registry Scale Fee under the Solicitors' Remuneration (Registered Land) Order, 1925, as amended by the Orders of 1944 and 1953.

ADJOURNED SUMMONS.

The London County Council in the year 1954 bought certain properties in Poplar from the trustees of an estate known as Padwick's Estate under the County of London (West Ferry Road, Poplar) Compulsory Purchase Order, made under the Town and Country Planning Acts, 1944–1947.

The validity of the title of the London County Council depended on section 81 of the Lands Clauses (Consolidation) Act,

† Note: This order which is printed in the Statutory Rules and Orders of 1882 and is referred to in Brickdale and Stewart-Wallace on the Land Registration Act, 1925 (4th ed., p. 503), as of 1882 came into force on January 1, 1883 and is referred to in the Annual Practice (1955, p. 3076) as the Solicitors' Remuneration Order, 1883.

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1845,[1] the costs of the sale being payable in accordance with section 82 of the Act. Application was made in due course by the vendors to the London County Council for payment of the bill which had been delivered to them (the vendors) by their solicitors on September 10, 1954. This was a bill without items, drawn on the footing that the solicitors were entitled as against their clients, the vendors, to payment of the scale fee which was described as being in accordance with the authorized Land Registry Scale.

The London County Council objected to paying the bill, and the costs, therefore, became taxable under section 83 of the Lands Clauses (Consolidation) Act, 1845; and, on a petition under that section, an order was made on October 7, 1954, for the taxation of the bill. The order recited that the petitioners were the owners of certain lands for which the purchase-money had been paid and the deed of transfer executed. It further recited that by section 82 of the Act the London County Council were liable to pay the vendors' costs of the conveyance of the lands, including all charges and expenses specified in the section, and that the London County Council did not agree the amount of the bill delivered on September 10, 1954, and were desirous of having the bill taxed under section 83 of the Act, "and the "Solicitors' Remuneration (Registered Land) Orders, 1925 and "1953." The taxing master allowed the bill as presented.

The London County Council, on January 17, 1955, entered the following objections to the taxation:

[1] Lands Clauses Consolidation Act, 1845, s. 81: "Conveyances of "lands to be purchased under the "provisions of this . . . Act . . . may "be according to the forms in the "schedules (A.) and (B.) respectively "to this Act annexed, or as near "thereto as the circumstances of the "case will admit, or by deed in any "other form which the promoters of "the undertaking may think fit; and "all [such] conveyances . . . shall be "effectual to vest the lands thereby "conveyed in the promoters of the "undertaking. . . ."

S. 82: "The costs of all such con-"veyances shall be borne by the pro-"moters of the undertaking; and such "costs shall include all charges and "expenses incurred, on the part as "well of the seller as of the purchaser, "of all conveyances and assurances of "any such lands, and of any outstand-"ing terms or interests therein, and "of deducing, evidencing, and verify-"ing the title to such lands, terms, "or interests, and of making out and "furnishing such abstracts and at-"tested copies as the promoters of the "undertaking may require, and all "other reasonable expenses incident "to the investigation, deduction and "verification of such title."

S. 83: "If the promoters of the "undertaking and the party entitled "to any such costs shall not agree as "to the amount thereof, such costs "shall be taxed by one of the taxing "masters of the Court of Chancery, ". . . upon an order of the same "court, to be obtained upon petition "in a summary way by either of the "parties; and the promoters of the "undertaking shall pay what the said "master shall certify to be due in "respect of such costs to the party "entitled thereto . . . and the expense "of taxing such costs shall be borne "by the promoters of the undertaking, "unless upon such taxation one sixth "part of the amount of such costs "shall be disallowed, in which case "the costs of such taxation shall be "borne by the party whose costs shall "be so taxed, and the amount thereof "shall be ascertained by the said "master, and deducted by him accord-"ingly in his certificate of such "taxation."

"(1) Because this taxation (being the taxation of vendors' costs arising out of a sale to which the Lands Clauses (Consolidation) Act, 1845, applied) is governed by section 83 of that Act, under which the taxing master had an unfettered discretion to certify the amount to be paid by the respondents [the London County Council] to the petitioners [the vendors] in respect of their costs.

"(2) Because the Solicitors' Remuneration (Registered Land) Orders, 1925, 1944 and 1953, do not apply to a taxation as between the vendors and the promoters under section 83 of the Lands Clauses (Consolidation) Act, 1845, but apply only on the taxation of a solicitor's bill as between him and his client.

"(3) Because the Solicitors' Remuneration (Registered Land) Order, 1925, is expressed to apply to the remuneration of solicitors in conveyancing and other non-contentious business under the Land Registration Act, 1925, whereas the business between the petitioners and the respondents arose under the Town and Country Planning Acts, 1944–1947, and the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, as well as the Land Registration Act, 1925.

"(4) Because in exercising his said discretion the taxing master ought to allow only such costs as are in all the circumstances fair and reasonable, using as a guide (but not as fettering his discretion) the Schedule II remuneration prescribed by the Solicitors' Remuneration Orders.

"(5) Because, if and so far as the Solicitors' Remuneration Orders are relevant, there is no reason in principle for distinguishing between unregistered land and registered land in regard to the taxation of a vendor's costs arising out of sales to which the Lands Clauses (Consolidation) Act, 1845, applies, and that since the Solicitors' Remuneration Order, 1882, expressly excludes the scale in the case of sales of unregistered land a similar exclusion ought to be implied in the Solicitors' Remuneration Orders relating to registered land."

The master delivered on February 7, 1955, the following answers, overruling the objections of the London County Council: "Schedule I, Part I, of the Solicitors' Remuneration Order, 1883 (as amended by the Order of 1953), lays down a scale of charges on sales, purchases and mortgages of land other than 'registered land' which varies according to the amount of the consideration involved in the transaction. Rule 11 of the Rules applicable to that scale provides that 'in cases of sale under the Lands Clauses (Consolidation) Act . . . under which the vendor's charges are paid by the purchaser, the scale shall not apply.' It would seem that it must have been in the contemplation of the framers of that rule that, but for the exception contained in the wording of the rule itself, the scale would have applied to such transactions.

"A scale of remuneration is provided under the Solicitors'

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" Remuneration (Registered Land) Orders, 1925 to 1953, govern-
" ing, according to the amount of consideration involved, the
" charges which solicitors are entitled to make for 'transfers on
" ' sale . . .' where the land concerned is 'registered land.'

" There is nothing in the Solicitors' Remuneration (Regis-
" tered Land) Order, 1925 (as amended by the Order of 1953),
" corresponding to the exception of the Lands Clauses (Consolida-
" tion) Act and similar cases contained in rule 11. . . . I
" therefore conclude that such cases were not intended to be
" excluded from the operation of the scale when the land is
" registered land, and it would appear that the appropriate scale
" does apply to the bill of costs referred to me for taxation in
" this case. The Registered Land Scale is chargeable in full
" whether a contract of sale is entered into between the parties
" or not, as is shown by paragraph 1 (*b*) of the 1925 Order."

The London County Council took out the present summons on February 10, 1955, asking the court to review the taxation and allow the objections presented by them.

H. E. Francis for the London County Council.
John Brunyate for the vendors.

Case cited in argument not referred to in the judgment: *In re County of Middlesex Light Railways Order, 1903.*[2]

Harman J., having stated the facts: The references in the petition of course (and repeated in the summons) to the Solicitors' Remuneration (Registered Land) Orders, 1925 and 1953, are, in my judgment, inappropriate to the Lands Clauses (Consolidation) Acts, 1860 and 1869, which have nothing to do with this matter. It was a petition and order of course under the Act of 1845 and nothing else, and the summons should be amended accordingly.

The first objection raised is an unexceptionable statement, in so far as it insists that the master must tax under section 83. That section directs the taxing of the costs mentioned in section 82, including " all charges and expenses," and those are the widest possible words. He has, therefore, to tax the costs, charges and expenses of the vendors, and if what was presented to the master were those proper costs, charges and expenses, which is a matter for his decision, then the vendors should undoubtedly receive them. They have after all been compelled to sell their land and there is no reason why they should not have their costs. What they did was to hand in the scale fee bill, and the master allowed that as being the proper costs for which the London County Council were liable.

If that be right there is no question that the vendors can recover those costs, and the real question here is whether, as between the solicitors and the vendors, that was the right bill to

[2] [1903] W.N. 167.

deliver. If this was the fee properly payable to the vendors' solicitors, I cannot conceive that the master could do other than say: "These are proper costs, charges and expenses under "section 83 and you shall have them." The question is, therefore: Do the Solicitors' Remuneration Orders apply to a taxation as between solicitor and client on a compulsory purchase order relating to registered land?

The second objection taken by the purchasers is that the Solicitors' Remuneration Orders do not apply to a taxation as between vendors and the promoters—the London County Council —under section 83. That is also true, but it misses the point which is whether this bill as delivered was a proper bill as between solicitor and client. The same is true of the third objection. It is clear that the Solicitors' Remuneration Order would apply had the vendors been dissatisfied with the bill delivered to them by their solicitors and had asked for a taxation.

The Solicitors' Remuneration Order, 1883, has been amended many times and is now cited as the Solicitors' Remuneration Orders, 1883–1953. By virtue of paragraph 2, the costs would be taxed according to the scale prescribed by Schedule I, but under paragraph 1 this schedule does not apply in the case of registered land. Moreover, by virtue of rule 11 applicable to this schedule the scale is excluded in cases of sales under the Lands Clauses (Consolidation) Act, 1845; it would follow that if this were unregistered land Schedule II would apply, this being business "not hereinbefore provided for," and that schedule gives the taxing master a wide discretion as to the amount which he shall allow, which is such sum as may appear reasonable having regard to all the circumstances of the case.

If, therefore, this were unregistered land these costs would be taxable under Schedule II and not on scale at all.

It is said that there ought to be no difference between registered and unregistered land in this respect, and I think that that is a very reasonable submission. But this is registered land so that Schedule I is excluded by paragraph 1, but that does not have the effect, curiously enough, of bringing in Schedule II where the land is registered.

There have been separate orders for registered land for many years, and the Lord Chancellor had power under section 131 of the Land Registry Act, 1862, to make such orders, and those costs are now governed by the Solicitors' Remuneration (Registered Land) Order, 1925, as amended by the orders of 1944 and 1953. Paragraph 1 of the order provides: "The remuneration "of solicitors in conveyancing and other non-contentious business "under the Land Registration Act, 1925, shall be regulated as "follows. . . ." The word "under" is an imperfect expression, but I think it must be treated as meaning remuneration in conveyancing in connexion with registered land. It is true that the conveyancing is not done under the Land Registration Act, 1925, and the form of words is inept; but I feel that is what it

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must mean, because the Solicitors' Remuneration Order correctly phrases it—that Schedule I shall not apply to transactions respecting real property of which the title has been registered under the Land Registration Acts.

Paragraph 1 (D) of the Order of 1925, as amended by the two orders of 1944 and 1953 provides that for every completed transfer on the sale of registered land, "(i) Where the land is registered with absolute or good leasehold title"—it is absolute title here—"the remuneration shall be that prescribed in the "Schedule hereto."

The schedule provides a sliding scale of remuneration which is the one followed by the solicitors in the present case. There have been certain percentage additions to that scale with which I am not concerned. I am of opinion that the solicitors were entitled to charge their clients on that scale. It is odd that there is no rule in this order excepting compulsory purchases as there is for non-registered land; and I do not see why there should be this difference, but there it is, and the result is that this scale applies to compulsory purchases as well as to others. That being so, the taxing master was right. I have not given quite the reasons which he gave because a view has prevailed that he was taxing under the Solicitors' Remuneration Order, which he was not. Nevertheless, his adjudication must be measured by the words "costs," "charges and expenses" under the statute of 1845. No order, therefore, is needed from me except to dismiss the summons, which I do.

Summons dismissed.

Solicitors: *J. G. Barr; Coward, Chance & Co.*

I. G. R. M.

[Queen's Bench Division.]

[Caernarvon Winter Assizes.]

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Jan. 24, 25, 26.

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* JONES *v.* RICHARDS and Others.

Agriculture—Threshing machine — Fencing — Statutory duty to fence "during the working thereof"—Machine to be kept "sufficiently "and securely fenced so far as is reasonably practicable and con- "sistent with the due and efficient working thereof"—Liability of owner of machine and employer of injured workman — Liability of farmer for whose "service or benefit" machine used—Whether farmer "permitted" use—Threshing Machines Act, 1878 (41 *&* 42 *Vict. c.* 12), *s.* 1.

By the Threshing Machines Act, 1878, s. 1, "The drum and "feeding mouth of every threshing machine . . . shall at all times "during the working thereof be kept sufficiently and securely

[Reported by H. Eifion Roberts, Esq., Barrister-at-Law.]

" fenced so far as is reasonably practicable and consistent with the " due and efficient working thereof. If any person permits any " threshing machine belonging to him or used for his service or " benefit to be worked without its being fenced as aforesaid " he shall be guilty of a criminal offence.

The first and second defendants were the owners of a threshing machine and a baling machine which they hired out to the third defendant for the purpose of threshing on his farm. The plaintiff had been engaged by the first and second defendants (who operated the threshing machine themselves) to feed the corn into the machine. This work necessitated his standing in a feeding box on the top of the machine and spreading the crop over an adjustable feeding board from which it dropped into the drum through an aperture called the feeding mouth which was six inches wide and about two and a half feet long. The feeding mouth was guarded by a protective door which could be opened or closed by operating a spring and cam. It was essential that the door should be open while the machine was being fed. In the closed postion it covered the aperture substantially although the amount of covering varied with the adjustment of the feeding board.

Owing to a breakdown of the baling machine the threshing machine was slowed down (but the drums continued to revolve) and the plaintiff was told to stop feeding the drum. Whilst the baling machine was being put right the plaintiff stepped out of the feeding box but failed to close the protective door although he knew that it was his duty so to do. He remained on the threshing platform. On his way back to the feeding box he took an incautious step or stepped slightly out of his path with the result that his right leg entered the drum through the feeding mouth and he sustained severe injuries.

The plaintiff claimed damages against all three defendants for breach of the statutory duty under the Threshing Machines Act, 1878, s. 1, and against the first and second defendants for negligence at common law:—

Held, (1) that since it was being supplied with motive power at the time of the accident and the drums were still revolving the threshing machine was " working " within section 1 of the Act notwithstanding that it was not then being fed and was not actually threshing corn;

(2) that the words " kept sufficiently and securely fenced " in section 1 of the Act necessitated (a) the provision of sufficient and secure fencing, and (b) the maintenance of that fencing in a sufficient and secure state whilst the machine was " working "; that there was no fencing at the time of the accident in that the feeding mouth was not then fenced by the protective door; that since the fence had to be placed in position by a man engaged on other work and the operation of the machine was such that the fence had to be out of position for a very long period of the day, it was not a sufficient and secure fence; and that accordingly the first and second defendants were in breach of their duty under section 1 of the Act and were also guilty of negligence at common law;

(3) that the threshing machine was being used for the service or benefit of the third defendant whose conduct had to be judged as though he had been aware of the provisions of the Act; that permission involved an element of knowledge or connivance or carelessness; and that, since the means of obtaining the requisite knowledge as to the fencing of the machine were available to the third defendant but he had not availed himself of those means, he

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was in breach of duty under section 1 of the Act; but that he should receive complete indemnity from the first and second defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6;

(4) that the plaintiff, in failing to use the guard which he knew ought to have been used, was guilty of contributory negligence and should be deemed responsible for one-third of the total damage which he suffered.

Action.

The infant plaintiff, John Gwilym Jones, suing through his father, sought to recover damages against the three defendants in respect of personal injuries which he suffered as a result of an accident with a threshing machine.

The facts appear from the judgment.

W. L. Mars-Jones and *R. G. Waterhouse* for the plaintiff.

Geraint Rees for the first and second defendants.

Elwyn Jones Q.C. and *E. B. B. Richards* for the third defendant.

The following cases were cited in argument: *James & Son Ld.* v. *Smee; Green* v. *Burnett* [1]; *Lovelace* v. *Director of Public Prosecutions* [2]; *McLeod (or Houston)* v. *Buchanan* [3]; *Monk* v. *Warbey.* [4]

Barry J. In many respects this is an anxious and difficult case. The plaintiff, Mr. John Gwilym Jones, is an infant, now 20 years of age, and he brings this action against the three defendants, Mr. William Richards, Mr. Owen Thomas Morris and Mr. John Owen, to recover damages for very serious injuries which he sustained as a result of an accident which took place on February 25, 1953. At that date the plaintiff was 18 years old, and since leaving school at the age of 15 he had worked on his father's farm in Merionethshire. He was not earning wages in the ordinary sense. He lived at home; his father maintained him, provided money for his clothes and other expenses, and also provided him with spending money as and when required. It is common ground that at the date of the accident the agricultural wage appropriate to a man of his age would have been £6 a week. When he was 16 years old, that is to say, some two years before his accident, he had worked for a period of about six weeks with the Merionethshire War Agricultural Committee (or whatever was its proper title at that date), and during that period he did spend a number of days, some 15 to 20 in all, working on a threshing machine and feeding corn and other grain crops into the machine.

The first and second defendants, Mr. Richards and Mr. Morris, are the joint owners of a threshing machine and a baling machine,

[1] [1955] 1 Q.B. 78; [1954] 3 W.L.R. 631; [1954] 3 All E.R. 273.

[2] [1954] 1 W.L.R. 1468; [1954] 3 All E.R. 481.

[3] [1940] 2 All E.R. 179.

[4] [1935] 1 K.B. 75; 51 T.L.R. 194.

together with two tractors, which, no doubt, draw those machines to their places of work and subsequently provide them with motive power. Mr. Morris is a farmer on his own account, but Mr. Richards' principal means of livelihood, is, I understand, the hiring out of these machines to farmers in the vicinity. He has a large number of farmers who are clients of his, and of Mr. Morris, and for several years before this accident Mr. Richards and Mr. Morris hired these machines to 40 or more farmers in their neighbourhood, in many cases twice each year. The first and second defendants were, of course, in sole control of these machines. They were responsible for their operation and adjustment, but labour for carrying the sheaves of corn and other crops to the machines and for carrying away the grain and straw after the threshing and baling had been completed was normally provided by the farmer who hired the machines on any particular date. The first and second defendants normally operated the machines themselves, and in particular fed the crops into the threshing machine, but owing to his other duties as a farmer on his own account it was not always possible for Mr. Morris to accompany the machines when they were hired out to farmers, and whenever he was unable to accompany the machines he hired a man to assist the first defendant, Mr. Richards, to carry out the work which he, Mr. Morris, otherwise would have done.

Before the accident the plaintiff had been engaged by Mr. Morris on some four or five occasions when he accompanied Mr. Richards and assisted in the operation of the machines and, in particular, with the feeding of the threshing machine, and, as he says, he was paid at the rate of 15s. per day. On February 25, 1953, the plaintiff was engaged to carry out this work for the two defendants at a farm belonging to the third defendant, Mr. John Owen. On that date Mr. John Owen had arranged to hire the threshing machine and baler belonging to the first two defendants, and when the plaintiff arrived at Mr. Owen's farm at about 8.15 in the morning the threshing machine and the baler were in position.

The corn which Mr. Owen required to be threshed on that day was stacked in a barn on his farm. For convenience the threshing machine had been pulled into the barn and had been placed in position. The barn had two doors facing each other which provided the only light for the interior of the barn with the exception of narrow ventilating slits. The threshing machine was driven by a tractor which was placed outside the large door, power being transmitted from the tractor to the threshing machine by means of pulleys and a belt. After threshing the grain emerges from the rear of the machine, and it is there collected into sacks and carried away by the men supplied by Mr. Owen to assist in the threshing operations. The baler was placed just outside the small door and opposite the front end of the threshing machine from which the straw ultimately emerges. The baler was driven by another tractor

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and the straw, after emerging from the front of the threshing machine, was carried to the baler and baled by that machine.

After the plaintiff's arrival on the morning of February 25, Mr. Richards, the first defendant, set the belts upon their appropriate pulleys and started the machines. Threshing proceeded throughout the whole of the morning, and during that time the plaintiff and Mr. Richards worked in alternate shifts in feeding the crop into the threshing machine. While feeding the machine the plaintiff, or Mr. Richards when he was carrying out this part of the work, stood in what was known as a feeding box or feeding pit at the top of the threshing machine, on what has been described as the threshing floor. This pit is some 12 inches deep and it is situated at the rear of the platform on top of the threshing machine. When working in this pit the plaintiff, or Mr. Richards, was assisted by two other men. One man moved sheaves of corn from the rick in the barn to the threshing platform on top of the threshing machine, and another man handed these sheaves to the plaintiff, having first cut their twine. The plaintiff's duty was to feed these sheaves into the machine and he did so by spreading the straw as evenly as possible over what is described as a feeding board, from which the corn dropped into the drum of the machine. It dropped in fact through a comparatively narrow aperture, about 6 inches wide, which was situated about the same distance above the threshing drum, or, more accurately, above the eight beaters which are attached to that drum. During threshing operations the drum and beaters revolve, and ultimately the grain is separated and emerges from one end of the machine, while the straw emerges from the other.

This feeding board is a sloping board which slopes down towards the mouth of the drum and is covered with metal. Beyond this feeding board and the aperture above the drum, which is 6 inches wide, and further towards the front of the machine, there is a protective door, or a guard. This door is controlled by a spring and cam which hold it either in the open or the closed position. When it is closed it is pulled down to floor level and the door, in this position, substantially covers the feeding mouth. This statement does, however, require certain qualification, because in fact the feeding board is adjustable and can be moved over a range of about 3 inches forward towards the feeding mouth or backwards away from it. When this feeding board is adjusted to the fully forward position, that is to say, when it has its forward end as near as possible to the feeding mouth, there is only a gap or aperture of $1\frac{1}{2}$ inches between the end of the protective door or guard and the front of the feeding board. In its backward position, that is to say, when it is adjusted to a point furthest from the feeding mouth, that aperture or gap is increased to $3\frac{3}{4}$ inches.

Threshing operations proceeded without any untoward incident throughout the whole morning. The work of feeding the straw into the feeding mouth, though not particularly skilled, is, I

believe, somewhat arduous. As a result, the plaintiff and Mr. Richards changed shifts fairly frequently, the change being made at approximately half-hourly or three-quarter-hourly intervals. Work stopped for dinner at about mid-day. After dinner the machinery was restarted and there is some conflict of evidence about the order in which the plaintiff and Mr. Richards took up their positions in the feeding box and proceeded to feed the machine, but both agree that at the very beginning of the work after the mid-day break the plaintiff began feeding. His case is, that he continued to feed the machine until his accident occurred a little later in the afternoon. On the other hand, Mr. Richards says that after he had seen that everything was in order and the machines were properly restarted, he took over from the plaintiff in the feeding box and completed a shift himself before changing again with the plaintiff. Although this is a matter of very little moment I am bound to say that I prefer Mr. Richards' recollection of that incident to that of the plaintiff. I therefore hold that Mr. Richards did take over from the plaintiff that work for a shift before this accident happened, and that the plaintiff then changed places with Mr. Richards and started to feed the machine from the feeding box. Soon after the plaintiff had restarted to feed the machine there was some trouble with the baler, which became choked. The plaintiff was told by someone to stop feeding the machine with corn. This, of course, was a necessary precaution, because, so long as the baler was out of working order, those responsible—and particularly Mr. Richards—did not want large quantities of straw to accumulate at the front of the machine. When he was told to stop feeding corn the plaintiff did so. It was not anticipated that this trouble with the baler would take long to put right, and, in consequence, the mechanism of the threshing machine was not stopped, but was merely slowed down. It is possible to take the drum of the threshing machine out of gear altogether, but that was not done. Someone slowed down the tractor and that resulted in the drums of the threshing machine continuing to revolve but at a slower speed than during normal work. After he had stopped feeding, the plaintiff decided to go to the front of the machine—still, of course, on the threshing platform—in order to see when the baler was put right.

His evidence is that before he left the feeding box and stepped up from it on to the threshing floor, he closed down the door or guard and so covered the feeding mouth, or at least substantially covered it, leaving only a gap of at least $1\frac{1}{2}$ inches, or, at the most, $3\frac{3}{4}$ inches, according to the adjusment of the feeding board at that particular time. The plaintiff told me that it was his habit, whenever he left the feeding box to do some other work or on account of any breakdown in the machinery, to close the guard, and he fully understood that it was his duty to do so. [His Lordship referred to the evidence, and continued:] Although it is a matter of very little moment in the present case, I think that the usual practice for a man who left the box on a

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change of shift was to close the guard, and for that guard to be reopened by the man who took over from him when he in turn entered the pit and was about to start feeding the machine. One thing, of course, is quite certain. While the machine was being fed it was essential for the door or guard to be in the open position, otherwise the corn could not slip down the feeding board and into the drum mouth.

Having, as he says, closed the guard, the plaintiff left the feeding box and proceeded to the front of the machine. He stood at a point somewhere near to the left-hand bottom corner of the threshing floor. After an interval of a few minutes, while the men had been working on the baler, the plaintiff received a signal from someone to the effect that the baler was now all right and that the threshing could recommence. His case is, that he then turned round to go back to the feeding pit, and he says that as he turned he slipped and found his right leg in the drum, it having slipped down through the feeding mouth. He says that as he turned to regain the feeding pit he heard the speed of the drum increasing. He says he has no idea of what caused him to slip, but he says, and indeed there is little dispute about this, that there is always a certain amount of corn, chaff and straw on the top of the threshing machine and that this to some extent made it slippery. He also says that when the speed of the drum increased, immediately before this accident, there was an increase in the quantity of dust which made it more difficult for him to see.

The results of this accident were unfortunately disastrous. The plaintiff's right leg went right down into the drum and was grossly injured. It was found necessary for the lower part of the limb to be amputated, and ultimately an amputation took place below the right knee. The plaintiff is left with a sufficient—indeed, some of the doctors consider a more than sufficient—stump on which an artificial ankle and foot can be fitted. An artificial limb has in fact been fitted and the plaintiff now has recovered to as great an extent as he ever can recover having regard to the permanent loss of the lower part of his right leg. [His Lordship referred to the evidence, and continued:]

There are a number of issues of fact which I have to determine before considering the law applicable to this case. The first and most important of these issues is whether or not the plaintiff closed the guard before he left the box to go to the front of the machine to watch the progress of the work upon the baler. After giving the matter very anxious care and thought I have come to the conclusion that it is impossible for me to accept the plaintiff's evidence that he did in fact close that guard. I will not repeat Mr. Richards' evidence in detail. It is sufficient for me to say that I accept it. Having accepted it, it immediately becomes apparent that during working hours the feeding board was always adjusted to its forward position. Even if there had been some carelessness with regard to the adjustment of the board I am satisfied that anyone operating the machine would have noticed that the board

was back long before the afternoon of this particular day. In its backward position the board protruded into the feeding box. It would certainly inconvenience the man engaged in feeding the machine and the pressure of the man's legs against the board, and to some extent, the force of gravity would tend to force the board towards its fully forward position. I feel bound to take the view that during working hours and in particular on the afternoon of February 25, 1953, the board was in that forward position. Having taken that view it inevitably follows that the plaintiff cannot have properly closed the guard.

Whatever criticism there can be made about the minimum gap of 1½ inches between the end of the guard and the forward end of the feeding board no one has suggested that a man's foot or any part of his leg could make its way through a gap of that kind. It was suggested by the plaintiff that although he closed the door before he left the box the door may not have closed properly owing to some obstruction which kept it in a partially open position. I am not entitled to speculate in matters of this kind and there is not one shred of evidence which indicates that there was any obstruction which would have prevented the door from fully closing. The one person who would have seen such an obstruction was the plaintiff himself. It is inconceivable that the door could have been obstructed by a sheaf of corn unless that sheaf had been seen by the plaintiff. No sheaf was there when the man came up to rescue the plaintiff after this most unfortunate accident and I cannot guess that a sheaf might have been there. There is nothing in the whole of the evidence to indicate that it was. If there had been any other object obstructing the closing of the door one would have thought that some of these men would have found it and that I should have heard of its existence. In these circumstances I feel bound to conclude that the plaintiff inadvertently failed to close the guard before he left the box on this particular afternoon.

I am also bound to say that I am not satisfied that the plaintiff ever slipped at all. On balance of probability I think that what happened here is that the plaintiff took an incautious step (that is one of the easiest things it is possible to do) on his attempted return to the box and, thinking that he had reached the box, or stepping slightly out of the path by which he had chosen to return to the box, his foot was placed by him either right into the mouth leading to the drum, or, perhaps, on the sloping board from whence it slid into the mouth and became caught by the beaters in the drum below.

On these facts I have to consider the legal position of the three defendants. As against the first two defendants the plaintiff principally relies upon the provisions of the Threshing Machines Act, 1878. He also alleges that the first and second defendants, as his employers on the date of the accident, were negligent in that they failed to provide him with proper machinery and a safe place of work. As against the third defendant, Mr. Owen, the

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plaintiff's case is based solely upon the provisions of the Act of Parliament to which I have referred, an Act which, no doubt, was wholly unknown to either Mr. Richards or Mr. Morris, and still more so to Mr. Owen on the date when this accident happened. The Act is, however, part of the law of this country and I am bound to administer it and to give it, if I can, its correct interpretation.

The Act is described as, "An Act for the prevention of "accidents by threshing machines." The preamble reads:— "Whereas by certain Acts of Parliament provision is made for "the fencing of dangerous machinery in factories and mines, and "it is expedient that similar provision should be made with "respect to threshing machines": By section 1: "The drum "and feeding mouth of every threshing machine as defined by "this Act shall at all times during the working thereof be kept "sufficiently and securely fenced so far as is reasonably practic- "able and consistent with the due and efficient working thereof. "If any person permits any threshing machine belonging to him "or used for his service or benefit to be worked without its being "fenced as aforesaid:

"Or, if any foreman, engineer, or other person in charge of "any threshing machine, works it or permits it to be worked "without its being fenced as aforesaid," . . . then such persons shall be guilty of a criminal offence and shall be liable to prosecution.

The plaintiff's case is that contrary to the provisions of that Act the feeding mouth of the threshing machine in question was not kept sufficiently and securely fenced in accordance with the terms of the Act, and that the persons responsible for the failure to comply with those provisions are the first two defendants who were the persons to whom the machine belonged and the third defendant in whose service or for whose benefit the machine was being worked.

The first and fundamental question is whether this machine was sufficiently and securely fenced. Before considering that question it is also necessary to consider perhaps an even more fundamental one, namely, was the machine working at the time when the accident happened? It is contended on behalf of the defendants that because the machine was not actually threshing corn at the moment when the accident happened it was, therefore, not working, and that the provisions of the section cease to have any application. It is also suggested by counsel for the first and second defendants that the provisions with regard to fencing were only designed to protect men who were actually working in the threshing process, and when they ceased to work on that process the protection was no longer available for them.

I think that it is much too narrow a view to hold that this machine was not working at the time of the accident merely because there had been what is often described as a technical hitch in the operation of another machine and corn was not

actually being fed into the threshing machine at the very moment when the plaintiff sustained his injury. The machine was working, as I find, because it was being turned by a tractor which was supplying its motive power; the engine had never been stopped, the drum had never ceased to revolve, and in a reasonable sense of the term I am quite satisfied that this machine was working even though for a very short period it was not in fact threshing corn.

Having decided, as I do, without any hesitation, that the machine was working, I must then turn to the major and more difficult question whether or not it was kept sufficiently and securely fenced, bearing in mind the qualifications provided in the Act, namely, that the fencing should only be sufficient and secure in so far as is "reasonably practicable and consistent with the due and efficient working thereof." I am quite satisfied that this Act is intended to protect all persons who may be in the vicinity of all these dangerous parts of a threshing machine, namely, the drum and the feeding mouth. I am satisfied that the plaintiff can rely upon the protection of the Act as can any other workman so long as the machine is working, whether they be at their normal place of work or moving about the threshing floor for any lawful purpose connected with their work or for the purpose of leaving or returning to their place of employment.

As regards the words, "kept sufficiently and securely fenced," I think one is bound to accept the view submitted to me by counsel for the plaintiff that those words necessitate (a) the provision of sufficient and secure fencing, and (b) the maintenance of that fencing in a sufficient and secure state throughout the whole period during which the machine is in fact working. I regret to say that my intelligence cannot follow the view put to me with great force on behalf of the first two defendants that the word "sufficiently" in some way cuts down the meaning of the word "securely," and that a machine can be sufficiently and securely fenced without being securely fenced. I think this Act means that secure fencing must be provided and maintained in position at all times throughout the working periods of the machine, subject to the qualification that the fencing need only be as secure as is reasonably practicable and consistent with the due and efficient working thereof.

On the findings which I have made it is at once apparent beyond any possibility of argument that when this accident occurred the feeding mouth of this machine was not fenced at all. It is quite impossible to say that at that time it was sufficiently and securely fenced, because in fact the fence was not then in position and the feeding mouth was open and wholly unguarded; except perhaps to the extent that the open door might have provided some protection for someone walking straight towards the mouth from the front portion of the threshing floor. Such a person, if he stumbled against the open door, might have closed it and so to some extent at least obviated danger to himself.

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Over each side there was no sort of guard protecting the feeding mouth and the entrance to this highly dangerous drum. It is said, of course, that the absence of fencing at the crucial moment when this accident occurred was due not to any breach of statutory duty on the part of any of the defendants but to the action of the plaintiff himself in failing to place in position the guard which had been provided for his use. There is no evidence here of delegation in the sense in which the courts now construe that word. Even if that were the case it would not necessarily mean that the defendants were not guilty of a breach of this statute. If, on the other hand, the true position were that the plaintiff was entirely responsible owing to his own conduct for this unfortunate accident then that might place very great difficulties in his path when seeking to recover damages from the defendants.

As I find the facts, however, no sufficient and secure fencing was ever provided for the feeding mouth and I have also come to the view that there is no practical difficulty in providing reasonably secure fencing and that the provision of such fencing would have no effect upon the due and efficient working of the machine. It was obviously impracticable, as I have already indicated, to keep the guard provided, namely, the opening and shutting gate, in the downward position protecting the feeding mouth when threshing operations were in progress. When the gate was in the open position the man actually engaged in feeding the machine, was, I am satisfied, in a position of at least relative safety, and that the criticisms of the gate or guard—in so far as they are concerned with the position of a man in the feeding box—have not been sustained to my satisfaction.

The position, however, is quite different with regard to other people who might quite properly be on the threshing floor. The man responsible for cutting the twine which held the sheaves together was moving, it is true, perhaps only a few inches, but he had to reach for a sheaf, cut the twine and hand it to the plaintiff. In his normal place of work he would therefore be several feet from the feeding mouth; but some incident in connexion with the work might always make it necessary for him to move perhaps a yard or two in one direction or another upon the roof of the threshing machine, and if he did so and inadvertently approached the ends of the feeding mouth while the machine was in operation and being fed there was nothing to prevent his feet from being trapped. Even on the very best view of the matter there were, during feeding operations, two ends of this highly dangerous area entirely exposed and unguarded; not guarded with sufficient and secure fencing. The feeding mouth has two sides and two ends and whatever protection was provided for the two sides, the two ends—in which a foot or any other limb could enter that danger area with equal ease—were without protection of any kind. More than that, I am satisfied that a fence which for its efficacy entirely depends upon the memory and concentration of a single workman is not in truth a sufficient

and secure fence. Whether that be so on the true construction of the statute is perhaps more open to doubt than upon a consideration of this matter at common law.

However, I have come to the conclusion that the owners of a threshing machine do not comply with the requirements of this Act merely by providing a fence which has to be placed in position by a man engaged on other work, when, as part of the necessary operation of the machine, the fence is out of position and wholly inoperative during a very long period of each day. I do not think that I am setting an unduly high standard in reaching this conclusion. One must always guard against making industry impossible and against slowing down production by setting unduly high standards or by placing wholly unreasonable requirements on the makers and owners of machinery of this kind. However, when the evidence of the plaintiff's expert is considered it seems to me that in the year 1955 it is not unreasonable to hold that in order to comply with the requirements of this Act there should at the very least have been two substantial end boards or side boards protecting the two open ends of the feeding mouth. It seems to me that anyone who directed his attention to the guarding of this mouth would at once see that it was necessary to protect the ends, and to protect them against just the sort of happening which resulted in this disaster to the plaintiff: a false, inadvertent step, leading to his foot going into the beater and being almost inevitably destroyed. I am quite satisfied that if 12-inch boards had been fitted to guard the two ends of this feeding mouth this accident would never have happened. I am very much inclined to think that if boards of considerably less height had been fitted the accident would still have beeen prevented. If the plaintiff had had to lift his foot to any appreciable extent in order to get it into this feeding mouth I do not think he ever would have got it in. He did get it in, because by one ordinary step—not lifting his foot more than was necessary to carry it forward—he was able, perhaps thinking that he was stepping into his feeding box, to step into this very dangerous trap. In those circumstances I am bound to find that the requirements of this Act have not been complied with.

As regards the first two defendants I think it is clear that they are the persons responsible for keeping the fencing of this machine sufficient and secure and on that finding of a breach of statutory obligation there can be no doubt that they must be liable in damages to the plaintiff. Without pursuing the matter further, I think I should say that I would, if necessary, hold that the first two defendants are also in breach of their common law duty to the plaintiff, and that irrespective of the provisions of this statute they would have been liable to him in damages.

The position of the third defendant has caused me very much greater doubt. I think it is a very serious, and I am bound to say a very distasteful, task to construe this Act in such a manner as to make Mr. John Owen liable in any way for this unfortunate

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accident. I am satisfied that he knew nothing about the provisions of this Act, and, being ignorant of it, it is impossible to see that any act or omission on his part was in any way reprehensible. He had no reason to think that Mr. Richards and Mr. Morris were anything other than perfectly competent contractors, as indeed I think they were except for their unfortunate omission to comply with the requirements of the Act in this one respect.

Mr. Owen had engaged them and hired their machines for many years and there had never been a mishap. I do not think that Mr. Owen, apart from the provisions of this Act, had any reason to do anything other or more than he did. However, my duty is to construe the Act, and with the greatest reluctance I feel compelled to agree with counsel for the plaintiff that one is bound to look at the penal provision of this Act in order to ascertain upon whom the obligation to comply with the requirements of the Act is imposed. It is clearly imposed upon the persons owning the machine, and there can be no doubt that in every true sense of the word Mr. Richards and Mr. Morris did permit this machine to be used unguarded or insufficiently guarded.

However, the Act also provides that not only shall the owners of the machine be liable if they permit the machine to be used when improperly fenced, but also any person for whose services or benefit the machine is worked. There can be no doubt that this machine was being worked at the time when this accident happened for the service or benefit of Mr. Owen. The only question is, did he permit the machine to be used without its being fenced in accordance with the provisions of the Act? I have very carefully considered the authorities on this question. Counsel for the plaintiff concedes that permission does involve an element of knowledge or connivance or carelessness. I feel bound, very reluctantly, to take the view that Mr. Owen's conduct must be judged as though he had been aware of the provisions of the Threshing Machines Act, 1878. That leads to a somewhat curious result, but none the less he must be assumed to know the law of this country. Assuming he did know the law, I am bound to find that he permitted this machine to be used in an unfenced condition or insufficiently fenced to comply with the requirements of the Act. In circumstances of this kind, when the whole of the means of knowledge were available to Mr. Owen, when, knowing that he was under a duty in the matter—as I am bound to assume he did—it was easy for him to see how the machine was guarded and to see whether it was properly guarded, I do not think that I can say he did not permit the machine to be used merely because of an actual lack of knowledge of a particular defect. If I did it would be placing a premium upon carelessness. Had Mr. Owen realized that he was under a duty in connexion with this machine I am quite satisfied that he could very easily have acquired the requisite knowledge

regarding its guarding or fencing arrangements and, that knowledge being available to him, it seems to me that it avails him not to say: "I did not take advantage of the opportunity which "was open to me."

I do not propose to analyze the cases cited, but bearing in mind the purport of the various decisions which have been brought to my notice I feel I am to hold here that Mr. Owen did permit this machine to be used contrary to the provisions of the Threshing Machines Act. I am sorry that it should be so, and I have no doubt that this decision may well come as a very considerable shock to many members of the farming community, not only in this part of the British Isles but in other parts as well.

This does not conclude the matter. Counsel for the defendants have pressed upon me that on any view of this case the plaintiff was to a very substantial extent the author of his own misfortunes. Having held that the feeding board was in the forward position I am bound to reach the conclusion that if the plaintiff had closed the guard no accident could have happened. With equal confidence I have reached the conclusion that if, as they should have done, the first two defendants had provided an adequate side board at each end of the feeding mouth the accident would not have occurred despite the fact that the plaintiff failed to close the guard before he left the feeding box. I entirely absolve the plaintiff from any blame as regards the false step he took which resulted in his accident. I cannot, however, take a similarly charitable view with regard to his failure to utilize the guard which was there, and which, if used, would have prevented this accident. I think it would be wrong to say that a workman who fails to use a guard which he knows ought to be used, and, as a result suffers a horrible injury of this kind, is in no sense responsible for the disaster which befalls him. I think he is responsible to a very substantial degree. In the whole of the circumstances of this case I do not think it would be right to say that the plaintiff and the defendants are equally responsible for such damage as may be awarded to the plaintiff. I think that the proper view is that the loss should be borne two-thirds by the defendants and one-third by the plaintiff.

It thus remains for me to consider the proper damages which should be awarded in a case of this kind. The medical evidence, although not agreed, is not now in any real dispute. There is very little I need say about it. This unfortunate young man is left with the lower portion of his right leg amputated; nothing anyone can do or say will return his leg to its full use. I am sure that everything which can be done has been done to provide him with a satisfactory artificial limb, but having regard to his pre-accident occupation as a worker on a farm this is a very grievous handicap. It is true that an amputation below the knee is very much less serious than one above it, provided there is a sufficient stump below the amputation. On the other hand, an injury of this kind is particularly crippling and incapacitating to

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one who hoped to make his living on the land, and particularly so as the plaintiff's father's farm is situated in a hilly district. I am quite satisfied that the plaintiff is incapacitated in the way he describes, and in the way in which his doctor also describes, for very many forms of farm work. There is, of course, a great deal he can do, but he cannot do very many, if not all, of the heavier portions of the work.

This is a difficult case in which to assess proper damages for this reason: The plaintiff was only earning a relatively small wage when this accident happened, but it is true, as has been put to him, that he is an intelligent young man, and that no doubt with suitable training he will be able to fit himself for many other forms of occupation in which his damaged leg will cause him little if any incapacity. Whether he can obtain these alternative occupations near his home is a matter open to very much graver doubt. To a very large extent I think he may be able to minimize and perhaps wholly reduce and eliminate any lack of earning power resulting from this accident, but he can only do so at the expense of his life ambition to become a farmer and at the expense of the future which was so bright for him with the expectation of succeeding to his father's farm and running it thereafter.

If he does succeed to his father's farm it is clear that he will not be able to do all the work himself, and will have to engage paid labour to do jobs which otherwise he could have done; but whatever view one takes of this case I think that the plaintiff, despite the fact that this is a less serious injury than an amputation above the knee, is entitled to very substantial damages. I think that he would have been entitled, had he not been partially to blame, to the sum of £4,000 in addition to the agreed special damages of £382, but, unfortunately, that total sum will have to be scaled down in the manner which I have indicated [i.e., by one-third to £2,921 6s. 8d.].

[His Lordship heard argument on the apportionment of the damage between the defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*) and (2), and said:] The plaintiff here is an employee of the first two defendants. It is a most artificial conception which arises, purely from the provisions of this Act, that Mr. Owen should be owing any responsibility to him at all. Whatever might have been the position if one of these other men working there had been injured, I am quite satisfied that the proper order in this case is that Mr. Owen should receive complete indemnity from the first two defendants.

Judgment for the plaintiff.

Solicitors: *Gwyndaf Williams & Roberts, Pwllheli; Breese Jones & Casson, Portmadoc; Porter & Co., Conway.*

[CHANCERY DIVISION.]

In re ALDHOUS. NOBLE *v.* TREASURY SOLICITOR.

1955 *March* 24.

Danckwerts J.

[1954 A. 3274.]

Executor and Administrator—Administrator—Grant de bonis non—Bona vacantia—Partial intestacy—No claim by next-of-kin—Balance of estate transferred by executor to Treasury Solicitor—Subsequent grant of administration de bonis non to niece of testator—Claim by administratrix to balance of estate—Administratrix not able to give good discharge—Trustee Act, 1925 (15 & 16 *Geo.* 5, *c.* 19), *s.* 27.

Administration—Statutory advertisement regarding claims against estate—Form desirable—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 27.

An executor, under the provisions of section 27 of the Trustee Act, 1925,[1] issued an advertisement in the usual form for "claimants against the estate" of the testatrix. Ultimately, having received no claims from any person claiming to be entitled as next-of-kin in respect of part of the estate, as to which the testatrix had died intestate, he paid the balance to the Treasury Solicitor.

Subsequently, after the death of the executor, a niece of the testatrix, having satisfied the Treasury Solicitor as to her relationship with the testatrix, obtained a grant of administration de bonis non to the estate by means of an affidavit that there were unadministered assets. The Treasury Solicitor was willing to satisfy her claim, but not without the protection of the court:—

Held, (1) that the form of advertisement used was effective to

[1] Trustee Act, 1925, s. 27: "(1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the Gazette, and [in a newspaper circulating in the district in which the land is situated] and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

"(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section—(*a*) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or (*b*) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain."

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protect the executor against the claims not only of creditors, but of beneficiaries.

Newton v. *Sherry* (1876) 1 C.P.D. 246 followed.

(2) That, consequently, on the payment of the balance of the assets by the executor to the Treasury Solicitor, (i) the estate was fully administered according to law, and there remained no assets to which the grant of administration de bonis non could attach, so that (ii) the plaintiff could not give a good discharge to the Treasury Solicitor.

Harvell v. *Foster* [1954] 2 Q.B. 367; [1954] 3 W.L.R. 351; [1954] 2 All E.R. 736 distinguished.

An order was made, by consent, which, after reciting that the Treasury Solicitor while not admitting liability was willing to account to whoever should be shown to be the lawful next-of-kin, directed an inquiry to that end.

Per curiam: The form of advertisement used was unsuitable in form, as it would appear to persons without legal training to refer to the claims of creditors only. The form ought to be recast so as to follow more accurately the wording of section 27 (1) of the Trustee Act, 1925, and to be expressed in such a way as to indicate to normal people that it referred to the claims of beneficiaries as well as to those of creditors.

Adjourned summons.

By her will dated January 29, 1948, Charlotte Agnes Aldhous appointed Patrick Aloysius Coyne to be the executor of her will and gave to him and his wife £100 free of legacy duty. She made no other disposition and, consequently, died intestate as to the rest of her estate, which amounted to approximately £1,400. She died on February 3, 1948, and probate was on April 13, 1948, granted to the executor. The usual advertisements under section 27 of the Trustee Act, 1925, were made in the following form:—

"Charlotte Agnes Aldhous, deceased. Pursuant to the "Trustee Act, 1925. Notice is hereby given that all persons "having any claims against the estate of the above named, late "of 21 Richmond Gardens, Shepherd's Bush, in the County of "London, who died on the 3rd day of February, 1948, are "required to send particulars thereof to the undersigned solicitors "to the executor on or before the 30th day of September, 1948, "after which date the executor will distribute the estate having "regard only to the claims then notified."

The executor, having received no claims from any person claiming to be entitled to the estate of the testatrix as next-of-kin and, under the mistake of fact that no such person existed, paid to the Treasury Solicitor, as bona vacantia, on September 10, 1949, the whole of the balance of the estate, amounting to approximately £1,445.

The executor died intestate on March 2, 1953.

It appeared that Charlotte Esther Noble (a niece of the testatrix) and several other persons were entitled to share in the undisposed part of the estate of the testatrix as next-of-kin, and, the evidence of her relationship to the testatrix having been accepted by the Treasury Solicitor, she applied for a grant of

administration de bonis non to the estate and it was made to her on March 11, 1954.

The Treasury Solicitor was willing to make the balance of the estate available for payment to the person entitled thereto, but contended that the administratrix could not give him a good receipt and discharge therefor without the protection of an order of the court.

She, therefore, took out a summons for "(1) a declaration "that the plaintiff has power to give a good receipt and dis- "charge to the Treasury Solicitor for the part of the estate of "the testatrix as to which she died intestate and which is now "held by the Treasury Solicitor; (2) alternatively, an inquiry as "to the persons entitled to the part of the estate of the testatrix "as to which she died intestate and directions as to the "distribution thereof."

V. M. C. Pennington for the plaintiff.
Denys Buckley for the Treasury Solicitor.

Cases referred to in argument: *Attenborough* v. *Solomon* [2]; *Harvell* v. *Foster* [3]; *Newton* v. *Sherry*.[4]

DANCKWERTS J. This is a case which raises points of some interest and importance, although the estate is a comparatively small one. Charlotte Agnes Aldhous died on February 3, 1948, having some five days earlier made a will dated January 29, 1948, by which she appointed Patrick Aloysius Coyne to be the executor of her will and gave to him and his wife the sum of £100 free of legacy duty. She made no other disposition in respect of her estate and, consequently, she died intestate as regards all the rest of her estate, which amounted altogether to something over £1,400.

Mr. Coyne obtained a grant of probate on April 13, 1948, and in July, 1948, he issued advertisements in pursuance of section 27 of the Trustee Act, 1925. These advertisements in the "London Gazette" of July 2, 1948, are in the form which permits advertisements to be made in respect of a number of estates with a common direction applying to them all in pursuance of arrangements made by the Lord Chancellor's Office as recorded in [1948] Weekly Notes, Part II, at p. 47.

The form of advertisement, which was inserted in "The Times" of July 26, 1948, and in the "West London Observer" of July 2, 1948, is as follows: [His Lordship read the form of the advertisement and continued:] It is perfectly clear that this form of advertisement is that which has been used for a long time, it having been based, as it appears to me, on the provisions

[2] [1913] A.C. 76; 29 T.L.R. 79.
[3] [1954] 2 Q.B. 367; [1954] 3 W.L.R. 351; [1954] 2 All E.R. 736.
[4] (1876) 1 C.P.D. 246.

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of the Act of 1859, generally known as Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 29, where, in fact, the words "claims "against the estate" of the deceased person are used.

It is clear from the decision of Brett J. in *Newton* v. *Sherry*,[1] that such a form of advertisement would be effective not only in respect of claims of creditors but in respect of the claims of next-of-kin of a deceased person or, I suppose, of persons entitled under the will of a deceased person to share in the estate of that person. It seems to me that it is unfortunately worded, if it is intended to notify persons without legal training that they are to put in their claims to share beneficially in an estate. "Claims against the estate" of a deceased person suggests to me, and I imagine to most reasonable people, much more naturally claims by creditors than by beneficiaries. In fact the wording of the advertisement does not follow the wording of the present section, which is section 27 of the Trustee Act, 1925. [His Lordship read subsection (1) and continued:]

It is perfectly plain that that section applies equally to the claims of beneficial owners as to the claims of creditors in respect of any estate or trust fund. The words "against the estate" do not appear anywhere in that subsection, and I cannot help thinking that the time has come when advertisements for creditors or for persons beneficially interested in the estate of a deceased person should be re-cast so as to follow more accurately the wording of the present operative section, which I have just read, and be expressed in such a way as to indicate to normal people that it is not merely the claims of creditors which are required to be sent in, but also those of beneficiaries. I must go on to read subsection (2) of this section. [His Lordship read the subsection and continued:]

As I have said, those advertisements which I have mentioned were issued by the executor in the present case. It appears that he dealt with all creditors who put in any claims and that no claims whatever came in from any next-of-kin. Accordingly, on September 10, 1949, he paid over a sum of £1,445 to the Treasury Solicitor on the footing that the deceased had left no lawful next-of-kin and that the Treasury Solicitor on behalf of the Crown had become entitled to all the remaining assets.

On March 3, 1953, the executor died intestate and no representation to his estate has been obtained, but on March 11, 1954, the plaintiff, Charlotte Esther Noble, a married woman, who claims to be a lawful niece of the whole blood of the deceased and one of the persons entitled to the undisposed estate of the testatrix, obtained a grant of administration de bonis non in the Probate Division.

The grant states that an affidavit for Inland Revenue had been delivered, wherein it was shown that the gross value of the

[1] 1 C.P.D. 246.

said unadministered estate in Great Britain (exclusive of what the said deceased may have been possessed of or entitled to as trustee and not beneficially) amounts to £1,400.

The present summons has been taken out by Mrs. Noble against the Treasury Solicitor as a result of his refusal to recognise her title to give a full receipt in discharge of the moneys paid over to him, which amounted, as I have said, to £1,445.

It appears that, in addition to the claim of the plaintiff, there are claims of other next-of-kin which may or may not be correct, and the Treasury Solicitor, whether or not he is under any lawful obligation so to do, is prepared to account for and pay over the moneys which he has received to any persons who establish their lawful claim as the next-of-kin.

The relief asked for by the plaintiff is: "A declaration that "the plaintiff has power to give a good receipt and discharge to "the Treasury Solicitor for the part of the estate of the testatrix "as to which she died intestate and which is now held by the "Treasury Solicitor" or "alternatively an inquiry as to the "persons entitled to the part of the estate of the testatrix as "to which she died intestate and directions as to the distribution "thereof."

It is contended on behalf of the Treasury Solicitor that there is, in fact, no unadministered estate left, and that, therefore, the grant which was obtained by the plaintiff was in fact nugatory. It is pointed out that the advertisements which have been issued in accordance with the provisions of section 27 of the Trustee Act, 1925, have the result of protecting the executor in respect of the payment which he made over to the Treasury Solicitor, so that it is plain, I think, that no proceedings could be brought against the executor or his estate for what he did, because he administered the estate in accordance with law.

On the other hand, it is contended on behalf of the plaintiff that an estate is never fully administered in the complete sense, because, at any time, assets of the estate may arise or be discovered, and it may, therefore, be the function of the personal representative of the deceased to recover those assets.

In support of that proposition I have been referred to *Attenborough* v. *Solomon*,[2] and in particular to the observations of Lord Haldane. The facts of that case were that, 14 years after the death of the deceased, one of the two executors attempted to pledge some of the assets of the estate. It was held by the House of Lords that the claim of the pledgee was ineffective against the other executor and a new trustee, because, after that time, the executors must be presumed to have assented to the trusts of the will and to have become trustees; and that they could no longer, therefore, exercise the power of a personal representative to raise money by pledge for the purpose of satisfying, for instance, creditors of the estate.

[2] [1913] A.C. 76, 85.

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Therefore, the decision seems to me to give no assistance whatever to the plaintiff's contentions; and, although the observations of Lord Haldane do suggest that there may be some functions still existing in the case of a personal representative after the debts had been fully paid or ought to have been fully paid, I do not think that that case really assists the plaintiff at all.

The other case to which I have been referred is the decision of the Court of Appeal in *Harvell* v. *Foster*.[3] In that case the testator gave all his estate to his daughter, who was the plaintiff, and appointed her his sole executrix. When he died in 1948, the plaintiff, his daughter, was under 21 years of age. Accordingly administration with the will annexed was granted to her husband during her minority. The husband and two solicitors as sureties gave to the Principal Probate Registrar a joint and several administration bond that the husband would "well and truly "administer the estate" according to law, and, further, that he would "make or cause to be made a just and true account of "the administration of the said estate." What happened was that the husband having got in the assets amounting to £950 did not account for them as he should have done to the plaintiff. He paid her only £300, and misappropriated the rest. He disappeared with them and he never accounted at all. The action was one against the sureties on the ground that the husband had not properly administered the estate.

Lord Goddard C.J. thought that the claim failed because, the debts and liabilities having been fully discharged, on the authority of Sargant J.'s decision in *In re Ponder*[4] the husband had become a trustee for his wife and the administration had been fully completed, but the Court of Appeal decided otherwise. They thought that the administration could not be fully completed until the administrator had accounted to the persons properly entitled to the assets. Obviously that had not been done in that case because the administrator had misappropriated the assets. That case does not, as it seems to me, apply to the present case because there is no suggestion that any proceedings could have been brought against Coyne when it is found that he acted in accordance with the law by issuing the advertisements which section 27 of the Trustee Act, 1925, allowed him to issue and that he distributed the assets after having complied with the provisions of the section. It is true that it turns out that he paid the assets over to the wrong person, but no complaint could be made against him, because he dealt with the claims which he had, and he was not aware and he had no notice of the claims of the true next-of-kin. That seems to me to distinguish the present case from the decision of the Court of Appeal in *Harvell* v. *Foster*.[5] Therefore, it seems to me that the executor had fully administered the estate in accordance with law and

[3] [1954] 2 Q.B. 367.
[4] [1921] 2 Ch. 59.
[5] [1954] 2 Q.B. 367.

that, looking at the matter properly, there are no unadministered assets outstanding in respect of which the plaintiff's grant could take effect.

It is perfectly true that the next-of-kin might have the right to follow the assets in the hands of somebody who had acquired them without a proper title to them, but that is a relief which is given to them by the statute and by law in their capacity as beneficiaries. It seems to me that it is of no assistance to the plaintiff in her capacity of administrator de bonis non.

It appears that although in some cases the beneficiaries might be entitled to follow the assets, in the present case the beneficiaries could not follow the assets strictly into the hands of the Treasury Solicitor because he, of course, having obtained the payment as the representative of the Crown has accounted to the Crown and the assets have gone into the Consolidated Fund. It may be that they could never be strictly recovered against anybody at all in the present case, but the Treasury Solicitor has voluntarily recognized the claims of the next-of-kin as being the persons who were really properly entitled to the assets of the estate and he is prepared to provide the money for the satisfaction of their claims. Accordingly, as it seems to me, if I had to decide the case on strictly legal principles, I should have to hold that the plaintiff could not give an effective discharge to the Treasury Solicitor, and it would be very doubtful whether she could obtain any relief on the present application at all, but with the co-operation of the Treasury Solicitor I propose to make an order in the following form.

The order will begin with the words: "The Treasury "Solicitor not admitting liability, but being willing to account "for the sums paid to him by the executor of the deceased to "whoever shall be shown to be the lawful next-of-kin of the "deceased." The order will then direct the ordinary form of inquiry as to next-of-kin with liberty to apply.

Solicitors: *Rose, Johnson & Hicks; Treasury Solicitor.*

J. L. D.

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ALDHOUS, *In re.* NOBLE *v.* TREASURY SOLICITOR.

Danckwerts J.

[COURT OF APPEAL.]

* *In re* ASTER (AN INFANT).

[1953 A. 3785.]

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1955
Mar. 23, 24.

Evershed M.R. and Jenkins L.J.

Infant — Custody — Illegitimate child — Rights of mother — Rights of putative father—Mother's wish to have child adopted.

On May 25, 1952, an illegitimate child was born and the infant's mother, who was a Roman Catholic, placed the infant with a Catholic society with a view to its being adopted. The father applied under the Law Reform (Miscellaneous Provisions) Act,

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1949, to have the infant made a ward of court and that the custody of the infant might be given to him. Harman J. made an order directing that the infant should remain a ward of court and that, until further order, the infant should be committed to the care of the father's brother and his sister-in-law upon an undertaking by them to bring the infant up in the Roman Catholic faith:—

Held, (1) that the paramount consideration was the welfare of the infant and there was no principle of law that, unless there emerged prevailing consideration of essential importance to the child, the wishes of the mother of an illegitimate child should prevail.

(2) That the judge had duly exercised his discretion and that there had been no error in law.

Barnardo v. *McHugh* [1891] A.C. 388; 7 T.L.R. 726 and *In re Carroll* (*J. M.*) [1931] 1 K.B. 317; 47 T.L.R. 125 distinguished.

Appeal from Harman J.

On May 25, 1952, Bernadette Mary Aster or McNiff was born, her mother being at the date of her birth under 20 years of age, and her father, a married man, much older. The parents subsequently quarrelled and the mother, who was a Roman Catholic, handed the infant to the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children with a view to its adoption under the Adoption Act, 1950. The father, who was admittedly devoted to the infant, objected to this course and applied by originating summons under the Law Reform (Miscellaneous Provisions) Act, 1949, for an order: (1) that the child might be made a ward of court; (2) that he might be appointed to be her guardian and, further, that her custody, care and control might be given to him.

On December 21, 1954, Harman J. made an order directing first, that the infant, having become a ward of court, should remain so during her minority or until further order and, secondly, that until further order she should be committed to the care of a Mr. and Mrs. Asher, who were the father's brother and sister-in-law, and he further ordered that the infant should be delivered to Mr. and Mrs. Asher. Mr. and Mrs. Asher gave an undertaking to the court to bring the infant up in the Roman Catholic faith. They were not willing legally to adopt the infant.

The mother appealed.

P. Ingress Bell Q.C. and *Stanislaus Seuffert* for the mother.
John Platts-Mills appeared for the father.

Eversheed M.R. This is an appeal from an order made by Harman J., which bears date December 21, 1954, in regard to the present custody and maintenance of a small girl called Bernadette Mary Aster or McNiff, a child who was born on May 25, 1952. As the judge said, the case is a difficult one, and, indeed, all these cases are necessarily anxious cases; but in this particular case the little girl's launching upon her voyage in this world was the more unfortunate in that she is the fruit of an illicit union

between her mother, who was then a young girl of under 20, and the father, who was greatly her senior, and who was at the time living away from his wife. The relations between the mother and the father became somewhat embittered, and the order from which the appeal is brought was an order made upon an application by way of originating summons taken out by the father. Let me say at once that this is a case in which the natural father has never denied the paternity, and has obviously taken an interest in the child, and according to a note of what the judge said, obviously has an affection for it. The summons asks, first, that the infant may be a ward of court, and it asks for the custody, care and control.

The order appealed from directed that, the child having become a ward of court, the child should remain a ward during her minority or until further order, and that she should be committed to the care and control of a Mr. and Mrs. Asher, Mr. Asher being, in fact, the father's brother. The order then proceeded to give directions for the child to be handed over, it then being in the actual care of a well-known society known as the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children; and it is of importance that an undertaking was given and signed by Mr. and Mrs. Asher that the child be brought up in the Roman Catholic faith, into which church it had already been baptized.

It is not, perhaps, surprising that this young woman should feel a certain bitterness against the man with whom she lived and from whom she has parted; and I am bound to say that I think the present appeal is to be attributed in some measure to that bitterness, and in some measure to religious zeal rather than to the single purpose of the welfare of the child. The reasons why I say that will later appear. But the notice of appeal is certainly a bold document, for it asks that the order made by Harman J. may be reversed, that the summons may be dismissed altogether, and that the costs be paid to the mother.

The judge observed that the father was greatly attached to the child, and, putting the matter quite shortly, the judge came to the conclusion that the best thing to do in the difficult circumstances of this case was to let the child go to Mr. and Mrs. Asher. It was a case—and this is fundamental to the decision—in which the mother, being a young girl, quite naturally had come to the conclusion that "she would like to start fair and fresh without "the stigma of having borne a child." It is not, therefore, a case in which the mother of the child desires to have its custody and upbringing. She desires to put the whole of this episode behind her and to have nothing more to do with the child. Indeed, as Mr. Ingress Bell has pointed out, the gist of her case is that her scheme, which the judge, according to Mr. Bell's argument, should have accepted, would have led to an adoption under the Adoption Act, 1950, and, of course, that would have meant an abandonment, an extinguishment for all practical purposes, of

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all her maternal rights towards the child. As my brother Jenkins observed, it is somewhat paradoxical for it to be asserted on her behalf that the mother's wishes in the interests of the child must be acceded to in the absence of some very special reason, when those wishes involve, as a necessary part of them, the total extinguishment of her maternal rights.

But this is a case which is also unusual, to judge from the authorities mentioned, in that here the putative father is very much on the scene. We were referred, for example, to *Barnardo* v. *McHugh* [1] in the House of Lords, and to *In re Carroll* [2] in this court. In both of those cases the putative father was not on the scene at all, if indeed he had ever been identified; and the question that the House of Lords and this court were there considering was the extent to which the wishes of the only parent who was, so to say, on the scene, ought to be acceded to.

This seems to me to be a different case. This is a case, in the first place, of the invocation of the parental duties and powers of the court as regards a ward of court, and by statute and well-established principle it is not in doubt that in every such case the paramount consideration must be the welfare of the child. Mr. Seuffert, for the mother, suggested that the judge never really considered that at all, but I entirely reject that suggestion. But, as Mr. Ingress Bell pointed out, "paramount" is not the same as "exclusive," and what really has been said for the mother here is that when the balancing considerations are looked upon, the mother's wishes must as a matter of law have prevailed, since, as a matter of law, the natural mother, even though she does not herself seek the company and custody of the child, has a right to choose who will bring it up, unless (as Mr. Ingress Bell put it) there emerged prevailing considerations of essential importance to the child. Mr. Seuffert suggested that that was so, unless the mother was shown to be in some way irresponsible or wicked.

In my judgment, those submissions are altogether too wide. I find nothing here to show that the mother's wishes were in fact disregarded. What the judge did, I think quite plainly, was to exercise his discretion by considering the alternatives presented to him on the one side and the other, and to come to a conclusion that in the interests of the child the better plan was that to which he gave effect. I can see no error of law in the matter at all.

In *Barnardo's* case,[3] the observations of Sir George Jessel M.R. in *Regina* v. *Nash* [4] were cited with approval by Lord Herschell [5]: "It is, however, no longer important to inquire "what are the rights of the mother in relation to an illegitimate "child at common law. All the courts are now governed by

[1] [1891] A.C. 388; 7 T.L.R. 726.
[2] [1931] 1 K.B. 317; 47 T.L.R. 125.
[3] [1891] A.C. 388.
[4] (1883) 10 Q.B.D. 454.
[5] [1891] A.C. 388, 398.

" equitable rules, and empowered to exercise equitable jurisdic-
" tion. As was said by Sir George Jessel M.R., in *Regina* v.
" *Nash* [6]: ' In equity regard was always had to the mother,
" ' putative father, and relations on the mother's side.' "

In the present case the real point made, I think, upon the facts—and when I say " upon the facts " I do not mean having looked into all of them, but upon the balance as presented by the statements in the judge's note—was this, that if the child goes to Mr. and Mrs. Asher, then, for reasons which are stated, it is very unlikely to be adopted, and what Mr. Ingress Bell has said is that from the point of view of the child's welfare it would be far better that it should be regularly adopted under the Adoption Act; and the mother's scheme (what the judge called the rival scheme) was that via this very reputable society the child should be, so to say, put in the way of a legal adoption under the Act.

That is, of course, a point of substance, but I have no doubt that the matter was considered by the judge, and as his judgment states, not later than—and I emphasize the words " not later " than "—the end of December, 1956, the case will be reconsidered. Against that consideration put forward on the mother's side there is the further consideration which, I think quite properly, entered into the judge's mind, the consideration expressed by the ancient proverb that " Blood is thicker than " water."

As I said a little earlier, behind all this there has undoubtedly lurked another matter, upon which I do not want to say much, but which I must briefly state. A written undertaking has been given that the child will be brought up according to the tenets of the Roman Catholic faith. It is said that in the course of cross-examination Mrs. Asher's own adherence to the doctrines of that church was shown to be somewhat lacking in sincerity, because she admitted, it was said, that of her three children none was in fact being brought up according to the tenets of that faith, and that she herself only went occasionally to church; and so Mr. Ingress Bell says that the undertaking that the child will be brought up as a member of the Roman Catholic Church was an undertaking which should not have been accepted at its face value.

Religious feeling is a matter which deserves everybody's respect, but I do not accept the view that the suggestion made is one to which we can or should accede. I see no reason why this undertaking, which was solemnly given, should not have been accepted, and I have not, I confess, altogether appreciated the somewhat veiled attack upon the position in which this child was placed because, it is said, the religious observances of Mrs. Asher are not what it is thought on the mother's side that they ought to be. I say no more about it, but I have said, I hope, enough

[6] 10 Q.B.D. 454.

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to indicate that I do not think there is any ground which would justify the court in differing from the judge, or in embarking upon a consideration of the matter with a view to exercising afresh a discretion properly vested in the judge and, as I think, properly exercised by him. I would dismiss the appeal.

Jenkins L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Willes & Gladstone; O. H. Parsons.*

B. A. B.

[Liverpool Assizes.]

1955
Feb. 1, 2, 24.
Glyn-Jones J.

* HURLEY *v.* J. SANDERS & CO. LD. and Another.

[1953 H. No. 379.]

Dock—Regulations—Shipbuilding—Dry dock—Painting ship with anti-fouling paint—"Work of repair"—Safe means of access to "all "parts of the ship"—Part of dock from which ship painted—Notional occupier—Shipbuilding Regulations, 1931 (*S.R. & O.* 1931, *No.* 133), reg. 1.

The first defendants, who employed the plaintiff as a painter, were engaged under contract with the second defendants in painting with anti-fouling paint the hull of a ship then in a public dry dock. The dock had been let by its owners to the second defendants who had contracted with the owner of the ship to execute the work being undertaken by the first defendants. The plaintiff in the course of his employment was required to paint a part of the hull of the ship amidships, and for this purpose was provided with a striker, a bamboo rod about 8 ft. long, to which was attached a brush. The painting of that part of the hull could be done only from the altar courses, a series of steps forming the upper part of the dock wall; the painter standing on one of the courses and painting so much of the ship as could be reached with his striker, down to a few feet below the level of the top of the vertical wall which bounded the bottom of the dock. The plaintiff was making his way towards the altar course from which he was to work, taking with him his bucket of paint and striker, and proceeding down the altar courses, when he fell and sustained injury. The plaintiff claimed from the second defendants damages for breach of the duty imposed upon them as the notional occupier to provide safe means of access for him to all parts of the ship to which he was required to proceed:—

Held, (1) that the painting of a ship in dry dock with anti-fouling paint constituted "work of repair" to which the Shipbuilding Regulations, 1931, applied.

[Reported by E. Somerset Jones, Esq., Barrister-at-Law.]

Day v. *Harland & Wolff Ld.* [1953] 1 W.L.R. 906; [1953] 2 All E.R. 387 followed.

Taylor v. *Ellerman's Wilson Line Ld.* [1952] 1 Lloyd's Rep. 144 distinguished.

Per curiam: The line between maintenance and repair is a fine one and I should have thought that the two were not mutually exclusive.

(2) That the plaintiff was required to proceed to a "part of the "ship" within the meaning of regulation 1, even though the place from which he was to paint the ship was upon the dock and his means of access to it lay over part of the dock; and that the second defendants were in breach of their duty to provide safe means of access.

ACTION.

The following summary of the facts is taken from the judgment. The plaintiff, James Hurley, was employed by the first defendants as a ships painter and he brought this action claiming damages in respect of injury sustained by him on November 9, 1952, in the course of his employment. The first defendants were at that time engaged under a contract made with the second defendants, C. & H. Crichton Ld., in painting with anti-fouling paint the hull of the s.s. *Arthemisia* then lying in dry dock. The dock had been let by its owners to the second defendants who had contracted with the owner of the ship to execute work being done on the ship. The bottom of the dock was 60 ft. wide and was bounded on each side by a vertical wall 14 ft. high. From the top of the vertical wall the sides of the dock rose in 12 steps, 18 ins. high and 12 ins. wide, to the top of the dock. The steps, called altar courses, were rounded along their edges, the level part of each course being no more than 9 ins. wide, and they formed an angle of 60 degrees from the horizontal. The painting of the hull of the ship near its bow and stern was done from staging built on the floor of the dock or suspended from the ship; but amidships there was no room for staging to be erected between the ship and the side of the dock, because the beam of the ship was 57 ft. and the dock between the vertical walls was only 60 ft. wide. The only practicable way of painting that part of the hull where staging could not be erected was from the altar courses, and this was the universal practice of the trade. For this purpose the plaintiff was provided with a striker, a bamboo rod about 8 ft. in length with a brush attached.

The plaintiff on November 9, 1952, was making his way towards the altar course from which he would have begun his work of painting a part of the ship's hull amidships. He was an experienced ships painter accustomed to that work and he went down the side of the dock in the usual way, i.e., he stepped down the altar courses, carrying his striker and taking up and setting down his bucket of paint as he proceeded, course by course, towards the one on which he was to work. As he was proceeding in this manner he slipped and fell, sustaining injury.

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The case is reported only on the plaintiff's claim against the second defendants on the ground of breach of the duty imposed upon them by Regulation 1 of the Shipbuilding Regulations, 1931.[1] The second defendants contended, inter alia, that the work which they had contracted with the ship owner to do was not work of construction or repair and that therefore the regulations did not apply.

G. Glynn Blackledge Q.C. and *Robert Lambert* for the plaintiff.

R. H. Forrest Q.C. and *C. M. Clothier* for both defendants.

The following cases in addition to those referred to in the judgment were cited in argument: *Marshall* v. *Gotham Co. Ld.*[2]; *Clayton* v. *J. Russell & Co.*[3]; *Drummond* v. *British Building Cleaners Ld.*[4]; *Dredge* v. *Conway, Jones & Co.*[5]; *Moodie* v. *Furness Shipbuilding Co. Ld.*[6]

Cur. adv. vult.

February 24. Glyn-Jones J. after stating the facts and his finding that the altar courses were dangerous as a place of work or as a means of access held that the first named defendant company was in breach of its common law duty to take reasonable care for the safety of the plaintiff, its servant, and continued:

I have now to consider whether the plaintiff has proved a breach of the Shipbuilding Regulations, 1931. The only provision of which a breach is alleged is regulation 1. Before I consider whether that regulation was broken I must first decide whether or not the regulations apply at all. The regulations apply to the repairing of ships in shipbuilding yards, and they clearly apply to a ship in a public drydock (which this was) undergoing repair. There is no evidence that any work was being done on this ship except repainting the bottom of the ship with anti-fouling composition, and the question is "Is this painting "work of repair?"

[1] Shipbuilding Regulations, 1931: ". . . the following Regulations . . . "shall apply to the construction and "repair of ships in shipbuilding "yards. . . .":

"It shall be the duty of the occu- "pier to comply with Parts I to VIII "of these Regulations. Provided that, "when a ship is being repaired in "*public dry dock*, the person who "contracts with the owner of the ship "or with his agent to execute the "work of repair, shall be deemed to "be the occupier for the purposes of "Parts I to VIII and it shall be his "duty to comply with the said parts "except . . ."

Reg. 1: "Safe means of access "shall be provided to all parts of the "ship to which persons employed "may be required to proceed in the "course of their employment."

[2] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

[3] [1953] 2 Lloyd's Rep. 692.

[4] [1954] 1 W.L.R. 501, 1434; [1954] 3 All E.R. 507.

[5] [1901] 2 K.B. 42; 17 T.L.R. 355.

[6] [1951] 2 Lloyd's Rep. 600.

In *London & North Eastern Railway Co.* v. *Berriman*,[1] the House of Lords held that a railway signal fitter's labourer engaged in the routine oiling of the apparatus connecting signal boxes with signals and points was not engaged in relaying or repairing the permanent way within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900. Mr. Forrest said that the object of oiling the moving parts of signal mechanism was both to improve the function and prevent corrosion, and the object of putting anti-fouling paint on a ship's bottom was precisely the same, that is to say, to protect the hull from corrosion, and by keeping the hull free of marine growth to improve, or at least to maintain, the vessel's speed by diminishing the friction between the hull and the water. I am unable to accede to this argument. Whether or not a given piece of work amounts to a repair is a question of fact depending upon the circumstances of a particular case, and I do not take the view that because the House of Lords by a majority of three to two decided that oiling the points and signal apparatus on a railway line was not repairing the permanent way within the meaning of a particular Act of Parliament, I am constrained by that decision to decide that to put a ship in drydock for the purpose of restoring or renewing the anti-fouling composition below the water line is not work of repair. The line between maintenance and repair is a fine one and I should have thought that the two were not mutually exclusive.

In *Taylor* v. *Ellerman's Wilson Line Ld.*,[2] Ormerod J. decided that certain painting work being done in a ship's hold—work which could have been done in wet dock or, I suppose, even at sea if the hold were empty—was not repair within the meaning of the Shipbuilding Regulations, although the work was being done in a drydock. In *Day* v. *Harland & Wolff Ld.*[3] Pearson J. decided that the painting of a ship in dry dock with anti-fouling composition constituted repair of the ship within the meaning of the Shipbuilding Regulations. I do not think that the two decisions are inconsistent, and having considered the cases cited to Ormerod J. and Pearson J., I find myself in agreement with the reasoning of Pearson J. in *Day's* case,[3] and in my opinion the work on which the plaintiff was engaged in this case was the repair of a ship.

The regulations provide that when a ship is being repaired in a public drydock the person who contracts with the owner of the ship for the purpose of repair should be deemed to be the occupier for the purpose of complying with certain parts of the regulation, including in particular regulation 1, which is the regulation in question in this case. The contractor becomes what has been called the notional occupier of the dock and assumes the duty

[1] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

[2] [1952] 1 Lloyd's Rep. 144.

[3] [1953] 1 W.L.R. 906; [1953] 2 All E.R. 387.

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to comply with Part I of the regulations. The first named defendant company had not contracted with the shipowner and is not the notional occupier, for that company's contract was with the second named defendant company, and there is no evidence that the second named defendant was acting as the shipowner's agent in making that contract. Mr. Forrest submits that there is no evidence justifying the inference that the second named defendant had so contracted, or, if it had, that it was the sole contractor. He referred to the judgment of Devlin J. in *Donovan* v. *Cammell Laird & Co.*,[4] and contended that the burden was on the plaintiff to prove affirmatively that there was no other repairer who had made a contract with the owner in respect of work to be done upon this ship on the same occasion. I hope that fairly sets out Mr. Forrest's argument. I venture to express my agreement with Devlin J. that the draughtsman of the regulations appears to have assumed that whenever there is a ship being repaired in a drydock there will always be a single repairer who can be identified as the notional occupier; in the present case there is no evidence that any work was being done on the ship other than that being done by the first named defendant; but I find that the second named defendant company had contracted with the owner of the ship to get this work done, had arranged with the Dock Board for the vessel to be taken into drydock and had contracted with the first named defendant company to do the work, and accordingly I hold that the second named defendant company was the notional occupier.

It follows that the second named defendant company was under a duty to comply with regulation 1 of the regulations, which reads as follows: "Safe means of access shall be provided to "all parts of the ship to which persons employed may be "required to proceed in the course of their employment." Mr. Forrest argued that this provision did not apply in that the plaintiff was required to proceed not to a part of the ship but to a part of the drydock, namely, the altar course on which he would stand while doing his work. I do not agree with Mr. Forrest's argument, and I am of opinion that the plaintiff was required in the course of his employment to proceed to that part of the hull of the ship which he was to paint, and the fact that his route lay over a part of the dock and not over any part of the ship itself does not deprive him of his right of safe means of access under the regulations, nor does the fact that in using his brush to reach that part of the ship he would stand on the altar course, which was a part of the dock. This conclusion appears to me to be in accord with the decision of Tucker J. in *Rippon* v. *Port of London Authority*,[5] and with that of Pritchard J. in *Daniels* v. *F. Leyland & Co. Ld.*[6]

[4] [1949] 2 All E.R. 82.

[5] [1940] 1 K.B. 858; 56 T.L.R. 415; [1940] 1 All E.R. 637.

[6] [1951] 1 Lloyd's Rep. 59.

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Next Mr. Forrest submitted that the means of access provided, namely, by going down the altar course, was safe within the meaning of the regulations in that the word "safe" must be construed in its context, that in relation to the parts of a drydock over which experienced ship repairers must go in order to do their work the word "safe" must be a relative term, and that to experienced ships painters or repairers the altar courses did provide a safe means of access, notwithstanding the risk of an occasional fall.

The findings of fact at which I have already arrived answer these contentions. I cannot find, while considering the employer's liability at common law, that the altar courses were a dangerous work place or means of access without arriving at the same finding of fact when considering the notional occupier's duty under the Shipbuilding Regulations, and I am driven to find that the second named defendant company was in breach of its statutory duty to provide a safe means of access for the plaintiff. What else the company could have done I do not know. It was not in its power to require the painters, over whom it had not a master's control, to wear safety belts and it is not practicable to paint the side below the water line amidships of a ship in drydock except from the altar courses; but the duty imposed by regulation 1 of the regulations is absolute, for that regulation does not contain the words "so far as is reasonably" practicable" (which qualify the duty imposed by section 26 (1) of the Factories Act, 1937).

Judgment for the plaintiff.

Solicitors: *Riley, Sutcliffe & Co., Blackburn; Laces & Co., Liverpool.*

[COURT OF APPEAL.]

* SCRACE *v.* WINDUST.

C. A.

1955

Mar. 22.

Evershed M.R., Jenkins and Romer L.JJ.

[Plaint No. K. 4168.]

Landlord and Tenant—Rent restriction—Alternative accommodation—Security of tenure—Original premises to be converted into two self-contained premises—Tenant offered part of converted premises—Converted premises decontrolled—Security of tenure not "reasonably equivalent to security afforded by the principal Acts"—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (3) (*b*)—*Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 35 (1) (*a*).

The defendant was tenant of a house within the protection of the Rent Acts. The house consisted of three rooms on the ground floor and three bedrooms on the first floor, garage and garden. The landlord, having given to the tenant notice to quit, offered to the tenant as alternative accommodation the three bedrooms, one of which was to be converted into a kitchen, one downstairs room

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and the garage. The premises so offered were to be separated from the rest of the premises by a partition in the hall which would have the effect of making the alternative accommodation self-contained:—

Held, that the landlord's proposed conversion would have the effect of producing two separate and self-contained sets of premises with complete physical division of the one from the other which, by the terms of section 35 of the Housing Repairs and Rents Act, 1954, would be excluded from the protection of the Acts and, therefore, that the alternative accommodation offered could not be regarded as satisfying the requirement of section 3 (3) (*b*) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that it should "afford to the tenant security of tenure reasonably "equivalent to the security afforded by the principal Acts."

Semble: If the landlord were to offer the same alternative accommodation to the tenant, but for a term of years instead of only on a weekly tenancy, she might be able to satisfy the county court judge that the security of tenure provided by the alternative accommodation was reasonably equivalent to the security provided by the Rent Acts.

Effect of a refusal by a tenant to allow his landlord to enter for the purpose of effecting works of conversion considered.

Appeal from Judge Armstrong sitting at Bournemouth County Court.

The landlord, Miss Annie Elizabeth Scrace, claimed possession of premises known as "Goldendene," Walkford Way, Christchurch, Hampshire, which were within the protection of the Rent Acts, from the tenant, Edward William Windust.

The following statement of facts is taken from the judgment of Jenkins L.J.: The tenancy originated in an agreement dated January 8, 1941, between a predecessor in title of the landlord of the one part, and the tenant, Windust, and his brother-in-law, one Culley, whose interest had determined, of the other part. The reversion expectant upon the determination of that tenancy passed from the original landlord to a Mrs. Hayward, and she left it by her will to Miss Scrace, the landlord.

The premises consisted of two floors: A ground floor, with a hall leading, through doors on the right, to a lounge and, behind that, a dining room; at the end of the hall there was a kitchen, and opening out of it a coal cellar with a garage attached on the kitchen side of the house, but there was no access to the garage through the house; on the first floor there were three bedrooms—two moderate sized ones and one smaller one, a bathroom and a w.c.

The landlord, having given to the tenant notice to quit, started proceedings for possession solely on the ground that suitable alternative accommodation could be provided for the tenant and his family. The proposal made by the landlord was that the tenant should take the lounge on the ground floor, together with the whole of the top floor. A partition was to be made in the hall, partitioning off the stairs, so that the tenant would have separate access to the upper floor by means of the staircase,

which would then be appropriated to his exclusive use. A door was to be provided by means of which he could have access to the lounge, from what would then be his own private entrance hall. A separate door was to be provided on the ground floor for the landlord, who would keep the kitchen and the dining room and also the coal cellar. Under these proposals the tenant was also to have the garage. Upstairs the smaller bedroom was to be converted into a kitchen, and water and means of heating were to be installed for use in that new upstairs kitchen.

The tenant opposed the claim for possession on a number of grounds. He said that the alternative accommodation provided was inadequate, and further that, the proposal being to give him a weekly tenancy only of the alternative accommodation and the transaction involving, as it did, the conversion of the one dwelling-house into two separate and self-contained dwelling-houses, the effect of the transaction would be to give him less security of tenure than he had in his existing dwelling-house, inasmuch as each part of the divided house would be taken out of the protection of the Rent Acts. That argument turned on section 35 of the Housing Repairs and Rents Act, 1954.[1] It was next said on behalf of the tenant that he objected to the doing on the premises of the work necessary to provide his separate self-contained alternative accommodation; and it was said that, as a statutory tenant, he was entitled to remain in the premises undisturbed and could not be compelled to allow workmen in to do the necessary work.

The county court judge held that the landlord had offered to provide suitable alternative accommodation, and he made an order for possession subject to the alternative accommodation being made available.

The tenant appealed.

The Court of Appeal refused to disturb the county court judge's decision that the premises afforded suitable alternative accommodation having regard to the size of his family, and the decision on this point does not call for report.

A. G. de Montmorency for the landlord.

D. H. Stansfield for the tenant.

The following decisions were referred to in argument: *Smith* v. *Prime*[2]; *Darrell* v. *Whitaker*[3]; *Selwyn* v. *Hamill*[4]; *Capital and Provincial Property Trust Ld.* v. *Rice*.[5]

[1] Housing Repairs and Rents Act, 1954, s. 35: "(1) The Act of 1920 "shall not apply to a dwelling-house "which consists, and consists only, "of premises falling within either of "the following paragraphs, that is to "say,—(*a*) separate and self-contained "premises produced by conversion, "after the commencement of this "Act, of other premises, with or "without the addition of premises "erected after the commencement of "this Act; (*b*) premises erected after "the commencement of this Act:"

[2] [1923] W.N. 131; 39 T.L.R. 403.

[3] [1923] W.N. 165; 39 T.L.R. 447.

[4] [1948] 1 All E.R. 70.

[5] [1952] A.C. 142; [1952] 2 T.L.R. 557; [1951] 2 All E.R. 600.

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Evershed M.R. I will ask my brother Jenkins to deliver the first judgment.

Jenkins L.J. This is an appeal by the defendant tenant, Edward William Windust, from an order of Judge Armstrong made in the Bournemouth County Court on December 16, 1954, whereby he ordered the tenant to give up possession of the premises known as "Goldendene," Walkford Way, Christchurch, Hampshire, subject to availability of alternative accommodation.

[His Lordship stated the facts, and after holding that there was evidence upon which the county court judge could hold that the alternative accommodation was suitable to the needs of the tenant's family, continued:] I next deal with the objection under the Housing Repairs and Rents Act, 1954. That Act received the Royal Assent on July 30, 1954, and came into operation one month later. [His Lordship read section 35 (1), and continued:] It is said for the tenant that the provision I have just read clearly applies in the present case. It is said on his behalf that the two dwelling-houses provided by the landlord's scheme are separate and self-contained premises produced by "conversion, after the "commencement of this Act, of other premises"; that is, the whole of the house "Goldendene." There is no doubt that the landlord's proposal would have the effect of producing two separate and self-contained sets of premises, with a complete physical division of one from the other, and no internal communication between them; and further, of making each of them self-contained, having all the necessary living accommodation in itself and without any sharing or anything of that sort. Even the stairs were to be partitioned off, so that the tenant's premises could be reached from his own front door without passing through any part of the landlord's premises or sharing any means of access with her.

I see no answer to this objection. It seems to me that the alterations or the conversion here proposed to be effected would, when effected, result in the production of separate and self-contained premises which, by the terms of section 35, would thereby be excluded from the protection of the Act. In my judgment, therefore, the tenant is entitled to succeed on that ground as the matter stands at present, for at present what is offered, as I understand it, consists of the premises I have described—the upper floor and the lounge and also the garage—on a weekly tenancy at a rent to be agreed. If it is the case that section 35 (1) of the Act of 1954 is to take those premises out of the protection of the Act, then the tenant would get in exchange for his existing protected tenancy of the whole house an unprotected weekly tenancy of part of it.

In my view, that could not be regarded as satisfying the requirements of section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: but that section does not say that the alternative accommodation must necessarily consist

of premises to which the principal Acts apply, because subsection (3) provides: " . . . accommodation shall be deemed to " be suitable if it consists either (*a*) of a dwelling-house to which " the principal Acts apply; or (*b*) of premises to be let as a " separate dwelling on terms which will, in the opinion of the " court, afford to the tenant security of tenure reasonably equiva- " lent to the security afforded by the principal Acts in the case of " a dwelling-house to which those Acts apply." Therefore, if in the present case the landlord were to offer the same alternative accommodation to the tenant, but for a term of years instead of only on a weekly tenancy, she might be able to satisfy the county court judge that the security of tenure provided in respect of alternative accommodation was reasonably equivalent to the security provided by the Rent Acts; but, as the matter stands at present, I cannot see that this requirement is fulfilled.

Finally, the point was taken on behalf of the tenant that he was in possession of the whole of the premises as a statutory tenant, and was entitled to remain in undisturbed possession of those premises until such time as he was ordered to give up possession by an effective order of the court. It was contended that he was under no obligation, therefore, to allow access by workmen to the premises for the purpose of effecting the conversion which was to produce the alternative accommodation offered to him. That attitude on the part of a tenant situated as this tenant is may be regarded as an unreasonable attitude; but the argument is one which it is not altogether easy to answer and I do not propose, speaking for myself, to attempt any decided answer to it for the purposes of the present case. It may be that in such a case, if the county court judge was satisfied that the necessary work could be done without any serious degree of interference to the tenant, he might properly disregard the objection and find himself satisfied that suitable alternative accommodation would be available for the tenant when the order or judgment took effect, and would be available because the plaintiff by whom and at whose expense the alteration was to be done was ready, willing and able to do it, and the only obstacle to its being done was the tenant himself. Alternatively, it might be possible for a landlord seeking possession on the ground that alternative accommodation is available, to evolve some scheme under which accommodation was temporarily provided for the tenant and his family in some other place, so as to leave the dwelling-house in question free for the proposed conversion to be effected. The attitude taken by the tenant here is in this respect so unreasonable that it seems to me probable that any court would be disposed, if it could, to evolve some method of meeting it in one or other of the ways that I have suggested, or possibly by some other method.

Be that as it may, I do not propose to express any view on this question for the present purpose; but I think that this appeal should be allowed on the ground that the effect of section 35 (1)

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of the Act of 1954 would be to take the alternative accommodation out of the protection of the Rent Act and that, on the footing of the weekly tenancy now proposed, there would be no security of tenure reasonably equivalent to the security afforded by those Acts. Therefore, I would allow this appeal.

Evershed M.R. I am of the same opinion and, although we are differing from the county court judge, I am in so full agreement with what has fallen from my brother that I cannot add anything useful for myself.

Romer L.J. I also entirely agree.

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield for R. E. Druitt & Allfree, Christchurch; J. W. Richardson.*

B. A. B.

[COURT OF APPEAL]

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Feb. 4, 5.
Denning, Hodson and Parker L.JJ.

*LLEWELLYN *v.* LLEWELLYN.

Husband and Wife—Divorce—Delay—Cruelty—No condonation—Unreasonable delay.

A wife petitioned for divorce on the ground of her husband's cruelty. The judge found that she had established cruelty by her husband up to July, 1951; that she continued to live with her husband from July, 1951, until January, 1953; that during this period the husband had repented, wanted a reconciliation and was not cruel to his wife; that during this period the wife did not condone her husband's previous cruelty, but that she acted in an objectionable manner towards him throughout the period. The judge held that although the wife had established cruelty she had been guilty of unreasonable delay, and in the exercise of his discretion he dismissed the petition. The wife appealed:—

Held, that the court was not to be used as a place to which people could come for redress when it suited them; if the trial judge came to the conclusion that a weapon was being held in reserve over the head of the spouse who was affected then he was entitled, in the exercise of his discretion, to refuse to accede to the prayer of the petition. The judge had not misdirected himself as to the principles upon which discretion was exercised and the appeal, therefore, failed.

Per Denning L.J. If the husband repents of his wrongdoing, as he had done here, the wife cannot stay in the house and refuse to forgive him, and all the while hold the past over his head, ready to strike with a divorce whenever it suits her. She cannot play fast and loose with the marriage in that way.

Appeal from Davies J.

The wife, Marjorie Llewellyn, petitioned for divorce on the ground of her husband's cruelty. The husband denied cruelty

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[Reported by G. D. Black, Esq., Barrister-at-Law.]

and cross-petitioned on the grounds of cruelty and adultery. The cross-petition was dismissed. The judge formed the opinion that the husband was a man of very violent and uncontrollable temper who frequently flew into infantile rages. He found that the husband had been guilty of cruelty to his wife and had assaulted her on occasions in 1946, 1947 and 1951, but he further found that after June, 1951, the husband had done nothing which in any way amounted to cruelty. During the period June, 1951, to January, 1953, when the parties remained living together, the wife did not condone her husband's cruelty, though he pleaded with her to forgive him, but instead acted in an exceptionally nasty and objectionable way towards him and was deliberately hostile to him.

Davis J. held that in remaining with her husband during the period June, 1951, to January, 1953, and in acting in the way that she did, she was guilty of unreasonable delay and he dismissed the petition.

The wife appealed.

F. Elwyn Jones Q.C. and *Phillip Wien* for the wife.
H. Edmund Davies, Q.C. and *Meurig Evans* for the husband.

The following cases were cited in argument in addition to those referred to in the judgments: *Mortimer* v. *Mortimer* [1]; *Nicholson* v. *Nicholson* [2]; *Brougham* v. *Brougham* [3]; *Hughes* v. *Hughes and Williams* [4]; *Matthews* v. *Matthews* [5]; *Moor* v. *Moor*.[6]

DENNING L.J.: I will ask Hodson L.J. to give the first judgment.

HODSON L.J. This is an appeal from a decision of Davies J. who, on July 27, 1954, dismissed the petition of the wife presented on the ground of cruelty. The form of the order is that the petitioner had sufficiently proved the contents of the petition, namely cruelty, but that she had been guilty of unreasonable delay in bringing the petition. Accordingly, the judge dismissed the petition and against that dismissal the wife appeals.

The petition was dated October 9, 1953, and contained allegations of cruelty extending until the parting which took place on January 9, 1953, from the date of the marriage which took place in April, 1943. The last sub-paragraph of the allegations of cruelty contains this language: "As a result of the respon- "dent's bad conduct and continuous unkindness the petitioner "was obliged to leave the respondent on January 9, 1953, since "when she has been apart from him." By his answer the husband denied the cruelty and alleged that the wife had been

[1] [1820] 2 Hag.Con. 310.
[2] (1873) L.R. 3 P. & D. 53.
[3] [1895] P. 288.
[4] (1915) 32 T.L.R. 62.
[5] (1860) 3 Sw. & Tr. 161.
[6] [1954] 1 W.L.R. 927; [1954] 2 All E.R. 459.

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guilty of cruelty towards him and asked for a divorce. By amendment the husband alleged that the wife had committed adultery with two named men who were cited and those were the issues that were fought at the trial which lasted for several days.

I can deal shortly was some of the issues. The husband's cross-charge of cruelty was dismissed by the judge, not because he found that the husband was wilfully untruthful but because he found that the husband had not established conduct which comes within the definition of cruelty as causing injury to his health or likely to do so. The position is that there was not sufficient substance in the husband's charges of cruelty to found a petition for divorce. So far as the charges of adultery were concerned, they were based entirely on statements made by the wife to a witness who was called on behalf of the husband, those statements being in themselves admissions of adultery with those two men. On that part of the case there was no evidence, apart from the so-called confession, of any association between the wife and those men. The result of that was that at the conclusion of the husband's case the men were dismissed from the suit, but there remained the evidence against the wife consisting of her own confession, and the judge came to a conclusion on that part of the case on which there is no appeal that the adultery had not been proved against her. He was not satisfied with the truthfulness of the wife as will appear when I make reference to his judgment. He thought it at any rate possible that the wife may have made statements of the kind which she was supposed to have made to this witness without there being any truth in them; in other words the statements may have been merely idle boasts of amorous affairs with other men, but he was satisfied in the absence of supporting evidence and on the inherent improbabilities of the charges of adultery themselves that no adultery had been established. I think there can be no doubt that the judge arrived at the right conclusion on that.

The circumstances in which the adultery with the first man was supposed to have been committed are such that adultery is exceedingly improbable, and even more so with regard to the second man, who is a Baptist minister. Adultery is supposed to have taken place, according to the wife's statement, in the man's own home with his sister there, and it is not surprising that on that slender basis of the wife's confession the judge should come to the conclusion that if such a thing was ever said it was mere idle talk. However, the result of the case was—and this is the strength of the wife's argument—that although the wife was disbelieved to a great extent, nevertheless the judge did find that the husband had been guilty of cruelty, and that such cruelty had not been condoned. Accordingly, said Mr. Elwyn Jones on behalf of the wife, prima facie, on that finding, the charge of adultery being negatived, the wife was entitled to a decree.

The judge, as the decree shows, dismissed the petition on the ground of unreasonable delay, and the argument in this court has been directed to that question, and to the further question: If there was unreasonable delay, was the judge right in exercising discretion in the way that he did? Mr. Elwyn Jones rightly made his main attack on the question whether the delay was reasonable or unreasonable, because the judge purported to exercise his discretion and it was not possible for counsel to point to any particular in which he had misdirected himself as to the principles upon which discretion is exercised, and he recognized that this court does not readily interfere with the exercise of judicial discretion, except of course where a judge has misapprehended the facts or acted upon some wrong principle.

So far as unreasonable delay is concerned, Mr. Elwyn Jones says, amongst other things, that he was really taken by surprise because the case was not fought on the basis of whether or not there was unreasonable delay, nothing of that kind appeared in the pleadings and the question came into existence in the judge's mind without counsel having had an opportunity of addressing him upon it, having regard to the way in which he had found the facts. If I may explain what I mean, if the judge had accepted the wife's evidence that cruelty had been proved throughout the marriage from the year 1943, till the date of departure in January, 1953, there would have been no question of unreasonable delay. The petition was presented in October and the period between January and October has no bearing on this question of delay. Contrary, I suppose, to the anticipation of anyone in the case, the judge's finding of cruelty stopped short at July, 1951, and therefore before I deal further with the question of delay, I will refer a little further to the facts of this case.

The parties having married in 1943, there were two children, a girl born on March 4, 1944, and a boy born on August 13, 1945. Although the wife's charges of cruelty extended over the period of the married life, they were, in so far as they are of importance, limited to a few instances. So far as the earlier instances are concerned the wife succeeded in proving that her husband had been violent towards her. The judge was of opinion that the husband was a man of very violent and uncontrollable temper. He used these words about him: ". . . he flew into "infantile rages . . . he really is not in a position to tell me what "happened or to remember the things that happened when he "was in one of those tantrums of rage." Dealing with the wife he said: "The wife on the other hand I am equally satisfied was "very often extremely nasty to him and the defects such as they "were in his temperament should have made it all the more "incumbent upon her to treat him kindly; but I am certain "that quite frequently she was guilty not of cruelty but of "objectionable conduct." Then he gives some examples of the

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objectionable conduct of this woman towards her husband. Of course, that would not justify the husband in treating his wife with violence of such an extreme character as to constitute cruelty, and this was recognized by the judge who found against him that he had assaulted her about the year 1946 by twisting her arm and bruising it, and that in 1947 in the course of an altercation he hit her right ear with his hand very hard so that she fell to the floor; the blow caused her ear-ring to pierce her ear and she had a bad ear and had to have penicillin injections. The judge continued: "Now the husband "admits that he hit her, but denies that he struck her; it was "a sort of self-defence back-hander and he caught her on the "ear and says the damage was really due to her ear-rings and not "his blow. It was a nasty unpleasant blow." There is another incident of violence not so important when the husband threw his dinner in the general direction of his wife, but did not hit her.

The crucial incident upon which the wife relies on the judge's findings occurred in July, 1951. As to this incident the judge preferred the wife's evidence because he thought her mentality was such that when she wished to tell the truth she was more able to remember with accuracy the truth of matters than her husband, who for the reasons which the judge has described, was not thought always capable of telling the truth. I need not relate in detail the scene which took place on that occasion, July, 1951. The husband was very angry with his wife and started off by tearing a book, and when the wife pursued him with a stick he got hold of the stick and beat her heavily across the backside, so heavily that weals were visible and seen by members of her family. That is the end of the wife's case on the judge's finding, because he held that after that, from July, 1951, until the parting in January, 1953, the wife proved nothing against her husband. Indeed, the proof was the other way, because the husband established that she was exceptionally nasty to him throughout that period.

The judge concluded: "I have said that I do not think it "possible to hold that the wife condoned the husband's conduct "up to July of 1951, which was the last instance; that is the "act of cruelty, and that it is such as to cause injury to health "or apprehension of injury to health. If the wife had left soon "after July, 1951, obviously on my finding of fact she would have "had a complete case. I do not mean to say for one moment "that a wife is bound to leave when her husband has been once "or twice guilty of cruelty to her, so that she is able to say "thereafter: 'He was cruel and I want a divorce.' On the "contrary, the court looks with very great favour on any attempt "by a wife, no matter at what cost to herself and no matter what "suffering she endures, to carry on with the marriage for the "sake of the children, but one asks oneself the question here, "why did she stay on for eighteen months being nasty to him, "there being as I find, with the possible exception of this incident

" that does not interest me very much "—I will refer to that in a moment—" no wrongdoing by the husband at all." The judge is there negativing the finding that this woman was patiently enduring at all costs to herself with the idea of re-establishing the marriage and taking the view, I think, that she was holding her hand until it was convenient for her to strike at her husband, having in mind the weapon that she had or thought she had, namely, the assault which she had suffered at his hand.

I said I would refer back to one incident which the judge has mentioned, that is an incident which occurred in about October, 1952, when there was a scuffle. According to his finding, that scuffle was not a matter which could be relied upon by the wife, but was merely an instance of the wife telling her husband to get out. The scuffle followed upon that, and was not in any way an incident which could be relied upon by the wife as cruelty directed against her.

There are a number of passages in the judgment which are supported by the evidence that the conduct of this woman towards her husband was exceedingly objectionable during the period when, as I have said, she may well have thought she had a case against her husband, which she could use when she thought fit. A witness was called on her behalf. The judge made no finding as to the truth of his evidence, but the effect of it was that the wife said to him that she was deliberately making her husband's life hell during the last 18 months they were together. Whether she said that or not, that is the effect, I think, of the finding as to the wife's conduct during that period; that she was being deliberately hostile to her husband. Mr. Elwyn Jones has pointed out that that is not really a complete picture of her conduct, because there are instances—and he quite rightly emphasizes the instances—when the wife was well disposed towards her husband at any rate outwardly. There were occasions when she spoke of him as being kind to her when she was ill, and she spoke in not unfavourable terms of him to a Miss Llewellyn, to whom also she complained, during this period of 18 months, of the husband's temper; so that the picture is not all one colour. Nevertheless, I think the judge was warranted in his finding that that was the attitude of the wife during those 18 months, and accordingly it follows from that, the judge having rejected her evidence almost in toto as to the last 18 months—although it is true that he accepted the views she put forward that sexual intercourse had ceased between these parties in 1951, the husband having put it at a later date—but apart from that, as far as I can see on all matters of substance, the wife's evidence was, if not rejected, at any rate not accepted by the judge, and he came to the conclusion that she, although she had a case in July, 1951, when she left her husband in January, 1953, left him not because she had a case, but because it suited her. He was fortified in that conclusion by the finding that he had made that the wife's entry into this marriage was somewhat of a commercial

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nature, having regard to her belief in the wealth of the husband's family, and further that she appeared to have become embittered as time went on because the husband was not a very successful man, and from a worldly point of view the marriage had not been much good to her. He also found as a fact—and this may or may not have influenced him in his conclusions; I think it must have done—that at the time of the parting in January, 1953, the wife had made an arrangement with a friend and neighbour for letters from another man to be sent to a neighbour's house, the neighbour's house being used as an accommodation address. Actual receipt of those letters was not proved, at any rate, no letter was proved to have arrived before the parting, but the fact that the accommodation address had been arranged was proved to the judge's satisfaction by evidence from the husband of the woman to whom the letters were arranged to be addressed. Accordingly, the judge felt himself able to say: "Although I find "that there was some cruelty culminating in an act in July, 1951, "in the exercise of my discretion, the wife not having acted "properly, I will dismiss this petition."

In my judgment this court should not interfere with the judge's finding that there was in those circumstances unreasonable delay. It is true that in cases of petitions for divorce on the grounds of cruelty there is nothing in the books to guide one, but the statutes to which we have been referred make unreasonable delay a discretionary bar to all suits for divorce, and since 1937 the same consideration has applied to suits for judicial separation. In considering unreasonable delay, which appeared as a discretionary bar in the Act of 1857, it appears, I think, from the authorities that the statutory provision merely carried on the ecclesiastical practice which existed before, so that some assistance is to be gained from looking at earlier cases in considering the principles upon which this court will act. Karminski J., in *Lowe* v. *Lowe*,[1] made a review of those cases, in which the judges have from time to time dismissed petitions on the grounds of unreasonable delay, where the purpose of the proceedings was not relief from the marriage by a spouse who was complaining of the injury inflicted upon him or her, but some other purpose. There is a divorce case where adultery was alleged, *Rickard* v. *Rickard and Bond*,[2] in which the Court of Appeal upheld the judgment of Horridge J. Horridge J. had said (and this language was approved by the Court of Appeal) that the court could not be used as a place to which people could come for redress just when it suited their monetary interests to do so. Lord Sterndale M.R. agreed, substituting, however, the words "monetary interests of their families," because that was the interest in that particular case. But the principle seems to me to be the same whatever interests are to be considered: the

[1] [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671.

[2] (1921) 37 T.L.R. 511.

court is not to be used as a place to which people can come for redress just when it suits them, and if the judge who tries the case comes to the conclusion that a weapon is being held in reserve over the head of the spouse who is affected, the court is entitled, in my judgment, in the exercise of its discretion to refuse to accede to the prayer of the petition. That is, I think, the effect of the judge's conclusions in the present case, having regard to the finding of fact that from 1951 until the parting this woman made no attempt to continue the marriage, but rather made herself continually objectionable to her husband, until it suited her to leave. In that state of affairs, on those findings, I think this appeal fails.

DENNING L.J. I agree. The last act of cruelty was in July, 1951, but the wife did not leave until January, 1953, 18 months later. During that time the husband repented and sought a reconciliation with his wife, but she refused; she rejected all his overtures and she was extremely nasty to him. In addition, she corresponded secretly with another man, who sent affectionate letters to her. After 18 months she left the house without any further cause at all, taking the two children with her. The husband was very upset, very anxious for her to come back, but she refused to do so and then brought this charge of cruelty against him.

There is no previous case of cruelty in the books where delay has been found to be a reason for refusing a divorce; nevertheless, I think the judge was justified in refusing it here. If the husband repents of his wrong-doing and seeks forgiveness, as he has done here, the wife cannot stay in the house and refuse to forgive him, and all the while hold the past over his head, ready to strike with a divorce whenever it suits her. She cannot play fast and loose with the marriage in that way.

The principle in *Boulting* v. *Boulting*[3] is in point: "The "petitioner must feel and suffer under the wrong of which "complaint is made, and the court must be satisfied that the "remedy is sought as a genuine relief from the pressure of that "grievance. Such is the beaten track of the decisions. It is "impossible to tread too faithfully in footsteps so wisely placed." So here it cannot be said that the wife, when she left the house, still suffered under the grievance of 18 months before. The judge thought that she was disappointed in the marriage; disappointed because her social position was not what she had hoped for, and eventually, at long last, for different reasons altogether than cruelty, she left her husband. In these circumstances I think that the judge was entitled to find that there was unreasonable delay in staying on for these 18 months before starting proceedings for cruelty. I agree that the appeal should be dismissed.

[3] (1864) 3 Sw. & T. 329.

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PARKER L.J. I agree with both judgments and there is nothing I can usefully add.

HODSON L.J. I should like to add with regard to Mr. Elwyn Jones's argument on not having had an opportunity of discussing with the judge this particular feature of the case upon which the decision turns, that, in my judgment, it was open to the judge to act as he did, having regard to the fact that all the material which was relevant to his decision on the question of unreasonable delay had been examined in evidence and discussed. It is quite true that the particular line which he took depended upon a particular view of the evidence, and I am prepared to agree with Mr. Elwyn Jones that it would have been better if an opportunity had been given to counsel to give the judge further assistance on that matter, but I think that the fact that he did not do so is not a sufficient reason for sending the matter back for further argument.

DENNING L.J. I agree with what my brother has just said.

PARKER L.J. I agree.

Appeal dismissed.

Solicitors: *C. James Hardwicke & Co., Cardiff; O. Glyndwr Davies, Bridgend.*

[QUEEN'S BENCH DIVISION.]

1954
Nov. 15.

McNair J.

*BUCHANAN *v.* MOTOR INSURERS' BUREAU.

[1952 B. No. 2753.]

Road Traffic—"Road"—Meaning—Dock road—Accident due to negligent driving of motor-lorry—Driver not insured—Claim for damages—Judgment not satisfied—Liability of Motor Insurers' Bureau—Whether dock road a road "to which the public has "access"—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 35 (1), 121 (1).

The plaintiff, a dock worker, was awarded damages of £2,000 in an action against a lorry driver in respect of injuries sustained in December, 1949, as the result of the negligent driving of a lorry on a road within the confines of the London Dock area. The lorry driver was uninsured and failed to pay the damages. The plaintiff sought to recover the £2,000 from the defendants claiming that the lorry driver ought, under section 35 (1) of the Road Traffic Act, 1930, to have been insured and that in those circumstances the defendants, by virtue of an agreement with the Ministry of Transport, were under a liability to satisfy the judgment. The defendants contended that the lorry driver was not required to be insured as the road on which the accident occurred was not a road

to which the general public had access within the meaning of section 121 (1) of the Road Traffic Act, and that they were therefore under no liability to the plaintiff.

Persons had been refused admission to the area on the ground that they could not produce the appropriate pass required of persons not actually engaged in work in the docks:—

Held, that the place where the accident occurred was not a road to which the general public had access either as a matter of legal right or by tolerance of the Port authority, and therefore the defendants were under no liability to the plaintiff.

Harrison v. *Hill* 1932 S.C. (J.) 13 and *Bugge* v. *Taylor* [1941] 1 K.B. 198 applied.

ACTION.

On December 1, 1949, the plaintiff, Walpert Jocelyn Buchanan, a dock worker at the London Docks, was seriously injured as the result of the negligent driving of a lorry driver, one Terence Wilcox, who was driving a lorry on a dock road within the confines of the London Dock area forming part of the premises of the Port of London Authority. The lorry was being driven without the authority, knowledge or consent of its owner and there was, accordingly, no effective policy of insurance covering the driver's liability. The plaintiff sued the driver for damages for personal injuries and final judgment was entered for the plaintiff for £2,000 and costs. The driver failed to pay the damages and the plaintiff brought these proceedings against the Motor Insurers' Bureau claiming that as the lorry-driver ought, under section 35 (1) of the Road Traffic Act, 1930,[1] to have been insured, the bureau were under a liability to satisfy the judgment by virtue of an agreement entered into with the Ministry of Transport in 1946 whereby the bureau undertook, inter alia, to accept liability where an ineffective judgment was obtained against any person in respect of liability required to be covered by a policy of insurance under Part II of the Road Traffic Act, 1930, whether or not such person was in fact covered by insurance.

The defendants denied liability. They contended that the road on which the accident took place was not a road within the meaning of sections 35 (1) and 121 (1) of the Road Traffic Act, and that in the premises the plaintiff's injury did not create any liability required to be covered by insurance.

Rudolph Castle-Miller for the plaintiff.

E. Ryder Richardson Q.C. and *Adrian Head* for the defendants.

[1] Road Traffic Act, 1930, s. 35 (1): "... it shall not be lawful for any "person to use ... a motor vehicle "on a road unless there is in force in "relation to the user of the vehicle "by that person ... a policy of "insurance ... in respect of third-"party risks as complies with the "requirements of this Part of this "Act."

S. 121 (1): "'Road' means any "highway and any other road to "which the public has access, and "includes bridges over which a road "passes."

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The following cases were cited in argument: *O'Brien* v. *Trafalgar Insurance Co. Ld.**; *Harrison* v. *Hill*†; *Bugge* v. *Taylor.*‡

McNAIR J. stated the facts, and continued: The basis of the plaintiff's claim is that the lorry driver at the time of the accident ought, under section 35 of the Road Traffic Act, 1930, to have been insured; and if the circumstances of the accident were such that the lorry driver ought to have been insured, then it is admitted that the Motor Insurers' Bureau accept liability for judgments such as this, where the judgment in fact obtained is ineffective by reason of the defendant's want of means.

The circumstance which it is said resulted in the lorry driver not being required to be insured is that the place where the accident happened, namely, a road within the confines of the London Dock, forming part of the premises of the Port of London Authority, was not a road within the meaning of the Road Traffic Act, 1930. The definition of "road" in section 121 (1) of the Act is: "'Road' means any highway and any other road to which "the public has access and includes bridges over which a road "passes." Accordingly, my decision must turn entirely on whether I take the view on the facts as proved before me that the place where this unfortunate accident happened was a road within that definition.

I have been referred to three cases where this or similar questions have been considered by the courts, but it seems to me that the case which gives me the most assistance on the matter is *Harrison* v. *Hill*,[1] a decision of the Scottish courts. That case was considered and adopted by a Divisional Court of this Division in *Bugge* v. *Taylor.*[2] In *Harrison* v. *Hill*[3] the Lord Justice General, Lord Clyde, who was considering whether in the case before him a road leading from a public highway down to a farm house was a road within the meaning of the Road Traffic Act, had occasion to interpret the definition which I have just read, and he said[4]: "It is plain, from the terms of the definition, that "the class of road intended is wider than the class of public "roads to which the public has access in virtue of a positive "right belonging to the public, and flowing either from statute "or from prescriptive user. A road may therefore be within "the definition (1) although it belongs to the class of private "roads, and (2) although all that can be said with regard to its "availability to the public is that the public 'has access' to it. "I think that, when the statute speaks of 'the public' in this "connexion, what is meant is the public generally, and not the "special class of members of the public who have occasion for "business or social purposes to go to the farmhouse or to any part

* (1945) 61 T.L.R. 225.
† 1932 S.C.(J.) 13.
‡ [1941] 1 K.B. 198.
[1] 1932 S.C.(J.) 13.
[2] [1941] 1 K.B. 198.
[3] 1932 S.C.(J.) 13.
[4] Ibid. 16.

" of the farm itself; were it otherwise, the definition might just " as well have included all private roads as well as all public " highways.

" I think also that, when the statute speaks of the public " having ' access ' to the road, what is meant is neither (at one " extreme) that the public has a positive right of its own to " access, nor (at the other extreme) that there exists no physical " obstruction, of greater or less impenetrability, against physical " access by the public; but that the public actually and physically " enjoys access to it. It is, I think, a certain state of use or " possession that is pointed to. There must be, as a matter of " fact, walking or driving by the public on the road, and such " walking or driving must be lawfully performed—that is to say, " must be permitted or allowed, either expressly or implicitly, " by the person or persons to whom the road belongs. I include " in permission or allowance the state of matters known in right " of way cases as the tolerance of a proprietor." Lord Sands used much the same language when he said [5]: " In my view, any " road may be regarded as a road to which the public have access " upon which members of the public are to be found who have " not obtained access either by overcoming a physical obstruction " or in defiance of prohibition express or implied."

Those judgments seem to me to give clear guidance on the proper way of approaching the question of fact in this case, and the evidence lies in this way. The place of the accident was undoubtedly within the London Dock area and was within the 20 feet boundary wall which surrounds that area. Access to the place of the accident can only be obtained by going through one or other of the gates which the Port of London Authority have provided for entrance to the London Dock. The main entrance is a gate which is primarily used for vehicular traffic and for pedestrians, but there are a number of other gates. On behalf of the plaintiff it is said that, whatever may be the strict legal position, in fact, any member of the public who wishes to, can and does find his way into the London Docks; and although there may be policemen there, members of the public are not in fact stopped; but it is to be observed that the witnesses who spoke in that sense were all persons who had a legitimate right to be in the dock, either as dock workers or as lorry drivers taking goods into the dock, and in one case a claims assessor going into the dock for the legitimate purpose of finding out from the injured man in the present case where the accident actually happened. On the other hand, I have had called before me the chief inspector of the Port of London Authority police, who is in charge of the division which comprises the London Dock. He tells me that that area is in fact policed by the men under him, who have instructions to stop unauthorized persons from entering, and although these rights are no doubt exercised with discretion the

[5] Ibid. 17.

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policemen soon get to know the regular users of the dock, in fact three or four times a week persons are refused admission to the dock because they are unable to produce a pass from the Port of London Authority entitling them to admission, such passes being required of any person not actually engaged in work in the docks.

In face of the evidence which has been given by that responsible officer it seems to me that it is quite impossible for me to hold that the place where this accident happened was a road to which the public, by which I mean the general public, have access either as a matter of legal right or by tolerance of the Port of London Authority. It would indeed be strange to find that in any great dock such as the Port of London or the Mersey Harbour Docks it was permissible for members of the public, without permission, to wander at large within the docks; and I am completely satisfied by the evidence which I have heard from the inspector that that is not the position in the London Docks.

The odd circumstance in the present case is that apparently the Port of London (Consolidation) Act, 1920, the private Act which regulated the Port of London Authority at the time of the accident, namely, December, 1949, provided by section 457 that for certain purposes the dock premises were to be deemed to be public places. That section provided: "The quays wharves "docks and other premises of the Port Authority . . . shall be "deemed to be public places" within the meaning of section 54 of the Metropolitan Police Act, 1839, "for the purposes of "making liable to the penalty . . . every person committing "within the . . . premises any of the following offences but no "further or otherwise . . ." One of the offences referred to is: "Every person who shall ride or drive furiously or so as to "endanger the life or limb of any person or to the common "danger of the passengers on the premises of the Port "Authority." Apparently, if anyone drove a donkey cart in the Port of London Authority area furiously or to common danger he could be prosecuted under the Metropolitan Police Act, 1839, for doing that in a public place, but not if he drove a motor-car dangerously, because section 11 of the Road Traffic Act, 1930, which deals with dangerous driving, was not incorporated into the Port of London legislation until 1950, when section 21 of the Port of London Act, 1950, expressly provided that dock roads were to include, in effect, any land which is accessible to motor vehicles. It was further provided that "the Road Traffic Acts "shall have effect as if in the provisions thereof hereinafter "mentioned the expression 'road' included a dock road." Amongst the sections incorporated is section 35 of the Road Traffic Act which requires users of motor vehicles to insure against third party risks, and section 11. Accordingly, if this accident had happened, not in December, 1949, but after July 12, 1950, when the Act of 1950 came into operation, the Motor

Insurers' Bureau would have been liable on their promise. But, seeing that the accident took place before the Act of 1950 came into operation, the point taken by the defendants is in law a good point. There must, accordingly, be judgment for the defendants.

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Judgment for defendants.

Solicitors: *Darracotts; Hair & Co.*

E. M. W.

[COURT OF CRIMINAL APPEAL.]

*REGINA *v.* WILSON.

C. C. A.

1955 *Jan.* 12.

Lord Goddard C.J., Cassels and Sellers JJ.

Criminal Law—Assault—Aggravated assault—Conviction of common assault—Assault with intent to resist arrest—Unlawful arrest—Whether jury may convict of common assault—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 38.

The appellant was charged under section 38 of the Offences against the Person Act, 1861, with assault on a gamekeeper with intent to evade lawful arrest. It appeared from the evidence at the trial that owing to a technicality the attempted arrest was unlawful. The judge directed the jury that the appellant could not be convicted under the section, but directed that he might be convicted of common assault if the jury were of the opinion that he used more force than necessary to avoid the unlawful apprehension. The jury convicted the appellant of common assault and he appealed on the ground that such conviction was not open to them:—

Held, that an assault with intent to evade arrest was simply one form of aggravated assault, requiring proof of an assault and intent to evade arrest. If the assault was proved, but the intent to evade arrest was not, the accused could be found guilty of assault, because that was an ingredient of the first offence; accordingly, the appellant was rightly convicted.

APPEAL against conviction.

The facts are fully set out in the judgment.

Peter Bruce for the appellant.

A. Ellis for the Crown.

The following cases were referred to in argument: *Rex* v. *Hollingberry* [1]; *Reg.* v. *St. George* [2]; *Reg.* v. *Sandys*.[3]

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

[1] (1825) 4 B. & C. 329.
[2] (1840) 9 C. & P. 483.
[3] (1844) 1 Cox C.C. 8.

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LORD GODDARD C.J. The appellant appeals by certificate granted by the deputy chairman of the Nottinghamshire Quarter Sessions before whom he was convicted of common assault. He was, along with another man, found poaching by a gamekeeper and he was charged with an assault on the gamekeeper with intent to evade arrest, contrary to section 38 of the Offences against the Person Act, 1861. The reason why he was thus charged was because under section 31 of the Game Act, 1831, a gamekeeper is entitled to arrest a person he finds in pursuit of conies, as this man was, but he must first ask for his full Christian name, surname and address. The gamekeeper in the present case, who gave evidence with commendable frankness, although given every opportunity of saying what he had said in the magistrates' court where he said he had asked the appellant for his full name and address, apparently before the jury said he had only asked for his name. Thus arises one of those technicalities which it would be a good thing to have abolished, because very often a gamekeeper may know perfectly well where a person lives though he does not know his name. Nevertheless the statute requires that before he arrests a person the gamekeeper must ask for the person's name and address. The deputy chairman, therefore, quite properly ruled that the appellant could not be charged with the offence of intent to prevent lawful apprehension under section 38 of the Act of 1861 because the apprehension was not lawful as his full name and address had not been asked for. But the deputy chairman directed the jury that they might find the appellant guilty of a common assault if they were of opinion that he used more force than necessary to avoid the unlawful apprehension. That again is a perfectly unimpeachable statement of the law. If a person is purporting to arrest another without lawful warrant, the person arrested may use force to avoid being arrested, but he must not use more force than necessary. In the present case, no doubt, what the court thought was the serious part of the case, and I think the jury must have done so too, was that the appellant threatened to get out knives, and called out "Get out knives," which itself would be an assault, in addition to kicking the gamekeeper. At any rate the jury came to the conclusion that he did use more force than necessary for repelling the unlawful arrest.

Mr. Bruce, although agreeing that in those circumstances the appellant could have been found guilty of common assault had he been charged with that offence, submitted that he could not, on a charge of intent to evade arrest, be found guilty of common assault. I think, with all respect to the interesting argument Mr. Bruce has put up, that the argument fails. An assault with intent to evade arrest is simply one form of aggravated assault, that is to say, it is an assault with circumstances of aggravation which allow a heavier sentence to be passed than for a simple assault. But of course it involves an assault and what has happened here is that the jury have found the man guilty of an

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assault without aggravation and the law has been well established over a great number of years that where a man is charged with an offence he may be found guilty of a lesser offence of the same quality. This seems, therefore, to be an a fortiori case. It was necessary to prove an assault and necessary to prove intent to evade arrest. The assault was proved, but the intent to evade arrest was not, so that part of the offence failed. Therefore, the accused can be found guilty of the offence of assault, because that is an ingredient of the offence. It simply means that the jury have found him guilty of the act complained of, but without the matter of aggravation. Therefore, in my opinion the deputy chairman was perfectly right in leaving this case to the jury. The cases cited show that, on a charge of feloniously attempting to shoot or of felonious wounding, there may be a conviction for common assault. So here, we are clearly of opinion that a verdict of common assault was justified in this case. We cannot measure the amount or weigh the actual violence; it was a common assault. An assault was necessary to prove the offence laid in the indictment, but the intent laid in the indictment failed. For these reasons the conviction is upheld.

Appeal dismissed.

Solicitors: *Hibbert & Son, Mansfield; Registrar, Court of Criminal Appeal.*

[COURT OF APPEAL.]

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Mar. 18, 21.

Evershed M.R., Jenkins and Romer L.JJ.

* WHITMORE AND ANOTHER *v.* LAMBERT.

[Plaint No. K. 626.]

Landlord and Tenant—Rent restriction—Death of contractual tenant—Widow named as executrix of valid will—Death of widow without proving will—Whether tenant died "intestate"—Whether on tenant's death widow remained as contractual tenant, or by virtue of statutory right—Right of adopted daughter to remain in possession—Admissibility of evidence of unproved will—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*)—*Administration of Estates Act,* 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 5.

Executor—Position before probate. Will—Unproved will—Effect.

In 1922 the contractual tenant of a dwelling-house within the Rent Acts died, leaving a will naming his widow sole beneficiary and executrix. She did not prove the will, but remained in possession of the premises, paying the rent which was subsequently increased from time to time. In 1953 she died and an adopted daughter, who had resided with her for many years, sought to remain in possession of the premises, relying on section 12 (1) (*g*)

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of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

Held, (1) that the unproved will was admissible in evidence to prove the fact that the tenant had made a will which complied with the requirements of the Wills Act, 1837.

(2) That since the widow could have justified her entry on the premises by the will, it could not be said that her continued occupation was necessarily referable only to section 12 (1) (*g*) of the Act of 1920; that the proper inference to be drawn from the facts was that her occupancy was on a contractual basis until the increases of rent had operated to determine the contractual tenancy and to substitute therefor a statutory tenancy, or alternatively that the landlords were estopped from denying that the widow's occupancy, before the increases of rent, was on a contractual basis.

(3) That the adopted daughter could not be prevented from relying on section 12 (1) (*g*) of the Act of 1920 on the ground that the legal estate, if any, at the death of the widow, was outstanding in the President of the Probate, Divorce and Admiralty Division of the High Court.

Mackley v. *Nutting* [1949] 2 K.B. 55; 65 T.L.R. 255; [1949] 1 All E.R. 413 followed.

Quaere, whether the words "dying intestate" in section 12 (1) (*g*) (as unamended) meant dying without a will which had been admitted to probate or its equivalent.

APPEAL from Judge Wrangham sitting at Bedford County Court.

On March 29, 1922, one John Ingram, the contractual tenant of premises known as 14 George Street, Bedford, within the protection of the Rent Acts, died. At the time of his death John Ingram was a contractual tenant paying a rent of £1 6s. 8d. monthly. He left a will in which he appointed as sole executrix his widow, Mercy Ingram, but she never proved the will. Mrs. Ingram was living with her husband at the time of his death and continued in possession of the premises until she died on June 14, 1953, paying a rent which by the time she died had been increased to £2 5s. 7d. monthly. In 1924 Mrs. Ingram informally adopted the defendant, Mary Ann Lambert, who was then about 10 years old, assuming towards her the obligations as to maintenance and upbringing of a parent to a child. The defendant lived with Mrs. Ingram in the premises until Mrs. Ingram died. On July 21, 1953, probate of Mrs. Ingram's will was granted to the defendant as sole executrix. On June 30, 1953, the plaintiffs, as landlords, wrote to the defendant requiring her to give up possession of the premises, and on June 10, 1954, they served a notice to quit dated June 9, 1954, on the President of the Probate, Divorce and Admiralty Division in respect of the tenancy of John Ingram which they alleged had vested in the President on the tenant's death intestate in 1922.

In August, 1954, the plaintiffs brought proceedings claiming possession. The county court judge held that, as the widow did not take out probate to the will she could not have derived any title to the tenancy under the will: her continued occupancy must, on that footing, have been referable to the rights arising

in favour of a member of a deceased tenant's family by virtue of section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,* which, accordingly, could not operate a second time at her death in favour of the defendant. He held that the legal estate had vested in the President and had been duly determined by service of the notice to quit in 1954; and he, therefore, ordered the defendant to give up possession in three months.

The defendant appealed.

Anthony Goodall for the defendant.

T. H. K. Berry for the plaintiffs.

In addition to the cases referred to in the judgments the following were cited in argument: *Phillips* v. *Welton*†; *Thynne* v. *Salmon*‡; *Attorney-General* v. *Partington*,§ and *Powell* v. *Cleland*.¶

EVERSHED M.R. From time to time difficult points of an unusual character arise under the Rent Restriction legislation, perhaps because that legislation has been superimposed on and interferes with (sometimes in language which may not have been too closely thought out) the relationship naturally arising under the ordinary law. This case appears to be an example and is found to raise (though not, I think, in the end to turn on) the scope of the words "dying intestate" in section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The point is not likely to recur, save very infrequently, for the words "dying intestate" have ceased for some 20 years past to be a part of the paragraph to which I refer. They were in fact excluded from it by amendment in 1935.[1] It may have been thought that the words "dying intestate" were in any case not well chosen, for the question might arise whether a person died intestate for the purpose of the paragraph if he had made a will which was duly proved but which did not mention the premises which were the subject of the claim to possession. It is, however, not necessary to consider the reason: the fact is, that the words I have mentioned are now no part of the Act of Parliament.

The relevant facts are these: one John Ingram went into occupation of the premises in question known as 14 George Street, Bedford, in or about 1920, and he paid a rent of £1 6s. 8d. per

* Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (unamended): "(1) . . . (*g*) . . . "the expression 'tenant' includes the "widow of a tenant dying intestate "who was residing with him at the "time of his death, or, where a "tenant dying intestate leaves no "widow or is a woman, such member "of the tenant's family so residing as "aforesaid as may be decided in "default of agreement by the county "court."

† [1948] 2 All E.R. 845.

‡ [1948] 1 K.B. 482; 64 T.L.R. 63; [1948] 1 All E.R. 49.

§ (1864) 3 H. & C. 193.

¶ [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.

[1] See s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935.

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month. Mr. Ingram died on March 29, 1922, and thereupon his widow, Mrs. Ingram, continued in occupation of the premises. She so continued for over 30 years until she died on June 14, 1953. In 1924 she adopted the defendant, Miss Mary Ann Lambert, who was then a young girl aged about 10 years. I have said "adopted," but this was not a case of adoption subject to the Adoption Act, 1950. Mrs. Ingram assumed towards Miss Lambert the obligations as to maintenance and upbringing of a parent to a child. After Mrs. Ingram's death in 1953 the defendant has in turn remained in occupation of the premises and she is now over 40 years of age. The defendant is also the legal personal representative of Mrs. Ingram whose will she proved. That might well have a bearing on the conclusion of this case. Thus, if Mrs. Ingram had been found to be a contractual tenant at her death, the defendant's right would have been quâ personal representative a successor to Mrs. Ingram's contractual right. But I think (and there has been no argument to the contrary) that if Mrs. Ingram became, after her husband's death, a contractual tenant, a series of increases of rent made her a statutory tenant by the date of her death. At any rate, Mr. Goodall's argument for the defendant has rested solely upon rights which he seeks to derive for her under section 12 (1) (*g*) of the Act of 1920; and we have accordingly confined ourselves to that submission.

The present proceedings for possession were brought by the plaintiffs, who appear to have acquired the premises, subject to Mrs. Ingram's occupation, somewhere in the early nineteen-thirties. Before starting the proceedings they duly served notice to quit upon the President of the Probate, Divorce and Admiralty Division of the High Court. No grounds have been suggested whereby the plaintiffs could obtain an order for possession (that is, for example, under one or other of the provisions of the First Schedule to the Act of 1933) if the defendant is in truth now a tenant within the meaning of the Act. The plaintiffs say that she is not; and the question is whether they are correct in so asserting.

If then the defendant is to succeed upon the case submitted on her behalf she must bring herself within section 12 (1) (*g*). I have referred to it many times and it is familiar, but it would be right that I should refer to some of its language with the reminder that, although one often speaks of "claiming under "section 12 (1) (*g*)," it is only so by virtue of the extended definition which that paragraph gives to the word "tenant." [His Lordship read the subsection as set out above and continued:] So far as the defendant is concerned she claims under the latter part of the definition; but by the time Mrs. Ingram died the words "dying intestate" had been excluded so that such a qualification was no longer necessary in the defendant's case.

It may be taken as well settled, as regards any premises and any family, that the paragraph can only operate once, that is without the machine being, as it were, wound up for a new start

by the grant or creation of a fresh contractual tenancy. Thus, if A be the tenant, whether contractual or statutory (*Moodie* v. *Hosegood* [2]), on A's death his widow may claim the benefit of the definition under paragraph (*g*). If she does so, on her death no member of her family can invoke the paragraph unless, as I have said, a new start has been made by the creation of a new contractual relationship with Mrs. A. It follows that the defendant has in the present case two obstacles to surmount. She has first to show that Mrs. Ingram was not a mere "section 12 "(1) (*g*) tenant" at the date of her death or at any other relevant time; and, second, she must show that she herself qualifies as a "member of the tenant's family so residing as aforesaid." The second point has been conceded in her favour and that obstacle is, therefore, removed.

At the trial the defendant sought on the first matter to show that Mr. Ingram was never a tenant at all. He was, it appears, a meek military musician, and Mrs. Ingram was the more dominating character, from which it was to be inferred that she herself had always been the tenant. The defendant failed on that matter of fact. It was held by the judge (and his finding cannot be disturbed) that Mr. Ingram was a contractual tenant of these premises at the date of his death. It follows, therefore, that unless a new contractual tenancy in favour of Mrs. Ingram came into existence, or something equivalent thereto, she was either a mere licensee or she owed her rights to the operation of paragraph (*g*). The judge's conclusion was: "Mrs. Ingram was "no more than a tenant under section 12 (1) (*g*)." If that is right it is, of course, an end of the defendant's case.

In this court, however, a new point has been raised on her behalf to the effect that Mrs. Ingram could not be a "section 12 "(1) (*g*) tenant" for the simple reason that Mr. Ingram did not in fact die intestate. It should be remembered that at the time when he died, paragraph (*g*) required of a widow who was claiming under that paragraph that her husband, the tenant, should have died intestate. It is not in doubt that no representation to the estate of Mr. Ingram was ever taken out, either by way of grant of letters of administration or by way of probate of a will; but evidence was given before the county court judge that Mr. Ingram had in fact made a will in accordance with the terms of the Wills Act, 1837. That evidence was objected to by Mr. Berry and he maintained his objection in this court. It does not appear that the objection was noted by the judge at the time but he said: "John Ingram made a will. In that will his widow "was named as sole beneficiary and executrix. Now if Mrs. "Ingram had taken out probate of the will she would have been "entitled, upon taking the proper steps, to succeed to her "husband's tenancy"—meaning thereby, of course, the contractual tenancy—"and would then have been a tenant within

[2] [1952] A.C. 61; [1951] 2 T.L.R. 455; [1951] 2 All E.R. 582.

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"the words of section 12 (1) (*f*) of the Act. But she never did. "Probate of that will has never been taken out. Mrs. Ingram "never acted as executrix. In these circumstances it seems to "me that section 5 of the Administration of Estates Act, 1925, "affords a complete answer to any contention that Mrs. Ingram "derived any title to the tenancy of 14 George Street under the "will of her husband; nor, as I understood him, was Mr. "Bairstow," who then appeared for the defendant, "able to "argue to the contrary."

Section 5 of the Administration of Estates Act, 1925 (which was not in operation when Mr. Ingram died), provides: "Where a person appointed executor by a will—(i) survives the "testator but dies without having taken out probate of the will; ". . . . his rights in respect of the executorship shall wholly "cease, and the representation to the testator and the adminis- "tration of his real and personal estate shall devolve and be "committed in like manner as if that person had not been "appointed executor." Although that section was not in operation when Mr. Ingram died, it reproduces the terms of the Court of Probate Acts of 1857 and 1858.[3] The new point challenges the validity of the judge's conclusion, particularly his view that section 5 of the Administration of Estates Act, or its predecessor, afforded an answer to the point. I have said that the matter as raised by Mr. Goodall in this court is a new point, for it will be recalled that his predecessor before the county court judge was unable to argue to the contrary of the conclusion stated by the judge. This, however, is a Rent Restriction Act case and, in any event, Mr. Berry, for the plaintiffs, has conceded that Mr. Goodall ought to be entitled to submit his argument in this court, whether or not it was involved in that submitted in the county court.

Mr. Berry's argument in support of the conclusion is of a general character. He says that no evidence of any will or of its contents, when the will has not been proved, can ever be received except for purely collateral purposes. For example, it may be proved that A.B. was alive at a certain date by proof of his signature being on a document which was executed on that date. But, says, Mr. Berry, an instrument cannot be proved to be a will properly within the terms of the Wills Act unless that will has already been proved, or unless it is sought to be proved in the course of proceedings for obtaining probate or letters of administration cum testamento annexo.

Mr. Berry referred us to section 60 of the County Courts Act, 1934, and to section 150 of the Supreme Court of Judicature (Consolidation) Act, 1925, and claimed that to admit the evidence here would involve the county court exercising a probate jurisdiction as a matter of procedure which it was not entitled (nor intended) in any way to do. I do not think that that broad proposition can be sustained in its wide form. It is no doubt perfectly true that

[3] See s. 16 of the Act of 1858.

the title to any property of a deceased person cannot be finally made good by virtue of his testamentary disposition unless that disposition has been admitted to probate. But, in my judgment, it is no less clear that a person appointed executor or executrix by will can do a number of things, and justify doing them, in regard to the property which was in the possession of the deceased, by virtue of the will before that will is proved: even though, because the executor or executrix dies, it never is proved, or capable of being proved by virtue of section 5 of the Administration of Estates Act.

One such thing which the executor may do or justify doing is entering upon property which was in the ownership and occupation, or in the occupation only, of the deceased. In support of that reference may be usefully made to Williams on Executors, (1921), 11th ed., vol. 1, p. 213, as follows: "Upon the principles "stated in the course of the preceding section, it has been held "that the executor, before he proves the will, may do almost all "the acts which are incident to his office, except only some of "those which relate to suits. Thus he may seize and take into "his hands any of the testator's effects, and he may enter peaceably into the house of the heir, for that purpose, and to take "specialities and other securities for the debts due to the "deceased. He may pay, or take releases of, debts owing from "the estate; and he may receive or release debts which are owing "to it; and distrain for rent due to the testator. . . . So he may "sell, give away, or otherwise dispose, at his discretion, of the "goods and chattels of the testator, before probate; he may "assent to, or pay, legacies; he may enter on the testator's "terms for years." Those general propositions represented the state of the law when Mr. Ingram died and have not been qualified by the subsequent changes in the law.

We were also referred by Mr. Berry to a passage from the judgment of the Judicial Committee in the Privy Council delivered by Lord Parker in *Chetty* v. *Chetty*.[4] The facts of that case are not material for present purposes, but in the judgment Lord Parker said[5]: "It is quite clear that an executor derives his "title and authority from the will of his testator, and not from "any grant of probate. The personal property of the testator, "including all rights of action, vests in him upon the testator's "death, and the consequence is that he can institute an action in "the character of executor before he proves the will. He cannot, "it is true, obtain a decree before probate, but this is not because "his title depends on probate, but because the production of "probate is the only way in which, by the rules of the court, he "is allowed to prove his title." As regards section 5 it will be observed that in the case of a sole executor dying before he has taken out probate, the result is that that executor's personal representatives cannot take out probate of the original will so as

[4] (1916) 85 L.J.P.C. 179. [5] Ibid. 181.

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to relate their title back to the death. In that event, they would have to apply for a grant of letters of administration. That, however, is not the point which is involved in the present case. I do not for my part conceive it necessary, or indeed desirable, to attempt any exhaustive statement of the purposes for which evidence may be given of an unproved will; nor do I think it necessary to express any concluded view upon the question whether the words "dying intestate" in the original paragraph (*g*) of section 12 (1) of the Rent Act of 1920 mean, and mean only, dying without a will which has been admitted to probate or its equivalent. I think it sufficient to say that, in my view, the facts of Mr. Ingram having made a will appointing his widow sole executrix, and having made it duly in accordance with the requirements of the Wills Act, was a fact properly admissible in evidence in this case; and I think that, having been admitted, that fact has a strong bearing on the question which the court is called upon to answer. For, whatever be the true meaning of section 12 (1) (*g*) of the Act, Mrs. Ingram quite clearly after her husband's death could have justified her entry upon the premises by reference to the fact that she had been appointed by her husband as his sole executrix, and she could thereafter at any time, if necessary, have proved the will.

It was suggested that Mrs. Ingram may not have known or perhaps did not know of the existence of the will. I cannot draw any such inference. Where the will came from at the trial appears to me to be somewhat of a mystery, but having regard to the facts which are known of the circumstances affecting Mr. and Mrs. Ingram's relations together as man and wife, I think it highly improbable that she did not know of the making of the will and, in the absence of something to the contrary, I should infer that she did know. It follows, therefore, that it cannot be said, in my judgment, that Mrs. Ingram's continued occupation after her husband's death could only have been referable to a statutory claim on her part under section 12 (1) (*g*); and once that stage is reached, what thenceforward is the proper inference to be drawn on the whole matter?

The court has been supplied with two rent books. The first begins in October, 1923, and there is inserted on the outside against the printed phrase "Tenant's name"—"Mrs. Ingram"; and it appears that rent at the contractual rate of £1 6s. 8d. went on being paid until, at any rate, March, 1928. The second rent book, which was not a printed form, but was created out of an ordinary small notebook, states on the left hand inside cover: "Mrs. Ingram, 14 George Street, tenant of F. G. Whitmore," that is, one of the plaintiffs. It is opened on the right hand side under the general heading "Rent due and paid November 1," and then the date is repeated in figures "1/11/35, F. Whitmore." On the inside cover again there is written "Two guineas per "month including rates," and below that: "From March 1, "1940, £2 3s. 4d." and "From July 1, £2 5s 7d." The book

appears to show that the rents at those varying rates were paid regularly right up to the close of the entries in 1953.

I have already said that Mrs. Ingram remained in possession on the terms recorded in these books for about 30 years. There is no evidence that the landlords, either the predecessors of the present plaintiffs, or the plaintiffs, made any inquiry whether Mrs. Ingram continued in occupation by virtue of a will left by her husband or otherwise. In my judgment, therefore, the plaintiffs cannot successfully say that all that occurred during Mrs. Ingram's occupancy after her husband's death should be attributed to a right which she had by virtue of section 12 (1) (*g*) of the Act of 1920, which left to her landlords no course open other than to act as they did. In all the circumstances of the case (including, as I have said, the fact that when Mr. Ingram died Mrs. Ingram's occupation could have been referred by her to the fact of her husband's will), I think that the proper inference is that her situation as occupant of the house after her husband's death ought now to be treated as having been upon a contractual basis until the increases of rent brought into operation the effect of the Act to determine the contractual tenancy, and substitute therefor a statutory tenancy. Alternatively, I think that on these facts the plaintiffs are estopped from denying that Mrs. Ingram's early occupation, until the increases of rent, was upon a contractual and not upon a statutory basis. It follows, therefore, from those premises that, in my judgment, the defendant should have succeeded, and that section 5 of the Administration of Estates Act, 1925, did not provide any answer to the defendant's claim.

One final point was suggested. It was said that since no representation was taken out to the estate of Mr. Ingram, the legal estate in the tenancy had been outstanding in the President of the Probate Court, or his predecessor, from 1923 until it was determined by the notice to quit in 1954; so that, when Mrs. Ingram died it was impossible then for anything to pass on to the defendant, Mrs. Ingram having at most merely a contractual right enforceable in a court of equity. In my judgment, that objection cannot be sustained, and I think it is covered by certain observations of Cohen L.J., who delivered the leading judgment of the Court of Appeal in *Mackley* v. *Nutting*.[6] That case in many respects bears a strong resemblance on its facts to the present case. Upon this point it was similarly suggested that the defendant in the case, Miss Nutting, could not rely upon the paragraph. Cohen L.J. said[7]: "Mrs. Nutting," who corresponds for the present purpose with Mrs. Ingram, "had she "been alive could, therefore, clearly have relied on estoppel "against the landlords. Does that right pass to the defendant, "Miss Nutting", who corresponds with the present defendant,

[6] [1949] 2 K.B. 55; 65 T.L.R. 255; [1949] 1 All E.R. 413.

[7] [1949] 2 K.B. 55, 62.

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"as her legal representative? In my opinion, it does." Then the Lord Justice cited a passage from Spencer Bower on Estoppel, (1923) [p. 151]: "'Speaking generally, on the death or disability "'of the representee, the persons who in right of him or his "'estate would be entitled to enforce any contract made with "'him are the persons who can take advantage of any rule of "'evidence, and, therefore, of any estoppel, which would be "'available to the representee if alive, or free from disability.'" I think from that language, and the earlier part of the judgment which I do not read, it is clear that in the present case, as in *Mackley* v. *Nutting*,[8] the answer is that the somewhat artificial situation created by the circumstance of Mrs. Ingram's death that the legal estate, if any estate was then involved, was outstanding in the President does not prevent the defendant from alleging and relying upon section 12 (1) (*g*) of the Act of 1920.

For these reasons, which involve matters which were not, of course, before the judge, and which he did not have an opportunity of considering as we have had, I think this appeal should be allowed, and that the claim by the plaintiffs for possession should have been dismissed.

JENKINS L.J. I agree.

ROMER L.J. I also agree.

Appeal allowed without costs. Defendant's costs to be taxed as between solicitor and client under the Legal Aid and Advice Act, 1949.

Solicitors: *Bird & Bird for J. Garrard & Allen, Bedford; Field, Roscoe & Co. for C. C. Bell & Son, Bedford.*

E. D.

[8] [1949] 2 K.B. 55.

[COURT OF APPEAL.]

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*CLAYTON (VALUATION OFFICER) *v.* BRITISH TRANSPORT COMMISSION.

Rates and Rating—Assessment—Rateable value—Dock undertaking—Valuation of office premises—"Profits basis"—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22.

The British Transport Commission owned and occupied certain offices as part of their dock undertaking at Hull. These offices were formerly railway hereditaments within section 1 of the Railway (Valuation for Rating) Act, 1930, and, as such, were exempted from rates. In 1952 the hereditament ceased to be used for railway purposes and became used for the dock purposes of the Commission

and, accordingly, ceased to qualify for exemption from rates. On the question whether the hereditaments should be valued on the "profits basis" as part of the dock undertaking, or under section 22 (1) of the Rating and Valuation Act, 1925, by reference to the rent which they would command as commercial offices if so let:—

Held (1) that under modern rating law and practice a public utility undertaking was, prima facie, rated upon the profits basis and that something of a very exceptional character would be needed to exclude the application of that method of assessment; (2) that if the profits basis were to be applied at all in a case to which it was prima facie applicable, there was no room for making material distinctions in treatment between individual hereditaments and between types of hereditaments among the totality of the undertaking's indirectly productive hereditaments; and that the adoption for the dock undertaking of the British Transport Commission as a whole of the profits basis of assessment negatived the extraction for separate assessment on a wholly different basis of individual hereditaments.

Metropolitan Water Board v. *Chertsey Assessment Committee* [1916] 1 A.C. 337; 32 T.L.R. 168; *Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331; 42 T.L.R. 275 and *Metropolitan Water Board* v. *Hertford Corporation* [1953] 1 W.L.R. 622; [1953] 1 All E.R. 1047 applied.

Mersey Docks and Harbour Board v. *Birkenhead Overseers* (1873) L.R. 8 Q.B. 445 not followed.

Decision of the Lands Tribunal affirmed.

APPEAL from the Lands Tribunal by case stated.

The appellant, Glanville Clayton, the valuation officer for the Kingston-upon-Hull rating area, appealed from a decision of the Lands Tribunal affirming a determination of the local valuation court as to the values at which hereditaments described as dock offices in Queen Street, Hull, occupied by the British Transport Commission through the Docks and Inland Waterways Executive should be added to the valuation list.

After the passing of the Local Government Act, 1948, the hereditaments in question being railway and canal hereditaments were omitted from the valuation list by virtue of section 89 (4). In January, 1952, the hereditaments ceased to satisfy the requirements of that Act, being occupied and used solely in connexion with the Hull Docks. The hereditaments if vacant could be readily let as commercial offices. The local valuation court gave directions that the hereditaments should be added to the valuation list with rateable values of £208, £20 and £13, on the basis that the hereditaments ought to be valued as part of the dock undertaking. It was agreed that, if the hereditaments ought to be valued on that basis, the determination of the valuation court was correct. The valuation officer appealed against that determination contending that the hereditaments ought to be valued under section 22 (1) (*a*) of the Rating and Valuation Act, 1925, at the rent which they would command as offices. On this footing it was agreed that the rateable values would be £2,288, £288 and £234 respectively.

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The Lands Tribunal dismissed the appeal and affirmed the determination of the local valuation court and held that, in view of the fact that the hereditaments were occupied and used solely in connexion with the docks, they were hereditaments which fell to be valued as part of the dock undertaking on the profits basis and did not fall to be valued under section 22 (1) (*a*) of the Act of 1925.

The valuation officer appealed.

M. L. Lyell Q.C. and *Patrick Browne* for the valuation officer.

Michael Rowe Q.C. and *K. D. Potter* for the British Transport Commission.

Cases cited in argument are referred to in the judgments.

EVERSHED M.R. This is an appeal by the valuation officer for the Kingston-upon-Hull rating area, and relates to certain premises owned and occupied by the British Transport Commission through the Docks and Inland Waterways Executive as part of the dock undertaking of that executive. The premises consist of offices which were formerly railway hereditaments within the meaning of section 1 of the Railways (Valuation for Rating) Act, 1930, and were rated accordingly until the commencement of the Local Government Act, 1948. By section 85 of that Act railway or canal hereditaments were exempted from rates and, because the premises then answered that description, they were therefore removed from the valuation list. In January, 1952, however, the use of the premises was changed from railway purposes to dock purposes; and, since the definition of railway and canal hereditaments in section 86 of the Act of 1948 does not include hereditaments used for dock purposes, they ceased to qualify for the exemption and became liable to be restored to the valuation list. The question in the case is: at what values should they be restored?

In paragraph 8 of the case stated it is said that it was agreed between the parties for the purposes of the appeal before the Lands Tribunal that, if the valuation officer was entitled to make an independent valuation of these hereditaments by reference to the rent which they would command as commercial offices, then the figures which he had proposed would not be excessive, and also that "if the hereditaments ought to be valued as part of "the dock undertaking" the values should be those determined by the local valuation court. That agreement is in fact recorded in certain correspondence annexed to the case.

It was contended, as a preliminary point both below and in this court by Mr. Rowe, that by that agreement the appellant, who was the valuation officer, had in effect conceded himself out of the arena; for it is quite apparent from the way in which it is stated and from the contentions recited in the case that these hereditaments were and are in fact owned and occupied as part

of the dock undertaking. But I feel no doubt that, although that matter of fact is not without its significance, yet it would not be right to suppose that the parties had deliberately entered into such an agreement as made the argument in this court really impossible: in other words, I think it was the intention of both parties that the question put forward on behalf of the valuation officer, which is a question of some significance and some novelty, should be adjudicated upon in this court.

The question may, I think, be put quite briefly somewhat in the manner that Mr. Browne formulated it in the course of his reply. He said that it is fundamental to all rating law that one must take any individual hereditament and value it upon the footing of what it would command to prospective tenants in the market. He said that in this case there was no doubt that the offices in question were offices which would command, in a competitive commercial market, a rent easily capable of ascertainment: in other words, as offices they could not be said to be only of value to a dock undertaking occupying them as part of such an undertaking. "Therefore," said the appellant here, "you should adopt what the statute says is the basis upon which "you should rate." I see the force of that contention, and, if this matter had come before the court half a century ago, it may well be that it would be a contention to which we should, or could, have acceded. But, in my judgment, during the course of the last half century at any rate, there has grown up a method of proceeding in regard to public utility undertakings which is sometimes referred to as the profits basis of valuation, which I think makes it impossible for this court to accept the contention put forward by the valuation officer and impossible for us to say that one can segregate these offices, rate them by application of the ordinary principles of section 22 of the Rating and Valuation Act, 1925, and at the same time quoad the rest of the undertaking, or indeed quoad the undertaking as a whole, concede the propriety of the profits basis of valuation.

A number of cases has been referred to in the course of the argument, but I should like to adopt and make the premise of my judgment what was stated by my brother Jenkins in the last of the cases which came before this court, namely, *Metropolitan Water Board* v. *Hertford Corporation*.[1] Jenkins L.J. said: "But if the 'profits basis' is to be applied it follows that the "net annual values attributed to all the hereditaments (directly "or indirectly productive) must not exceed the cumulo value, "and it follows, further, that to achieve this end consistently "with a fair apportionment of the cumulo value amongst the "hereditaments in the several rating areas, and, in particular, "with the attribution of a fair proportion of it to the indirectly "productive hereditament here in question, an aggregate net "annual value must be placed on all the indirectly productive

[1] [1953] 1 W.L.R. 622, 632; [1953] 1 All E.R. 1047, 1056.

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"hereditaments in the undertaking, and a fair proportion of that "net annual value must be attributed to this hereditament." It is fundamental to that proposition that you take the indirectly productive hereditaments together, arrive at a net annual value for them as a totality, and then proceed to apportion that total valuation among the individual units: in other words, if that proposition is sound, as I think myself on the authorities as I understand them it is, then it is a negation of the proposition that you can, while applying the cumulo principle, the profits basis principle, to the undertaking as a whole, segregate individual items of assets (whether they are productive or unproductive hereditaments) and proceed to value those items distinctly and without any apportionment to them of the total profits basis valuation. It need hardly be said that if such picking out, such selective segregation, were allowable, considerable practical difficulties might be encountered in the process of selection. Arithmetically it seems also fairly clear that you would certainly fail to achieve as between parish and parish a fair apportionment of the burden, if it is to be assumed that all parts of an undertaking, treated as a whole, ought to bear a proper part of the total liability to rates, particularly since many parts of an undertaking, such as a water undertaking or a dock undertaking, are of a nature which in themselves could not conceivably command any rent in a competitive market.

I shall have occasion to refer briefly hereafter to one or two of the other cases, but for the moment I will confine myself to the passage which I have read from my brother's judgment and from it proceed now to state the grounds upon which I am led to the conclusion which I have stated. The statement in Jenkins L.J.'s judgment is founded upon earlier citations from the cases which he made and is founded upon the view that, under modern rating law and practice, a public utility undertaking, such as a water board or a dock undertaking, is prima facie rated upon this profits basis. I think it hardly necessary to take time by stating what the basis is. It is sufficient to say that you get for the whole undertaking a single figure representing, in effect, its annual earnings. As Jenkins L.J. pointed out in *Metropolitan Water Board* v. *Hertford Corporation*,[1] there is no statutory sanction for that method of fixing liability for rates. It is a method whereby subject-matters, not themselves susceptible of treatment under section 22 of the Act of 1925, are nevertheless made to bear a due proportion of a just liability; and although it is said from time to time that the method, not only having no statutory sanction, is likewise not sacrosanct, so that it may be disregarded if special circumstances indicate that it should be disregarded, nevertheless it seems now well established that, prima facie, for undertakings of this character that is the proper method of assessment. Something

[1] [1953] 1 W.L.R. 622, 632.

I conceive of a very exceptional character would be needed in order to exclude the application of the method. The idea which is fundamental to the method and underlies its application is two-fold: first, that for rating purposes the sum of the various individual valuations on which individual rates will be paid to individual parishes will not in total exceed what is called the cumulo value, the single sum of earning capacity which I have mentioned; and, second, that there should be a fair apportionment among the various hereditaments in their various rating areas of the liability which, at the end of all, will be represented by a figure related to the cumulo sum. From those premises it seems to me to follow that, if the profits basis is to applied at all in a case to which it is prima facie applicable, then there is really no room for making material distinctions in treatment between individual hereditaments or between types of hereditaments among, say, the totality of indirectly productive hereditaments.

The method for which Mr. Lyell contended on behalf of the valuation officer seems to involve these stages in arriving at the result: first (and though I put it first I am not necessarily thereby saying that chronologically the process would take place first) one must find, since this is admittedly a dock undertaking, that is an undertaking admittedly on the face of the case stated appropriate for assessment on that basis, the cumulo sum, the annual value of the whole undertaking. Then, it is said, this sum—I will call it £X— is a sum arrived at before deduction therefrom of the rates for which in the end the undertaking will be liable. Next one values any indirectly productive hereditaments, which may be suitable for valuation in accordance with the principles of section 22 of the Act of 1925, as though it was an hereditament occupied otherwise than as part of the public utility undertaking—as though, for example, it was an ordinary commercially owned and occupied hereditament. One must, therefore, at this stage break away from, so to speak, or at any rate disregard, the cumulo value one has earlier conceded or arrived at. Then, having got one's valuation for the selected hereditament or hereditaments, one deducts the sums representing their annual value or values and the rates payable in respect of them from the cumulo value of £X, and the balance, if any— and I emphasize those two words " if any " because it is possible that there will be no balance— will be called £Y, which Mr. Lyell referred to as " the net cumulo." One then proceeds to treat the net cumulo by applying it and apportioning it among the remaining indirectly productive hereditaments (that is to say, those which have not lent themselves to what is called the strict method of valuation) and also among the productive hereditaments as though, first, there were no other indirectly productive hereditaments than those which were left after the first selection, and also, as I think, as though the so-called net cumulo were the original, first cumulo sum, the £X which was

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arrived at on a computation of the capacity of the whole undertaking. That, as I understand it, is the inevitable consequence of accepting Mr. Lyell's submission and the result seems to me clearly liable to throw a disproportionate liability in respect of the total amount of rates payable by the undertaking on particular hereditaments in particular parishes. Since it might happen that the cumulo value, the profits basis figure, in an undertaking carrying on its affairs in a somewhat unresponsive world were either nil or a very small sum, the figure for the selected hereditament might easily swamp and exceed the cumulo and there would be merely a minus quantity for net cumulo. But in any case I am of opinion that, as this matter has developed and having regard to the sanctity this method of assessment has acquired, there is really no warrant upon the cases for applying this hybrid method of attack.

The earlier cases referred to, namely, *Reg.* v. *Mile End Old Town Overseers* [2] and *Reg.* v. *Proprietors of the West Middlesex Waterworks*,[3] were cases decided before this method of assessment for public utility undertakings had acquired its form and more or less stereotyped shape. But they were (and I think Mr. Rowe was entitled so to say) really concerned with the method of apportionment, dividing up the total figures, which had been arrived at and which had been accepted in those cases, among the component parts. More important, however, for present purposes are two cases in the House of Lords, *Metropolitan Water Board* v. *Chertsey Assessment Committee* [4] and *Kingston Union* v. *Metropolitan Water Board*.[5] They were both cases relating to the Metropolitan Water Board, but no question has arisen that what is true, as a matter of principle in rating a water undertaking, is applicable, generally speaking, no less to a dock and canal undertaking. It is, I think, possible to take sentences from the speeches in those cases and to say that they seem to contemplate not merely a consideration of the question whether one applies the profits basis wholly or not at all, but whether, applying the profits basis, one may have room within it for some variation in method. There are passages, for example, such as one I will read by way of illustration from the speech of Lord Parker in the first case, which the valuation officer thought lent some judicial support to his contention. Lord Parker said, after referring to the practice of taking the profits basis method of assessment with water undertakings [6]: "The origin of this rule is not very clear, but it may, "I think, be explained as follows: In considering what the hypo- "thetical tenant will pay by way of rent the company itself "cannot be excluded as a possible tenant. If there are possible

[2] (1847) 10 Q.B. 208.
[3] (1859) 1 E. & E. 716.
[4] [1916] 1 A.C. 337; 32 T.L.R. 168.
[5] [1926] A.C. 331; 42 T.L.R. 275.
[6] [1916] 1 A.C. 337, 360.

" tenants other than the company, the annual rent may be esti- " mated on a competitive basis, but if, as is generally the case, " the company is the only possible person who would be likely " to give any rent at all for the property, the competitive basis " is excluded." It think that that language was not directed at all to the sort of question which has been here raised; and I do not say it is not a significant and interesting question. But Lord Parker was, in my judgment, considering, and considering only, whether the profits basis should be applied where the undertaking treated as a whole for rating purposes was occupying premises for the occupation of which there would be no competition in the ordinary course.

Ten years later, in *Kingston Union* v. *Metropolitan Water Board*,[7] I think the sanctity (I will not say rigidity) of this method of assessment in the case of public utility undertakings was perhaps more emphasized, particularly in the speech of Lord Cave L.C. The language he used makes it, to my mind, tolerably clear that Lord Cave L.C. was applying himself not to individual items in the total occupied property of the whole, but to the hereditaments taken all together. That is, to my mind, clear enough, if one reads the whole passage in his opinion from pp. 337 to 340. I take one passage from which I will read enough to make clear the line of reasoning[8]: " The mains and other works in any " particular parish, taken by themselves, might conceivably " produce no rent at all, for it is almost impossible to suppose " that any person would wish to become the tenant of them; but " the same hereditaments, if looked upon as part of a great " undertaking extending over a large and populous area, might be " quite indispensable to the undertakers (who must be regarded " as possible tenants) and so might command an extortionate " rent. In these circumstances it was desirable, in order that a " fair assessment might be arrived at, to devise some formula " which, while allowing a fair value to the hereditaments in each " parish, would not compel the undertakers to pay rates on an " aggregate sum exceeding the whole yearly value of their under- " taking; and, accordingly, rating surveyors, soon after the pass- " ing of the Act of 1836, began to assess waterworks and other " like concerns, such as railways, canals, gasworks, etc., upon " the basis of the profits earned by the whole undertaking. From " the gross receipts of the undertakers for the preceding year " they deducted working expenses "—and then certain other deductions—" and treated the balance remaining (which would " presumably represent the rent which a tenant would be willing " to pay for the undertaking) as the rateable value of the entire " concern. It was then necessary to distribute this rateable value " among the various parishes into which the undertaking " extended, and this was effected by dividing the hereditaments " in each parish into indirectly productive assets (such as

[7] [1926] A.C. 331.

[8] Ibid. 338.

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" intakes, filter-beds, reservoirs, pumping stations and carrying " or pumping mains) and directly productive assets (such as the " service pipes which actually carried the water to the con- " sumers), and by allowing to the parish a percentage on the " structural (or contractor's) value of property of the former class " contained in the parish, and a proportion of the remainder " based on the water revenue arising there. Thus, a series of " assessments was reached which, while giving to each individual " parish a fair proportion, based upon the hereditaments which " it contained and the revenue which it produced, of the total " rateable value, did not in the aggregate exceed the rental which " the undertakers or any other possible tenants might be expected " to pay for the whole undertaking in any year."

Although I agree, of course, that Lord Cave L.C.'s mind was not directed to the point now raised or the arguments in support of it, still it does seem to me that his formulation of the justification for the profits basis really excludes, or any rate ought to be treated as excluding, exceptions of the kind suggested by the valuation officer; whereby one would, while applying the profits basis for other purposes, first of all, in effect extract by selection certain suitable premises altogether from the undertaking. In an earlier passage in Lord Cave L.C.'s speech he made use of a phrase to which I will allude because Mr. Lyell referred to it. It was where [9] Lord Cave L.C. spoke of the origin of this rule, and said that in this class of case it was necessary for rating experts and the courts to have recourse to hypotheses of a more or less violent character. It was the argument, and an attractive argument if I may say so, for the valuation officer, that it is contrary to principle to have an hypothesis, and particularly an hypothesis of a violent character, when the facts do not call for any hypothesis at all. I follow the argument, but, as I have already said, I think for my part that once the method of assessment for something which, as is admittedly the case here, is proper to be regarded for rating purposes as a single unit and as a dock undertaking, there is no room for having the best of both possible worlds.

I conclude my references to authority first by reading another passage in the judgment of Jenkins L.J. in *Metropolitan Water Board* v. *Hertford Corporation*,[10] where, before referring to Lord Cave L.C.'s speech, my brother said [11]: " The manner of apply- " ing its general principles, no doubt, admits of variation to suit " the peculiarities of individual cases, and, no doubt, there may " be cases in which there are special circumstances sufficing to " justify its total exclusion. Nevertheless, the ' profits basis ' has " behind it the sanction of long practice and of judicial approval " over many years, and at the present time it may, I think, be " said that as a matter of law it is prima facie the right method " to apply in a case of this kind, the onus of showing special

[9] Ibid. 339.
[10] [1953] 1 W.L.R. 622.
[11] Ibid. 631.

"circumstances justifying a departure from it being on those "who advocate such departure." With that sentence I respectfully entirely agree. It was said that the first part of the first sentence in that passage clearly intimated that one might, without excluding the application of the profits basis altogether, apply it with modifications, such as the extraction for the purpose of separate assessment of particular hereditaments which were suitable for such extraction. Though my brother was properly and naturally reserving himself against the effect of a too dogmatic statement of the practice and the law, I do not think he was contemplating so much a modification of the profits basis, but an application of it at the same time as an application of a quite different method in regard to one and the same subject-matter, namely, the undertaking of a public utility undertaking. It is at that point that I think that, as the authorities stand, it is impossible for us to go with the argument of the valuation officer. It may be, as Mr. Rowe conceded, that in arriving inter se at the proper proportion of the sum to be borne for rating purposes by the indirectly productive hereditament one may, instead of taking a percentage of capital value, adopt a method of competitive tenancy or the assumed product of a competitive tenancy. That, however, is another matter. I think that the adoption for the undertaking as a whole of the profits basis negatives the extraction for separate assessment on a wholly different basis of individual hereditaments.

In the course of his reply Mr. Browne referred to *Mersey Docks and Harbour Board* v. *Birkenhead Overseers*,[12] a case decided in the year 1873 in the Queen's Bench Division. In that case it appears to be true that, as regards certain warehouses, the court assented to their assessment on what is now the section 22 basis, while the other assets of the harbour board appear to have been assessed according to something corresponding with the profits basis. I think, in the first place, that in the year 1873 the full weight and significance of the profits basis method of assessment had not been apprehended. I think also, from the facts, that it may well be that the circumstances relating to these warehouses, particularly the fact that they were from time to time let to other persons by the harbour board, may have justified the view that they represented an undertaking distinct in many respects from the undertaking of the docks and harbour board properly so called. At any rate, in the light of later authorities I do not think that *Mersey Docks and Harbour Board* v. *Birkenhead Overseers*[12] could justify this court in adopting in face of the later decisions the argument here put forward on behalf of the valuation officer. I therefore think upon this main point that the view of the tribunal was correct.

A second point was intimated on behalf of the commission which was to this effect—that since these offices had before 1948

[12] (1873) L.R. 8 Q.B.D. 445.

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been on the railway list when they were railway hereditaments within the wider definition of the Act of 1930, so if they were put on any list at the present time they could be only put on with the same valuation for rating purposes as they had previously borne. Such, it was said, was the effect, not express but implicit, of section 89 (6) of the Local Government Act, 1948. In the view which I take, it is unnecessary to express a final view upon that point, but, as at present advised, I confess I am not disposed to accept it; and it would have the effect apparently, as Mr. Browne observed, that if these offices, having ceased to be railway hereditaments, had then been occupied by some commercial undertaking of an ordinary character, they would still, if put on the list at all, have been put on at their old railway figure. That does not appear to me to be either sensible or contemplated. I need say no more on that point, for, as I have already said, I think that the tribunal rightly concluded the main argument, and I would dismiss the appeal.

JENKINS L.J. I agree.

ROMER L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; M. H. B. Gilmour.*

B. A. B.

[COURT OF APPEAL.]

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Denning and Parker L.JJ. and Roxburgh J.

* SMITH *v.* PORT LINE LD.

Dock—Regulations—Crane or winch—Signaller—Crane engaged in loading barge—Scope of duty to provide signaller—Area of duty defined—Docks Regulations, 1934 (*S.R. & O.* 1934, *No.* 279), *reg.* 43.

There is no obligation under regulation 43 of the Docks Regulations, 1934, as modified by the proviso thereto, to employ a signaller when cargo is being loaded into or unloaded from a lighter, if the driver of the crane working the fall has a clear and unrestricted view, limited to those parts of the hold where work is actually being carried on at the time, when the set is over the hatchway.

Accordingly, where the plaintiff, a lighterman in charge of the loading of a lighter, moved forward unexpectedly along the gunwale to give orders to men working in the lighter, and was injured by the swing of the crane, but it was found that at the time the crane-driver had a clear and unrestricted view of those parts of the hold where the work of loading was being carried out:—

Held, on a claim for breach of statutory duty, that the duty to employ a signaller under regulation 43 did not arise, since

the plaintiff was outside the area of danger in which the duty arose; and that as the owners of the crane had not been negligent the plaintiff's claim failed.

Decision of Devlin J. reversed.

Ashworth v. *McGuirk & Co. Ltd.* [1944] 1 K.B. 1; 60 T.L.R. 14; [1943] 2 All E.R. 446 distinguished.

APPEAL and cross-appeal from Devlin J.

On July 17, 1952, the plaintiff, William David Smith, a lighterman, was in charge of a lighter which was being loaded with sacks of wool in the London Docks. A mobile crane, of a modern type in general use throughout the docks, was on the quay, picking up bales and transferring them into the lighter. The after-part of the lighter had been filled and the forward part had still to be loaded. The plaintiff, who had been standing at the stern, walked forward along the gunwale of the lighter to tell men down in the lighter receiving the bales to fill up a space in the after-part. While he was talking to them, the crane slewed round and struck him, as he stood in the very arc of the swing, and he was thrown into the barge and injured.

The plaintiff brought an action against the owners of the crane, claiming, first, that their crane-driver was negligent; secondly, that the crane was not suitable for the work; and thirdly, that there had been a breach of regulation 43 of the Docks Regulations, 1934,[1] in that no signaller had been employed.

Devlin J. was satisfied, on the claim in negligence, that the crane-driver had acted with all proper care and that the real cause of the accident was the plaintiff's own fault in moving forward without notice from the back of the lighter, and held that the owners were not negligent. On the claim for breach of the regulations, he found that in the particular crane cabin the crane-driver might not have been able to see the men moving on the gunwale and on the quay, and held that it was too narrow a construction of the regulation to suppose that the area in which the duty to provide a signaller arose was confined to the very spot where work was going on, and that the reasonable meaning to give it was that the crane-driver should be able to see the place where the work was going on and yet have a sufficient area of vision round about so that he could see the movements of men at work or men coming in and out of the particular danger area of work for purposes connected with the work. His Lordship assessed the damages at £3,000 general damages and £628 special damages, and apportioned liability for the accident as to half to the plaintiff and half to the defendants.

[1] Docks Regulations, 1934, reg. 43: "When a cargo is being loaded or unloaded by a fall at a *hatchway*, a signaller shall be employed, and where more than one fall is being worked at a *hatchway*, a separate signaller shall be employed to attend to each fall. Provided—(i) That this Regulation shall not apply in cases where a barge, lighter or other similar vessel is being loaded or unloaded if the driver of the crane or winch working the fall has a clear and unrestricted view of those parts of the hold where work is being carried on."

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The owners appealed against the decision on the breach of the regulations, and the plaintiff cross-appealed against the decision that the owners had not been negligent and that he had himself been negligent.

The case is reported solely on the construction of the regulation.

Montague Berryman Q.C. and *W. G. Wingate* for the owners.
C. J. A. Doughty Q.C. and *I. F. Reuben* for the lighterman.

The following cases were cited in the argument: *Hawkins* v. *Thames Stevedore Co. Ld. & Union Cold Storage Co. Ld.*[2]; *Ashworth* v. *J. McGuirk & Co. Ld.*[3]; *Watts* v. *Enfield Rolling Mills (Aluminium) Ld.*[4]; *Jones* v. *Staveley Iron and Chemical Co. Ld.*[5]

DENNING L.J. This case raises a question as to the proper conduct of cranes in the docks. [His Lordship stated the facts and continued:]

Devlin J. on the first issue, was very impressed by the evidence of the crane-driver, a very experienced man. He said that before he moved the load, or "the set" as he called it, he looked to the left through the window of the crane and saw that all was clear; then he looked back to the set and began to swing it round. After it had gone a foot or two he saw that the plaintiff was in the way, standing on the gunwale. He immediately stopped his crane, but there was a swing on the load by that time, and the swing carried it forward with sufficient force to throw the plaintiff into the lighter. The judge said that he was satisfied that the crane-driver acted with all proper care and that the real cause of the accident was the plaintiff's own fault, in that he moved forward without notice from the back of the lighter along the gunwale and stood in the arc of the crane at the very moment when it was coming across. The crane was doing 150 of these swings in the course of an hour, and the lighterman ought not to have got in the way of it. Mr. Doughty does not contest the finding of negligence against the lighterman, but he asks us to say that the crane-driver was negligent. He says that the crane-driver ought to have looked to the left a second time before he lifted the load to swing it. I think that would be putting too high a duty on the crane-driver. He had only looked that way a second or two before, and he could not reasonably be expected to anticipate that a man would walk forward straight into the arc of the crane in this way.

On the second issue, it is suggested that the owners of the crane were negligent in that the crane in itself was not suitable

[2] [1936] 2 All E.R. 472.
[3] [1944] 1 K.B. 1; 60 T.L.R. 14; [1943] 2 All E.R. 446.
[4] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.
[5] [1955] 2 W.L.R. 69; [1955] 1 All E.R. 6.

for the purpose, because the crane-driver had not a proper field of vision. I do not think that there is anything in that point at all. This was a modern crane of a type in general use throughout the docks. It was well constructed for the purpose; and I do not think that there is any ground for attributing negligence to the defendants in that regard.

The third issue raises a question of general importance. Devlin J. has held that under the Docks Regulations a signaller should have been employed, and that on that account the defendants should be held liable. If the decision of the judge is right, it means that signallers will have to be employed on nearly every occasion when barges are loaded or unloaded in the ports of this country.

It all depends on regulation 43. The operative words are these: "When cargo is being loaded or unloaded by a fall at "a *hatchway*, a signaller shall be employed, and where more "than one fall is being worked at a *hatchway*, a separate "signaller shall be employed to attend to each fall." I stop to say that the word "hatchway" is defined as meaning the whole space within the square of the hatches from the top deck to the bottom of the hold.

Subject to the proviso which I will mention in a moment, those operative words apply to all the ships, great and small, which come to the ports of this country. The object is clear. When ships are being loaded and unloaded by cranes, the load or set goes into the hold below the deck out of the sight of the crane-driver so that he cannot see what is happening. In those circumstances this regulation requires that a signaller shall be employed. There must be a man to give signals to the driver to tell him when to raise or lower, and give any other proper direction.

But there is a proviso concerning barges and lighters: "Pro- "vided that this regulation shall not apply in cases where a barge, "lighter or other similar vessel is being loaded or unloaded if "the driver of the crane or winch working the fall has a clear "and unrestricted view of those parts of the hold where work "is being carried on." The object of that exception is clear. It is this: in the case of a barge or lighter, which is little more than one large hold, there need not be a signaller if the driver has a clear and unrestricted view of those parts of the hold where work is being carried on. In other words, if he can see where the set is going within the hold, then he need not have a signaller, for the very good reason that the crane-driver himself can see what is happening and can take steps accordingly for the safety of the men. In the great majority of barges and lighters the crane-driver can see into the hold and see all that is going on, so that a signaller is not necessary. That is the reason for the proviso.

The judge has held that this proviso does not apply unless the crane-driver has a clear and unrestricted view, not only of

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the hold itself but also of any adjoining places where people are likely to be, either approaching the danger area, or going from it, such as, for instance, the gunwale or the quay. This crane was so constructed that, when it was facing towards the lighter, taking cargo into or out of the hold, the driver could see everything in the hold quite clearly; but when it was turned round towards the quay or lengthwise along the quay, the driver could not then see everything in the hold or anyone on the gunwale because there was a pillar on the crane which obstructed the view. The judge held that this meant that the proviso did not apply and that there ought to have been a signaller.

I cannot agree with the judge's interpretation of the proviso. In my judgment all that is necessary in order to bring the proviso into play is that the crane-driver should have a clear and unrestricted view of "those parts of the hold where work "is being carried on." This means, I think, only the hold itself, and not the adjoining places like the gunwale or the quay. The effect of the proviso is that when the crane-driver brings the crane round facing the lighter, ready to raise or lower the set, he must then have a clear and unrestricted view of the square of the hold where work is being carried on, and he must keep that view for all the time that the crane is facing that way. So long as he has such a view, he can work on his own without a signaller. He must of course, in working the crane, take all reasonable care of people who may be on the gunwale or on the quay, but that is a duty imposed by the common law and not by the regulations.

On the evidence and the photographs it is quite clear that this crane-driver, whenever the rope came over the square of the hold, had a clear and unrestricted view of all the parts of the hold where work was being carried on. The proviso was therefore satisfied. There was no need for a signaller and there was no breach of the regulations.

My conclusion is that there was no fault on the part of the defendants or their driver, but the sole fault was that of the plaintiff himself. The appeal should be allowed and the cross-appeal dismissed.

PARKER L.J. I agree with all that my Lord has said, and I would only add this: The main body of regulation 43 is perfectly general in its terms—a signaller must be employed to attend to each fall at a hatchway. The proviso, however, excuses the provision of a signaller in the case, inter alia, of a barge, if, and only if, "the driver of the crane or winch working "the fall has a clear and unrestricted view of those parts of the "hold where work is being carried on."

That immediately raises two questions: First, of what must the driver have a clear and unrestricted view? And, secondly, at what point or points of time must he have such a view? Now, in regard to the first question it seems to me that the

words themselves are explicit, namely, that he is to have a view of those parts of the hold where work is being carried on. No doubt this is intended to embrace not only the very spot where the set goes down on to the bottom of the hold, but a reasonable area around, where the men in the hold will be; but I find it impossible to extend the area beyond that. No doubt it could have been provided, and it might well have been reasonable to provide, that the driver should have a clear and unrestricted view, not only of the part of the hold that was being worked, but of the whole area which might form a danger area in the course of the whole operation of taking up the sets from the quay and lowering them into the hold; but the words here seem to me to confine the area, as I have said, to that part of the hold which is being worked. I also think that a consideration of the main body of the regulation is decisive of the point. A signaller is required when a fall is worked at a hatchway, not elsewhere. If the loading was on deck, or from deck, no signaller would be necessary under this regulation, but it is only when the cargo is being loaded or unloaded by a fall at a hatchway. Accordingly, when one comes to the proviso it seems to me that it would be natural to provide that a signaller is not required when the driver has a view down the hatchway. That is all that the regulation and the proviso is concerned with.

Again, as regards the second point, it seems to me that in this context the point of time at which the driver is to have a clear and unrestricted view is when the part of the hold in question is about to become, or has become, a danger area; or in other words, once the set on the sling on the fall is over the hatchway. It seems to me that to provide for the driver to have a clear and unobstructed view of the hold when he has got his back to it, and is perhaps taking up cargo from the quay, would be perfectly idle; and again, I think a reference to the wording of the main body of the regulation assists this interpretation, because the point of time and place is shown by the words: "when cargo is being loaded or unloaded by a fall at a "hatchway." In other words, I think that this proviso is considering only the safety of the men working in the hold, and not all of the men, wherever they may be, who are connected with the process of loading or unloading. If the safety of those in the hold is adequately provided for through the driver having a clear and unrestricted view, the regulation does not apply.

If that is correct, then it seems to me to be clear on the facts of this case that there has been no breach. Once the point of time is reached when the set becomes situated over the hatchway, the driver will have slewed his crane and will have a clear and unobstructed view through the front window, and not through the front window plus the side window, or plus the small slit of window which also faces towards the front. Accordingly, in my view there has been no breach of the regulation,

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because the regulation itself, by reason of the proviso, does not apply.

I should mention, before leaving that part of the case, that Mr. Doughty referred us to the decision of this court in *Ashworth* v. *McGuirk & Co. Ld.*[1] In that case a docker engaged in unloading on the quay was injured when sacks from a sling were brought from a ship and lowered on to the platform where he was working, and there was no signaller there at the time. It is perfectly true that in that case it was assumed that there had been a breach of the regulation in that there was no signaller, despite the fact that cargo was not at the time being loaded or unloaded by a fall at a hatchway, but in fact on the quay. No point, however, as to this was taken in that case. As I have said, it was assumed that the regulation applied, and the argument dealt merely with the question whether the defendants had fulfilled their obligation by entering into a contract of employment with a signaller, or whether it was necessary in order that they should fulfil their obligation for them to secure that a signaller was there at all times. In my view that decision did not deal with this point and the matter was not argued.

So far as the cross-appeal is concerned I have nothing to add to what my Lord has said, and accordingly, I would allow the appeal and dismiss the cross-appeal.

ROXBURGH J. I agree.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Botterell & Roche; Bryan O'Connor & Co.*

M. M. H.

[1] [1944] 1 K.B. 1; 60 T.L.R. 14; [1943] 2 All E.R. 446.

[PROBATE, ETC., DIVISION.]

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Feb. 15, 16.

*MARJORAM *v.* MARJORAM.

Lord Merriman P. and Collingwood J.

Husband and Wife — Justices — Practice—Irregularities—Cumulative effect — Husband's letter to court giving his defence — Failure to inform wife—Failure to assist litigant in person to put case in cross-examination — Refusal of adjournment — Refusal to allow closing address to court on law—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 61.

Husband and Wife — Desertion — Constructive desertion — Wife's sluttishness.

A wife sought an order in a court of summary jurisdiction on the grounds of desertion and adultery. Before the hearing, at which the wife was represented and the husband was not, the husband had written to the court setting out his case and alleging

that he had left the home because of his wife's sluttishness. No notice of any kind was given to the wife or her solicitor of the existence of this letter; the allegations of sluttishness were not put in cross-examination but were first made at the end of the husband's examination-in-chief when the letter was produced to him and he was asked if its contents were true. The court refused the wife an adjournment to consider the position and if desired to call witnesses, although she was allowed to return to the witness-box to deal with the allegations; and the court further refused to allow the wife's solicitor to address the court at the close of the evidence upon the law relating to just cause for leaving in such alleged circumstances.

The charge of adultery was dismissed for want of corroboration at the close of the husband's evidence-in-chief; but the court failed to remind the husband when giving his evidence to deal with admissions and conduct alleged against him:—

Held, that there must be a rehearing, in view of the unsatisfactory nature of the trial, since (1) the court had failed to give prior notice to the wife of the allegations in the letter; (2) by failing to assist the husband to present his case properly in cross-examination or examination-in-chief the court had not complied with the provisions of section 61 of the Magistrates' Courts Act, 1952; (3) the wife ought in such circumstances to have been allowed an adjournment; (4) it was a proper case for the court in its discretion to allow the wife's solicitor to address it at the close of the evidence upon a question of law; (5) there had been misdirection upon the question of corroboration and proof of adultery.

Possible effect of *Lang* v. *Lang* [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571 upon *Bartholomew* v. *Bartholomew* [1952] W.N. 535; [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035 considered.

Price v. *Price* [1951] P. 413; [1951] 2 All E.R. 580n.

APPEAL by wife from the dismissal by the justices for the Wallington petty sessional division of Surrey on December 10, 1954, of her complaints of adultery and desertion.

In or about September, 1954, the wife went to see her parents in Ireland, taking the two children of the marriage, a boy of about seven and a girl of about four years. Early in October, 1954, shortly after her return, she saw her husband's motor-cycle at about 11.0 to 11.30 p.m. outside a house opposite the matrimonial home in which the woman with whom adultery was alleged at the hearing was living. She went across and entered the house; but she was prevented from opening one of the doors to a room inside for a few minutes. When the door was opened she found her husband and the woman alone together. The wife asked what they were doing; the woman replied "I am not doing anything." No answer was given when they were asked why the door was not opened. The wife alleged that she was dragged back home by her husband who told her he was going to leave her. For the next week or two the husband spent every evening from 9.30 to 11.30 with the woman in her house, and on October 17, 1954, he left the matrimonial home, telling the wife that he was going to live with the woman. These allegations were not claimed in evidence. The following day the wife saw the husband; and she stated in evidence that she had asked him if he was sleeping

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with the woman and that he had replied "Yes, and it's lovely, "and no matter what happens we shall always be together." This was not admitted by the husband; but he did not deny it in his evidence. He admitted at the hearing that he had been living at the woman's house since October 17, 1954; that he had told the wife that he preferred the woman's company to hers; that he would not have the wife back and that he would not go back to her.

Two days before the hearing the husband (who was not then represented) wrote a letter to the clerk of the court setting out the nature of his case, which was in effect that he had left home because of his wife's sluttishness. He complained about her alleged dirty habits, saying that she went to bed with her clothes on, and never took them off from one week to another; that she did not wash, that she did no mending and failed to look after the children properly. He denied desertion and, although admitting friendship with the woman concerned, denied adultery.

No information was, however, given to the wife or her solicitor about this letter, or the substance of it, until the end of the husband's evidence-in-chief, when the letter was produced to him and he said that the contents were all true; and the wife was never cross-examined about her alleged sluttishness. At the close of the husband's evidence-in-chief the justices announced after the clerk had conferred with them that the adultery had not been proved because of the absence of corroboration. Cross-examination was accordingly restricted to the issue of desertion, and two witnesses were called to support the allegation of sluttishness.

The wife's solicitor asked for an adjournment so that witnesses might be called to refute the allegations made at this late stage against the wife; his application was refused, although he was allowed to put the wife back into the box to answer questions about them. She admitted to being untidy and that she did not have frequent baths, but she denied the allegations of sluttishness. The justices further refused to allow the wife's solicitor to argue that the wife's alleged conduct was not sufficient answer to the charge of desertion, or to refer (as it was suggested on the appeal he wished to do) to *Bartholomew* v. *Bartholomew* [1]; and the justices dismissed the complaint of desertion on the ground that the husband had been justified, by reason of the wife's conduct, in leaving the matrimonial home.

Peter Dow for the wife appellant.
Miss Morgan Gibbon for the respondent husband.

The cases referred to in argument are cited in the judgment.

LORD MERRIMAN P., giving judgment, said that the trial had taken such an unsatisfactory course that it was impossible to

[1] [1952] W.N. 535; [1952] 2 T.L.R. 934; [1952] 2 All E.R. 1035.

support the decision; but that as it was plainly a matter which could not be decided in the absence of seeing and hearing the witnesses, there must be a rehearing. His Lordship outlined the evidence upon the issue of adultery and, referring to the impropriety of a litigant writing ex parte to the court to give his views upon the case, added that if the matter had been properly handled much harm need not have been done, because although the wife had been represented, the husband had not been, and in such circumstances, if any difficulty occurred in the presentation of his case, it was the duty of the justices to comply with the provisions of section 61 of the Magistrates' Courts Act, 1952, as to the examination of witnesses by the court. The clerk, moreover, might have done what would appear to be elementary, that was to say, he might have informed the wife's solicitor that he had received the letter, given it to him to read in open court or had it read out, so that the substance of it might be known, and then given consideration to an application for an adjournment which might reasonably have been made.

That course had not been taken, and not one single question had been put to the wife in cross-examination about her alleged sluttishness; neither was the letter, the contents of which had clearly influenced the decision of the justices, referred to at that stage. It was also relevant to the duty of the court under section 61 to remind the husband that he had not dealt with the allegation by the wife that he had admitted sleeping with the woman concerned; that also had not been done.

Referring to the dismissal of the complaint of adultery, his Lordship said: I do not in the least retreat from or retract what this court has said many times, that if justices think there is nothing in a case when they have heard one side of it they are entitled to stop it; but I also do not retract the warning that, speaking generally, it is extremely unwise to do so until they have at least heard the whole of the evidence. In this case it is manifest, to put it at its lowest, that there is a prima facie case of adultery, and, as things stood at that moment, the question, in relation to the charge of desertion, whether the wife's "sluttishness" (a word which I use to summarize the whole contents of the husband's letter) was indeed the true and effective cause of his decision to leave the matrimonial home, or whether there was not another, and even more potent, reason. Plainly, therefore, it was extremely unwise of the clerk, who, on the information we have, appears to have taken a considerable part in the proceedings, at this moment to have suggested to the justices, in effect, that this was the time to get rid of the charge of adultery. And it was done in this way: the wife's solicitor was asked by the clerk "Are you going to call any "evidence in corroboration of the charge of adultery?" and the wife's solicitor said "No," whereupon the clerk, turning to the justices, obviously gave them some advice, and then said "The

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" justices dismiss the charge of adultery for want of corroboration." Now, " for want of corroboration " does not appear in the notes, but it is quite plainly a misdirection, because Miss Gibbon, naturally, has not suggested for a moment that even on the husband's own evidence as it stood, there was no corroboration. He says he agrees with the wife's evidence about the " association "; he did say he preferred this woman's company; then he added he was not in love with her and that they did not go out together; he agreed that his wife was unable to get in; said that they were sitting together on the settee (the wife complains that they were by this settee) and listening to the radio, it was fairly late at night (he did not specify which particular programme was still running at the time the wife did get in) and the woman was reading a book; and he denied the adultery. It is impossible on that evidence to say that the husband himself had not provided some corroboration. I repeat that he had not dealt with the wife's evidence that he had, in effect, confessed adultery to her, and I do not in the least dispute the proposition, which has been established for many many years, that apart altogether from special cases, where there is some evidence of a witness being an accomplice, and so on, it is always desirable in matrimonial cases to have corroboration of the story, if possible. There is no law that it is essential, and there is no law that it is essential with regard to adultery any more than in other cases, though here, again, courts have always been cautious about accepting alleged confessions of adultery which depend solely upon the evidence of the other spouse. To that extent, at the proper time, no doubt, some caution might have been given to the justices about this so-called confession, but at any rate the time to deal with it was not then, but when it had been seen, one way or the other, whether the husband denied or admitted having made that statement to the wife, or gave some explanation, if he did make it, for doing so. I consider that the stopping of the case as regards adultery at that moment was so manifestly wrong from the point of view of both complaints that that alone would almost oblige us to order a new trial.

It goes without saying, though I do not accept the contention that this ruling absolutely precluded the wife's advocate from cross-examining about the association with this woman in relation to the charge of desertion, that at the least, as a matter of common sense, the fact that the justices had already dismissed the charge must certainly have acted as some discouragement to pursue that line of cross-examination.

But we are told that the solicitor, up to that moment, had not the faintest idea that this charge of " sluttishness " was being made. It has been said that he ought to have known. Of course, if that means no more than that, if the charge of " sluttishness " is true, then the wife ought to have instructed him about the truth, and in that sense he would have known, well and good, but otherwise I am not sure that he should assume,

or be expected to assume knowledge, that this detailed history of "sluttishness" throughout the marriage was what he ought to have come prepared to meet as the alleged justification for the withdrawal of the husband from cohabitation. At any rate, speaking for myself, I am prepared to accept the assurance that he was completely taken by surprise. Having had a hurried consultation with his client he made it known to the court that he would be in a position, given an adjournment, to call witnesses who could refute the charge. It is not necessary to say who the witnesses indicated were, because it is now clear that he did not mention the names of the witnesses to the court itself, but merely stated that he would like the opportunity to bring to the court witnesses who could refute the charge. This application was refused, and, in effect, it was intimated to him that he must be content with the privilege, which was graciously accorded, of recalling the wife, to deal with something which had never been put to her in cross-examination at all.

She was recalled. She admitted that she was untidy, and denied the allegations made by her husband specifically. [His Lordship referred to those allegations, and continued:] The justices having refused the adjournment, having given the wife no opportunity of calling witnesses to refute this charge that was sprung upon her advocate if not upon her (the justices could see, of course, whether it was sprung upon her), the wife's solicitor then wanted to argue that these allegations that were put forward as a defence to the charge of desertion were not good enough; and we are told that in particular he wished to cite *Bartholomew* v. *Bartholomew*.[1] They did not allow him to say anything. He was not allowed to cite that case, or to argue the matter as a point of law at all. Now, admitting that the complainant's advocate, who has the opportunity of addressing the court at the beginning, is not entitled to address the court on the facts again, it is common ground between counsel that, speaking generally, the practice is that if a point of law is raised the complainant's advocate has the right to address the court on the law as a matter of courtesy, a matter of discretion. It is not a matter of statutory right. It is a matter of discretion, and is the general practice, as one would naturally suppose. Miss Gibbon has very kindly made a search overnight and found that it is so stated, at any rate with regard to the criminal jurisdiction proper, in one of the older editions of "Stone."[2] It is so obviously a sensible practice that it is a great pity it was not followed in this case, particularly

[1] [1952] W.N. 535.

[2] See also r. 18 of the Magistrates' Courts Rules, 1952, whereby: "(1) "On the hearing of a complaint, "except where the court determines "under subsection (3) of section "forty-five of the Act to make the "order with the consent of the defen- "dant without hearing evidence, the "complainant shall call his evidence, "and before doing so may address the "court.

"(2) At the conclusion of the evi- "dence for the complainant the defen- "dant may address the court, whether "or not he afterwards calls evidence.

"(3) At the conclusion of the "evidence, if any, for the defence, "the complainant may call evidence "to rebut that evidence.

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having regard to the fact that the defence put forward on the charge of desertion only emerged in the way I have described, and that the justices had refused an adjournment to enable the facts about that particular defence to be fully elucidated from the wife's point of view. In other words, it seems to me that in a short space of time the clerk contrived to accumulate a considerable store of errors in the conduct of these proceedings, which, even if they were all matters of discretion, seem to me, as I said at the beginning, to make this trial so unsatisfactory that we cannot let the dismissal of these two complaints stand, and I think that there must be a rehearing.

That brings me to what I think I must say by way of supplement, so as to give the justices what little guidance we can. It must be hypothetical, for, after all, it all depends on what view they take of the facts when the case comes on again; but, as I said a moment ago, the wife's solicitor was minded to cite to the justices, in rebuttal of this justification which the husband had put forward, the case of *Bartholomew* v. *Bartholomew*,[3] which was decided by the Court of Appeal. I can very well understand why he wished to cite that case, because, without going into detail, it bears, so far as the facts are concerned, a rather striking resemblance to the alleged facts of this case. In a word, it was a case of a husband returned from active service, who found the house, as he said, in a dirty condition, and gave his wife a warning that if it was not put right within some brief time limit that would be the end; and, according to his version of the facts, which had been accepted by the commissioner who tried the case, matters had not been put right within the time limit. Accordingly he treated himself as being expelled from the matrimonial home, and, after the lapse of the statutory period, brought a petition on the ground of constructive desertion. The Court of Appeal overruled the commissioner, who had pronounced a decree nisi; but it is necessary to add this caution about the case: the two leading judgments, those of Singleton L.J. and Denning L.J., adhere to what has been called one school of thought, which, in fact, begins with *Boyd* v. *Boyd*[4] and ends with *Bartholomew* v. *Bartholomew*[5] itself. I do not propose to review that school of thought or to set out against it the rival school of thought, for both are set out in full and dealt with in detail in a recent decision of the Privy Council on an Australian appeal in *Lang* v. *Lang*.[6] At the end, the particular school of thought which is exemplified by *Boyd* v. *Boyd*[4] down to *Bartholomew* v. *Bartholomew*[5] is

" (4) At the conclusion of the " evidence, if any, for the defence, " and the evidence, if any, in rebuttal " as aforesaid, the defendant may " address the court—(*a*) if he has not " previously done so; or (*b*) with the " leave of the court, if the defendant " and any other witness have been " called on the part of the defendant.

" (5) If the defendant is allowed to " address the court twice as afore- " said, the complainant may address " the court in reply."

[3] [1952] W.N. 535.

[4] 55 T.L.R. 3; [1938] 4 All E.R. 181.

[5] [1952] W.N. 535.

[6] [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571.

decisively rejected, and, indeed, if the justices want the most authentic guidance on the point of constructive desertion they cannot do better than to look at the statement of it as laid down in that latest and most authoritative case.

Having said that, it does not follow, of course, that the decision itself, though two of the judgments were apparently based on that "line of thought," may not have been right; and it is only right to point out that Hodson L.J. does not arrive at that result by that process of reasoning. Equally it is right to point out that, so far as the very careful argument on both sides has gone, and (I think I can speak for both of us) so far as the court is aware, there is no decision in which "sluttishness" alone has been held to be a sufficient ground for a charge of constructive desertion.

But I think, really, that the most helpful suggestion to the justices who retry this case will be to remind them of another principle which is very well established. In their reasons, having accepted the evidence of the husband and rejected that of the wife on this question of sluttishness, they say: "We are of "opinion that the wife's dirty habits must have been apparent "to her, and that she ought to have realized that sooner or "later it was bound to bring about discord in their relations." Now, some criticism has been directed to the use of the word "discord." Plainly, there had been discord for some time, a very long time, according to the husband's evidence; but I think they really meant to use the word in the full sense as being "bound to, or likely to, bring about a disruption of the con-"sortium," for they go on: "We therefore found from the "evidence that the husband's complaints were in our view grave "and weighty, and that the wife must be held responsible for "breaking off the relations with her husband and that the "husband was justified in taking the course he did. We there-"fore" (they end) "dismiss this complaint also."

If that statement of their reasons had been a judgment in a suit for restitution of conjugal rights, to which the answer had pleaded just cause for refusing to return, coupled with a cross-charge of desertion by the wife in that she had expelled the husband from the matrimonial home, it is established by the recent decision of the Court of Appeal in *Price* v. *Price* [7] (not, incidentally, for the first time) that precisely the same principles would apply in these circumstances—I am omitting deliberately any complication introduced by the allegation of adultery one way or the other—to the answer to the restitution suit and to the cross-charge of desertion. That this is so in relation to a charge brought in the High Court of wilful neglect to provide reasonable maintenance for the wife appears quite plainly from the judgment of Hodson L.J. in *Price* v. *Price*.[8] I do not need to read the whole judgment, but after setting out the decision in *Jones*

[7] [1951] P. 413; [1951] 2 All E.R. 580n.

[8] [1951] P. 413, 420–421.

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v. *Newtown and Llanidloes Guardians*,[9] in which Lord Reading gave the leading judgment, and reading a passage,[10] which I need not repeat, Hodson L.J. says [11]: "That passage draws attention "to something which, I think, is perhaps not always clearly "remembered, namely, that the husband's obligation to main- "tain his wife is prima facie complied with by providing a home "for her. A wife has no right to separate maintenance in a "different home unless she can justify the fact that she is living "apart from her husband." Then he deals with that and with the proposition that at any moment she may not only have put herself right but may, by the same process, have made the husband into a deserter, and he refers to the decision of this court in *Thomas* v. *Thomas*,[12] to which I do not think it is necessary to refer back. He continues [13]: "I should not have mentioned "that point had not my brother Denning mentioned that pro- "ceedings for restitution of conjugal rights might differ in their "result from proceedings under this section. For my part I "think that the proceedings under section 23 of the Act of 1950 "are on the same footing as proceedings for restitution of conjugal "rights; if a wife becomes a deserter she would not be entitled "to maintenance just because she is a wife, that is to say, to "separate maintenance. The question of her right to mainten- "ance may depend on whether she is a deserter or whether she "is deserted or whether there is a contract between them. I do "not think that the law recognizes a sort of undefined condition "where parties are living apart in conditions which may be "described as of drift, or in some not very clearly defined condi- "tion in so far as rights to maintenance are concerned. It is "necessary that those conditions should be clearly defined, and "I think that they were clearly defined by Lord Reading C.J. in "*Jones* v. *Newtown and Llanidloes Guardians*.[14]" Somervell L.J., who had not dealt specifically with that proposition, though he had dealt with it by indirect reference to *Thomas* v. *Thomas*,[15] though not by name, added as a supplement to his judgment [16]: "I agree with what has been said about the cross-appeal. On "the question of the relationship between rights under this "section and the right to a restitution plea, I agree with what "has been said by Hodson L.J."

So, on the rehearing, I think that the justices will be well advised, first of all, to ask themselves this question of fact: "Was the wife's alleged 'sluttishness' the real and effective "cause of the husband leaving the matrimonial home; or was "the cause, in whole or in part, the husband's desire to continue "what the wife says was an improper association with the woman "mentioned?" In effect, was the "sluttishness," either wholly

[9] [1920] 3 K.B. 381; 36 T.L.R. 758.
[10] [1920] 3 K.B. 381.
[11] [1951] P. 413, 420.
[12] 62 T.L.R. 166; [1946] 1 All E.R. 170.
[13] [1951] P. 413, 421.
[14] [1920] 3 K.B. 384.
[15] 62 T.L.R. 166.
[16] [1951] P. 413, 422.

or partly, a pretext to enable the husband to carry on an improper association? It is, perhaps, worth calling attention to one point. Unlike the facts in *Bartholomew* v. *Bartholomew*,[17] so far as the note before us goes I see no evidence of anything in the nature of a warning given by the husband immediately before his departure. It is quite true that he says in his letter and evidence that he had been intending to go for years but had put it off until the children reached school age. Well, one of the children was well over seven, and the other, I think, was four, and it will be a question for the justices whether, if sluttishness was the real cause of his departure, the departure had not been somewhat unduly delayed, and to ask themselves whether it was a mere coincidence that it happened to occur about the time that this man had plainly formed a friendship with the woman with whom the wife charges him with committing adultery.

Of course, their answer to this question of fact may be decisive of the whole case, because, if they take the view that the sluttishness was not the effective cause of his departure, then there appears to be nothing further to discuss. On the other hand, if their view, after having heard all the evidence, is that that was the cause of his leaving home, then they will have to do their best to answer the question whether that alone, in light of what is said in *Lang* v. *Lang*,[18] and in light of the fact that the same sort of facts in *Bartholomew* v. *Bartholomew* [17] were not held to justify a charge of desertion, and that there is, as I have already said, no known case at present where sluttishness alone has been held either to be a complete answer to a plea for restitution of conjugal rights or to support a charge of desertion.

Further than that I do not think it is possible for us to go. In my opinion this appeal must be allowed and the order dismissing the wife's complaints set aside, and both complaints remitted for rehearing by a fresh panel of justices. I might perhaps add, finally, that we were told that an assistant or deputy clerk was acting on this occasion. It might be just as well if the real clerk acted on the rehearing.

COLLINGWOOD J. I agree. [His Lordship stated the facts, referred to the course taken at the hearing, and continued:] In my opinion it is quite impossible to support such a conclusion arrived at in such a way. In the first place, as to the adultery, the justices say that they found that the wife had good reason for suspicion of an adulterous association, but that as it was denied, and it must be proved beyond reasonable doubt, they were far from satisfied that it had been proved. At the time when they stopped the proceedings so far as the adultery issue was concerned they intimated, or it was intimated on their behalf, that they decided that there was no corroboration of the wife's

[17] [1952] W.N. 535.

[18] [1954] 3 W.L.R. 762.

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charge. Now, it is obviously impossible to say that there was no corroboration, having regard to the husband's own admission with regard to the wife's story of his association with the woman concerned. Coupled with that is the fact that he had failed to give any denial of the wife's evidence that he expressly admitted adultery with her and said how pleasant he found it. In my opinion the justices' intervention at the point at which it took place was quite unjustified. Furthermore, the husband's relationship with the woman was clearly a very relevant matter in regard to the question of his reason for leaving his wife. Was it the shortcomings of his wife that made him leave her, or was it the attractions of the other woman? And I think that the intimation by the justices at that stage was clearly embarrassing to the solicitor in his cross-examination upon that issue. As my Lord has said, it did not preclude him from pursuing that matter but it certainly made it difficult for him after the justices had intimated that so far as they were concerned they were not having anything more to do with a charge of adultery.

The second matter on which this trial is open to criticism is that no questions were put to the wife, prior to her recall to the witness-box, about the dirty habits which constituted the husband's sole defence to her charge of desertion, although the clerk to the justices had in his possession, even before the court assembled, a letter setting out in detail the charges which the husband proposed to bring against his wife. One would have thought that the first thing to be done when the case was called on would be for the clerk to hand that letter down to the representative of the wife and let him know the information which had been put into the hands of the court. But even if he did not follow that course, his obvious duty was to put to the wife seriatim the allegations which the husband had intimated he proposed to bring, and ask whether they were accepted or not by her.

The next complaint is that the first intimation of any of these charges of dirty habits was the husband's evidence—" The letter " produced is all true,"—this being his evidence in relation to the whole defence to the charge of desertion. It would be bad enough if evidence on such an issue were elicited by a series of leading questions, but to read out the witness's proof and confine his evidence on those issues to the words " That is all true " is a course which cannot possibly be supported; and the effect of that letter on the minds of the justices is obvious when one finds that their reasons, in a number of instances, are taken verbatim from the letter itself.

As if that were not enough, the justices then refused the application by the solicitor for the wife for an adjournment to enable him to call evidence to meet these charges, introduced in such a way and at such a time, and he had to content himself with putting the wife back into the witness-box and asking her to what extent she accepted the same.

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Finally the justices refused to hear the wife's solicitor when he wished to make a submission on a point of law. The exact point of law upon which he wished to make a submission was, I gather, as to what constituted or was capable of constituting grave and weighty matters in regard to the reason for one spouse leaving the matrimonial home. I imagine at that stage it was too late for him to make any submission on a point of law with regard to the question of what may or may not constitute corroboration of evidence of adultery. However, it is quite clear that he did wish to put before the justices *Bartholomew* v. *Bartholomew*,[19] and they refused, very unfortunately, to listen to him.

In my opinion each of these matters individually constituted a serious defect in this trial, and taken in conjunction with one another their force is quite overwhelming. They are irregularities of such a character, and there are so many of them, that it is impossible to support the justices' decision and there must be a rehearing. As to the matters for consideration by the justices who sit at that rehearing, I wish to say that I agree entirely with what Lord Merriman has said, in particular with regard to the question whether the wife's dirty habits, as deposed to by such witnesses as were called, did or did not constitute grave and weighty matter sufficient to justify the husband in leaving his wife, having regard to the decision of the Court of Appeal in *Bartholomew* v. *Bartholomew*.[19]

As I have said, I agree that this case should be sent back for a rehearing before another panel.

Solicitors: *Macmillan & Mott; Copley, Singleton & Billson.*

J. B. G.

[19] [1952] W.N. 535.

[PROBATE, ETC., DIVISION.]

*FORBES *v.* FORBES.

1955
April 1, 4.

Mr. Commissioner Latey Q.C.

Husband and Wife—Divorce—Cruelty—Contraceptives—Wife's deliberate refusal to have children—Insistence on contraception—Knowledge of injurious effect on husband—No fear of childbirth.

During a period of some eight years' cohabitation a wife, who on her own admission before justices had no fear of childbirth, consistently refused, with the object of avoiding conception, to allow her husband to have free intercourse, and insisted on precautions which were obnoxious to him. The husband's health was affected:—

Held, that the wife, who was well aware of the effect of her conduct upon her husband, had treated him with cruelty.

Fowler v. *Fowler* [1952] 2 T.L.R. 143 distinguished.

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UNDEFENDED PETITION for divorce by a husband.

The marriage took place on November 10, 1945, at St. Luke's Church, South Lyncombe, near Bath. The husband had served as a lieutenant-commander, R.N.V.R., during the war, and had returned to duties at the Admiralty. He and his wife had first met in 1939, and had become engaged to be married during the war. While he was away at sea she wrote him affectionate letters. She had never raised any objection to having children when they discussed the matter, and she knew that he was particularly fond of children. She was an artist of considerable talent, and had exhibited pictures in the Royal Academy.

In the events which have happened, some significance must be attached as showing her state of mind to one or two phrases in letters which she wrote to him before they were married. In a letter written on August 21, 1944, the wife had suggested separate bedrooms after the marriage; and on September 26, 1944, she wrote: "When I was younger I thought physical attraction was "the chief thing, but now I am older I find mental companionship "so much more." At that time she used to sign herself "Buttercup" in writing to him. On April 25, 1945, she wrote: "What do you mean, my sweet, by saying there is only one "thing you want *more* than to see me and that is a little "'Buttercup'?" Later, in this same letter, she wrote: "I'm "terrified of getting married. I suppose I will get over it eventu- "ally." On July 27, 1945, she wrote to him: "No, my sweet, "I'm not thinking of marrying anyone else! I'm the kind that "can always be contented because I can always interest myself, "especially in painting; whereas other girls (like Chris) have no "interest than can be used in a home except nursing, and I "suppose having a baby would be her natural bliss—and through "not having one she is restless. The food is too poor to have "one anyway. But painting is my baby—of course I have "always liked the company of men—but *only* the company!!! "except in your case! Yes, I'm lucky to be interested in "painting because it is creative, and only creative work uses up "the energy properly, or as nearly as possible."

After the marriage the parties discussed the question of having children. The wife said that the time to have a child was between the age of 35 and 40. He disagreed, and at intervals he tried to persuade her to his way of thinking. The wife maintained an evasive attitude, and gave various and inadequate excuses, especially that she did not want a baby while they continued to live at her mother's house, where they had been occupying twin beds at her instigation; but she agreed to submit to free intercourse when they should have a home of her own. She avoided discussion on the subject as far as possible. After three years he pressed the matter. She put him off sometimes with taunts such as "You only want to prove your manhood," and "'Didums' want to be a father."

Meanwhile, the husband had reluctantly acquiesced in his wife's wish for him to use contraceptives; but after she had detected him in a subterfuge which might have rendered his ordinary precaution of no avail in avoiding conception, she resorted to the use of a female contraceptive. This, in time, became repulsive to him and frustrated his sexual instincts. He reasoned with her, pointing out that this procedure was wrong, as the purpose of marriage should be procreation, or at least mutual love.

By 1950, owing to her refusal to have free intercourse, their relations had become strained. On every occasion when his natural instincts moved him the husband was faced with the same somewhat cold-blooded preparations of his wife. In that year his wife's sister give birth to a baby, and he took advantage of the occasion to try to persuade his wife how happy it would be for both of them if she followed her sister's example. She refused. He tried, successfully, to enlist her mother's persuasions on his behalf, but this only aroused the wife's resentment. They went for a holiday in Brittany together, but further persuasions he made there proved futile.

In the summer of 1950 the husband had a short affair with another woman, and in respect of which the court was asked to exercise discretion. This affair was unknown to the wife.

In August, 1952, the husband and wife had a holiday together at San Sebastien, where he was laid up for a few days, and his wife went about alone. On their return to England she seemed distraught, and when he questioned her she burst into tears and said that she had fallen in love for the first time in her life, with a man whom she had met in Spain.

In October, 1952, the husband anticipated being sent to a post at Bath, and he tried again to persuade her to become a wife in the full sense. She maintained that that must await a new home, a separate home.

In February, 1953, they stayed together for a while at a hotel or lodgings in Bath. They were there for a few weeks, and on one occasion he believed, as there had been no demonstration at all of his wife's usual preparations, that she had allowed him free intercourse. He later became convinced from the subsequent events, and the subsequent statements by the wife, that no such thing happened. On that occasion, when they were living together there, he again begged her to start a family. For the first time she definitely refused and said: "No, never, I want to "be free, to have my liberty." He was completely dumbfounded, as hitherto the main reason for her refusal had been the desire for a separate home. He told her that after all these years, years of putting him off, it was a cruel deceit on her part. He renewed his entreaties from time to time, reminded her of her marriage vows, but in vain. He was provoked into remarking to her: "I suppose you would prefer to have a baby by the man in "Spain," and she answered "Yes." He warned her that if she

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persisted in that course of conduct they would have to go their separate ways.

After a holiday together in the Western Highlands in September, 1953, during which there was no attempt at marital intercourse, she told him that she had seen a solicitor, was going to leave him, and was looking for a flat. Meanwhile, the husband had arranged to take a flat at Atworth, and in November, 1953, he began to live there. The wife had told him that she was still in love with the man in Spain.

That was the end of the married life, and she never joined him at Atworth.

On March 27, 1954, the husband's solicitors wrote to her giving notice that the flat in which they had been living, in London, must be given up, and that her husband did not propose to accept responsibility for her maintenance. They added: "Your refusal throughout the marriage to bear children led to "the increasing unhappiness and frustration of your husband "and, on June 11, 1953, to the complete breakdown of marital "cohabitation." The wife's solicitors, in reply, said: "I am "instructed that your client's allegation contained in your letter, "that his wife has throughout the marriage refused to bear "children, is quite untrue. It is, of course, a fact that there "have been no children of this union, but that, as I am "instructed, has not been the fault of my client, who has had "medical advice, and, according to my instructions, Mrs. Forbes "has throughout the marriage done everything in her power to "make the marriage a success. I am further instructed that "your client informed his wife that he had lost affection for her "and told her that she was too old and mature for him. It "appears from my instructions that he had wilfully refrained "from cohabitation with my client and has now apparently "decided to live elsewhere and to refuse legal responsibility for "her maintenance."

The wife then took out a summons before the Bath justices on the grounds of desertion and wilful neglect to provide reasonable maintenance, and the hearing took place on June 22, 1954. Her summons was dismissed, the justices holding that there had been a refusal of intercourse by the wife and an eventual agreement to separate. In the course of the proceedings the wife had stated that she was always prepared to have a child and had no fear of childbirth.

James Stirling for the husband.

The wife did not appear and was not represented.

The cases cited in argument are referred to in the judgment.

MR. COMMISSIONER LATEY, Q.C. In this case the husband, who is 36 years of age, prays for a divorce on the ground of the cruelty of his wife, who is about the same age. The suit is undefended,

but Mr. Stirling, with his usual integrity, made it clear at the outset that the grounds put forward for relief required careful consideration.

The main ground of the husband's case is that his wife consistently refused, with the object of avoiding conception, to allow free intercourse, and insisted on precautions which were obnoxious to him, with the result that that course of conduct on her part undermined his health.

This court always has to see that cruelty, as alleged, comes within the well-established definition—that is to say, conduct by the accused spouse of such a character as to have caused damage to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger, and the court has to be careful to watch that the range of grounds of divorce is not extended to cover mere incompatibility and such falling away from the ordinary mutual relations of husband and wife as do not come within that definition. Nor must one ignore the fact that in undefended suits the court usually hears only one side. Mr. Stirling has put before me to the utmost of his knowledge, and his client's knowledge, the case which might have been presented by the wife had she thought fit to defend the charges against her: having heard the evidence and the useful and able argument, and considered the authorities cited to me, I have come to the conclusion that the husband has established his case.

[The Commissioner stated the facts, saying of the letter of April 25, 1945, that the husband had told him that what he really wanted was a daughter, and that some significance must be attached to the passages from the letters written by the wife before marriage, as quoted above, as showing her state of mind at that time, and that from them, he (the Commissioner) was entitled to deduce that the wife was not looking forward to marriage with that full-hearted enthusiasm which might be expected from a young woman whose fiancé was soon to return from the war. She had, however, resolved her doubts and married him in November, 1945, according to the solemn vows made in the sacred ceremonial of the Church of England. The Commissioner continued:] I have already pointed out that, in a case like this, it is essential in the absence of a defence to become acquainted with all the circumstances available on both sides, and I have therefore admitted as evidence the shorthand transcript of the proceedings before the justices.

The issue before me now is not quite the same as the issues which the justices had to decide, but nevertheless the question here—the refusal of the wife to render ordinary intercourse and to make possible conception—was fully ventilated before the bench. In substance, the husband gave the same evidence on that point as he has given here. Among other things, he said that he gave his wife ample opportunity of joining him in his flat at Atworth. The wife's story, put shortly, was that she never refused free intercourse and that, in fact, it often took place.

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She maintained that her husband was under-sexed, although she was not, and that he was lacking in affection for her. She said that she was prepared to have a child and had no fear of childbirth.

The justices held that there was a refusal of intercourse by the wife, and an eventual agreement to separate, and they dismissed the summons.

The petition very clearly set out the case which has been elaborated at considerable length in evidence. It was duly served on the wife and she has not thought fit to take any action whatever.

In a case like this I do not think that there is much doubt that she could have obtained security for costs of any defence. She has not thought fit to take any action whatever about it, but, of course, that does not necessarily mean that she has not got a case. Her case was, however, fully presented before the justices, who had the advantage of seeing both parties; and it is quite obvious from their decision that they accepted the husband's story and not the wife's. I have seen the husband only, but I am quite satisfied that I can believe every word he says. I am satisfied that he has not exaggerated his case and that he has told the truth, not only about his wife's attitude but also about the reaction upon his own well-being. The husband told me that he had got into a very bad state of health, but that the tension under which he had been living gradually diminished after the final parting with his wife in the autumn of 1953. I have had corroboration of this from his sister and his landlord, who described the husband's tense and emotional state when he first went to Atworth. Mr. Arnold Crowther, the husband's solicitor, described the husband's distraught condition during the proceedings before the justices, and how he broke down and wept twice, and even then was still suffering from a tremendous strain.

Apparently the husband did not go to a doctor because, when on two occasions his wife suggested that he should see a psychologist owing to his restless condition, he retorted that it was no use as the cause of his condition was manifest to her, as it was to himself.

I am satisfied that the injury to his mental health was caused in the main by his wife's persistent refusal to be a wife to him in the full sense, (a) by her insistence on contraceptives, and (b) by refusing him the chance of a child.

Quite apart from the exhortation in the solemnization of matrimony that, firstly, Christian marriage was ordained for the procreation of children, I cannot ignore the fact that it is a natural instinct in most married men to propagate the species and to bear the responsibilities, and enjoy the comforts, of their own children. If a wife deliberately and consistently refuses to satisfy this natural and legitimate craving, and the deprivation reduces the husband to despair, and affects his mental health, I entertain

no doubt that she is guilty of cruelty within the definition on which this court always acts.

Mr. Stirling has offered me a very useful review of the authorities dealing with this matter. The question of the refusal of free intercourse is considered in *Baxter* v. *Baxter*[1] on an issue of wilful refusal in nullity. There a wife insisted on the use of a contraceptive and the husband reluctantly acquiesced. When he petitioned for nullity on the ground of wilful refusal, it was held that the marriage had been consummated by the process of intercourse employed; but Lord Jowitt L.C., in his speech said[2] "the proper occasion for considering the subject "raised by this appeal is when the sexual life of the spouses, and "the responsibility of either or both for a childless home, form "the background to some other claim for relief."

In *Walsham* v. *Walsham*[3] it was held that a husband's abstention from marital intercourse for varying intervals modified by occasional acts of coitus interruptus contrary to the wife's wish adversely affected the wife's health and constituted cruelty. There were similar decisions in *White* (*orse. Berry*) v. *White*,[4] and *Cackett* (*orse. Trice*) v. *Cackett*.[5] Here, it is a wife's abstention that is in question, and Mr. Stirling has drawn my attention to an authority in the Court of Appeal, which on the face of it might seem to run counter to the general proposition which I have just stated. That was *Fowler* v. *Fowler*.[6]

The principle stated in the headnote to *Fowler* v. *Fowler*[6] is this: "Where a wife refuses to have children and refuses to have "sexual intercourse, except on the understanding that the "husband prevents conception, with a consequential injury to "the husband's health, the wife is not guilty of cruelty unless "her conduct is intended to inflict misery on her husband." Mr. Stirling has dealt with this case in detail. Personally, I do not think that that paragraph quite conveys the full effect of the judgments, with their qualifications. In that case, as in this, the wife refused intercourse except with a contraceptive, and equally it was shown in that case that the husband desired a child. In that case the wife put forward as an excuse for not having a child in the early years the unsettled conditions caused by the war; later, having had a womb operation, she urged that it was unsafe for her to conceive a child, and, still later, changed her mind and claimed that they could not afford a child. The commissioner who tried the case, held that the husband's anxiety-state could not be attributed to the wife's attitude, and the petition failed.

The Court of Appeal held that there was no cruelty unless the wife by her conduct intended to inflict misery on her husband.

[1] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.
[2] [1948] A.C. 274, 290.
[3] [1949] P. 350; [1949] 1 All E.R. 774.
[4] [1948] P. 330; 64 T.L.R. 332; [1948] 2 All E.R. 151.
[5] [1950] P. 253; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677.
[6] [1952] 2 T.L.R. 143.

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Denning L.J. held that such an intention could easily be inferred if a husband took contraceptive measures against the wife's will, but that was not necessarily so vice-versa because a wife's conduct might be attributed to fear of consequences to herself, without any intention to injure her husband.

How far intention should be considered an ingredient of cruelty has been discussed recently in a number of cases before the higher tribunals, and I do not propose to traverse this somewhat thorny path. I will content myself with the statement of principles laid down in the House of Lords in *Jamieson* v. *Jamieson*,[7] and so lucidly summarised in the more recent case of *Cooper* v. *Cooper*.[8]

The particular passages in *Jamieson* v. *Jamieson*[7] which are very relevant to the present case are from the judgment of Lord Merriman P., in which he said[9]: "In saying this, however, "I must not be taken to suggest that either in England or in "Scotland it is essential to impute to the wrongdoer a wilful "intention to injure the aggrieved spouse in order to establish a "charge of cruelty. In *Mackenzie* v. *Mackenzie*[10] Lord Watson "said: 'I do not impute to the appellant that his conduct, cruel "'and reprehensible as it was in my estimation, was dictated "'by a wilful intention to injure the respondent.' Likewise in "*Kelly* v. *Kelly*,[11] to which I shall recur later, because it is "the leading case in England on the subject of cruelty without "physical violence, Lord Penzance, in his judgment in the full "court, said: 'He says that he does not desire to injure her, "'and it has never been asserted that he does.'" And then Lord Merriman P. went on to refer to a citation by Tucker L.J. in *Squire* v. *Squire*,[12] a citation from a judgment of Shearman J. in *Hadden* v. *Hadden*,[13] in which Shearman J. said: "I do not "question . . . that he had no intention of being cruel . . . "but . . . his intentional acts amounted to cruelty."

That, to my mind, is the shortest way in which any judge has put the principle—and the clearest—that is to be acted upon.

There were other passages, by Lord Normand[14] and Lord Reid,[15] the former going particularly to support the passage I have read by Lord Merriman P.; Lord Reid perhaps in not quite such a strong way; and there is a passage by Lord Tucker which seems to me to be very much to the point. Lord Tucker said[16]: "Every such act must be judged in relation to its attendant "circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending "spouse, and the offender's knowledge of the actual or probable "effect of his conduct on the other's health (to borrow from the

[7] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.
[8] [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415.
[9] [1952] A.C. 525, 540.
[10] [1895] A.C. 384, 409.
[11] (1870) L.R. 2 P. & M. 59, 72.
[12] [1949] P. 51, 58; 64 T.L.R. 371; [1948] 2 All E.R. 51.
[13] The Times, Dec. 5, 1919, p. 5, col. 3.
[14] [1952] A.C. 525, 534–5.
[15] Ibid. 548–9.
[16] Ibid. 550.

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" language of Lord Keith) are all matters which may be decisive " in determining on which side of the line a particular act or " course of conduct lies."

As I have stated, there have been a number of cases in which guidance has been given on the question of intention, but in this particular case I find that the wife respondent knew very well what she was doing to her husband in the course of her persisting in evasion and refusal.

In *Fowler* v. *Fowler* [17] both Hodson L.J. and Denning L.J. emphasize the wife's fear of childbirth, and it was also emphasized that the wife was never warned by the husband of the effect of her refusal on his health. The essential distinction in the present case is that the husband was constantly complaining to the wife of her course of conduct, and was using all reasonable means to persuade her to change her attitude, and that she was well aware that she was causing him extreme anxiety and misery by her persistence in refusing any opportunity of conception.

Knowing her husband's feelings, knowing that the practice she insisted upon was repulsive to him, and that his desire for fatherhood had become an obsession, a legitimate obsession, an ever-growing load on his mind, taunting him as she did, she cannot in my view be acquitted of the intention to pursue her policy of abstention, whatever the result to him. Moreover, as I have already said, she definitely stated on oath before the Bath justices that she had no fear of childbirth.

In those circumstances, I find that the wife has been guilty of cruelty to the husband, and in the exercise of my discretion I pronounce a decree nisi in his favour.

Decree nisi.

Solicitors: *Sharpe, Pritchard & Co. for A. G. Smith & Son, Melksham, Wilts.*

E. J.

[17] [1952] 2 T.L.R. 143.

[CHANCERY DIVISION.]

1955
April 21.

Upjohn J.

* *In re* ARNOULD, DECD.
ARNOULD *v.* LLOYD AND OTHERS.

[1954 A. No. 3159.]

Will — Construction — Omission — Gift of income during minority — Whether gift of corpus implied—Bequest of " All other money . . . " up in trust for my four grandchildren . . . until each reaches the " age of twenty-five years "—Conflict of authorities—Ordinary rule of construction applicable—No gift of corpus. Punctuation—Nonsensical full stop—Construed as comma.

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A testator by his will gave the following bequest: "All other "money belonging to me I wish to be up in trust for my four "grandchildren . . . until each reaches the age of twenty-five years." The will contained no gift of residue. On a summons to determine, inter alia, the effect of that bequest:—

Held, that having regard to the later authorities, the court should follow the ordinary rule of construction, that words should not be inserted in or read into a will unless the context required it; and applying that principle, a gift of the corpus to the grandchildren could not be implied; there was accordingly a gift of income to each grandchild until the age of 25 years and since there was no gift of residue the property was then undisposed of.

In re Hedley's Trusts (1877) 25 W.R. 529 and *In re Tottenham* (1946) 62 T.L.R. 245; 174 L.T. 367 applied.

Wilks v. *Williams* (1861) 2 J. & H. 125 not followed.

ADJOURNED SUMMONS.

By his will dated September 5, 1954, Herbert Thomas Arnould appointed his only son Thomas Norton Arnould as his executor, and directed "that all my debts and funeral expenses "shall be paid as soon as conveniently may be after my "decease." After bequeathing all his "household goods and "chattels" to his housekeeper, Mrs. Annie Maud Lloyd, and certain legacies, not here relevant, he stated: "All other money "belonging to me I wish to be up in trust for my four grand-"children:—Norton Arnould. Adrian Williams. Garry Bufton "and Cheryell Bufton. until each reaches the age of twenty-five "years."

The will contained no gift of residue, and the testator made no provision for his wife from whom he had been separated for a number of years.

The testator died on September 5, 1954, the day on which he made his will.

The question on the summons, relevant to this report, was whether on the true construction of the testator's will and of the gift therein contained of "all other money" belonging to him "to be up in trust" for his four named grandchildren each of the said grandchildren: (a) took a vested interest in the property passing under such gift; or (b) took an interest in such property contingently on attaining the age of 25 years; or (c) took an interest in the income of such property until the age of 25 years.

G. A. Grove for the plaintiff, the executor.

The first defendant, Mrs. Annie Maud Lloyd was not represented and did not appear.

J. L. Arnold for the testator's grandchildren.

H. E. Francis (*F. W. Mulley* with him) for the testator's widow.

UPJOHN J. The question that I have now to determine is the true meaning of the following short paragraph in the testator's will: "All other money belonging to me I wish to be up in

"trust for my four grandchildren:—Norton Arnould. Adrian "Williams. Garry Bufton and Cheryell Bufton. until each "reaches the age of twenty-five years." I have already construed the meaning of the phrase "All other money," which, having regard to the peculiar definition of the word "money" to be found in the will, I have held to be a specific gift of certain assets forming part of the testator's estate and not a general residuary gift. It is also to be observed that in the will there is a stop after the name Norton Arnould, after the name Adrian Williams and after the name Cheryell Bufton; but I do not think that I can treat those stops as of any significance, because if I treated them literally as full stops it would make nonsense of the will, and I shall therefore treat them as commas.

The point which I have to determine (and it is one of some difficulty) is whether this is a gift to these four grandchildren of the income until each attains the age of 25 years and then the corpus is undisposed of, or whether it is a gift of corpus upon attaining the age of 25 years with a gift in trust in the meantime.

As a matter of the literal interpretation of the will, there is no gift of the corpus to those children unless a gift of corpus upon the attainment of 25 years is to be implied, and the question is, therefore, whether I can imply such a gift.

There is no doubt that, having regard to the earlier authorities alone, the court then felt no great difficulty in implying such a gift of corpus in these circumstances. But it is equally not in doubt that the earlier authorities have subsequently been the subject of some criticism.

I do not propose to refer to all of the authorities, for the position is sufficiently set out in Jarman on Wills, 8th ed., vol. 2, p. 682, where this is said: "In *Newland* v. *Shephard*,[1] "an absolute gift of real and personal estate to the testator's "grandchildren was implied from a direction to the trustees to "apply the 'produce' and interest for their maintenance and "benefit during minority. But the decision has been questioned. "In *Atkinson* v. *Paice*,[2] *Peat* v. *Powell*[3] and *Hale* v. *Beck*,[4] "absolute interests were implied from gifts to trustees in trust "for A until he should attain twenty-one. But these three "cases seem to be of doubtful authority. In *In re Hedley's* "*Trusts*[5] a testatrix gave her residue to a trustee upon trust "for her daughter till she should attain the age of twenty-one "or marry, and it was held by Hall, V.-C. that there was no "implied gift of the capital to her."

The first authority which I propose to examine is *Wilks* v. *Williams*,[6] which was strongly relied on by Mr. Arnold in support of his submission that there was here a gift of corpus to the grandchildren. The headnote reads as follows: "Testa- "trix, having by her will directed the trustees, who were also

[1] (1723) 2 P.Wms. 194.
[2] (1781) 1 Bro.C.C. 91.
[3] (1760) 1 Ed. 479.
[4] (1764) 2 Ed. 229.
[5] (1877) 25 W.R. 529.
[6] (1861) 2 J. & H. 125.

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" the executors of her will, to invest the residue of her property " in the funds, left the interest to two nieces, to be paid to " them half-yearly, and, at their decease, ' the half-yearly " ' dividends to be continued to their children till they came to " ' the age of twenty-one years.' She then ' constituted and " ' appointed ' the said executors (nominatim) trustees for the " said nieces and their children. All the children of a deceased " niece had attained twenty-one. *Held*, that they were entitled " absolutely to the moiety given to her for life." Page Wood V.-C., after expressing some doubts as to the correctness of the decision in *Newland* v. *Shephard*,[7] in discussing *Fonnereau* v. *Fonnereau*,[8] said this[9]: " Here the testatrix desires her trustees " to invest the principal money, constituting the residue of her " property, in the funds. She then leaves the interest to her " nieces, Fanny Williams and Rebecca Wilks, to be paid to them " half-yearly. At their decease ' the half-yearly dividends are " ' to be continued to their children, till they come to the age " ' of twenty-one years.' And then comes this passage:—' I " ' constitute and appoint Benjamin Hill and George Dace " ' trustees for the said Fanny Williams and Rebecca Wilks and " ' their children '; and the testatrix appoints Hill and Dace " executors of her will. That is much stronger in favour of the " construction, for which the plaintiffs contend, than anything " in *Newland* v. *Shephard*.[10] In *Newland* v. *Shephard*[10] there " was a mere devise upon trust for the grandchildren until " twenty-one. But here the testatrix directs all the residue of " her property to be invested by Hill and Dace; she places " the whole of that residue in their hands, and then constitutes " and appoints the said Hill and Dace ' trustees ' (trustees, " that is, of the entire residue) ' for the said Fanny Williams " ' and Rebecca Wilks, and their children.' It is clear that, " upon these words alone, without the intermediate bequest of " the dividends until the children should attain twenty-one, " there would have been an absolute gift for the testatrix's nieces " and their children. In an independent sentence the testatrix " appoints Hill and Dace executors of her will. In the absence " of the clause constituting them trustees for the nieces and " their children it would have been their duty to pay the " dividends, as directed, until the children attained twenty-one. " The insertion of that clause, therefore, must be looked upon " as emphatic, and as indicating that, after the children " attained twenty-one, the trust for their benefit was still to " continue." So here, Mr. Arnold argues, the expression " I " wish to be up in trust " means that it was to be held in trust until the children respectively had attained the age of 25 years and then it was to be transferred to them.

[7] 2 P.Wms. 194.
[8] (1745) 3 Atk. 314, 315
[9] 2 J. & H. 129.
[10] 2 P.Wms. 194.

The next case is *In re Hedley's Trusts.*[11] The headnote is as follows: "A testatrix, after directing payment of debts and "legacies, gave all the residue of her estate and effects to a "trustee upon trust for her daughter till she should attain the age "of twenty-one years or marry, whichever should first happen, "and appointed the trustee sole executor of her will. *Held*, that "there was no implied gift of the capital to the daughter on her "attaining twenty-one or marrying." Hall V.-C. begins his judgment in this way[12]: "I do not think, in the present state of the "authorities, I can hold that there is enough to give the capital "fund beneficially to this person after attaining the age of "twenty-one years or marrying. But for authority there could "not be a doubt suggested. In the present mode of construing "wills, we must take the words as we find them, and give effect "to them; we must not guess at them or create complications. "The fund is given to the trustee, and the only way of giving "it to limit his interest to correspond with the interest of the "petitioner until attaining the age of twenty-one years, would "have been to give it until the child attained twenty-one or "married. But that would be inconsistent with the provisions "before me for paying debts and capital sums out of it, which "is a sufficient reason to account for the corpus being vested "in the trustees. That distinguishes it from anything that has "been referred to." The judge then criticized *Newland* v. *Shephard*[13] and pointed out that in the case before him it was a trust of residuary real and personal estate and he was being asked to disinherit one of the co-heiresses. He then examined the later authorities, saying[14]: "As to the subsequent "authorities there is some peculiar circumstance in every one "of them." After examining *Peat* v. *Powell*[15] and *Hale* v. *Beck*[16] he considered *Wilks* v. *Williams*[17] to which I have already referred, and after quoting the passage from the judgment of Page Wood V.-C., which I have already cited, he continued thus[18]: "Upon that I make this observation—that the "Vice-Chancellor seems to have relied for his judgment upon "that ultimate part, apparently not being willing to rely on or "considering, as far as I can see, that without that ulterior "clause he could hold a mere direction to pay income till "twenty-one as amounting to a direction to pay the income till "twenty-one upon trust, and as from that time, though not so "expressed, by implication a trust for the person after attaining "twenty-one. It seems to me that I really must give effect to "what is now well settled as a rule of construction:—not to insert "words or employ words which are not to be found, but to give "effect to the clear ordinary meaning of the terms employed.

[11] 25 W.R. 529.
[12] Ibid. 530.
[13] 2 P.Wms. 194.
[14] 25 W.R. 530.
[15] 1 Ed. 479.
[16] 2 Ed. 229.
[17] 2 J. & H. 125.
[18] 25 W.R. 530.

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ARNOULD, DECD., *In re.* ARNOULD *v.* LLOYD.

Upjohn J.

"So construing this will, there seems to me to be nothing in "it whatever in the shape of beneficial interest except to the "person named, and for her benefit, until attaining twenty-one."

That case was cited to Wynn-Parry J. in *In re Tottenham*,[19] where he said this[20]: "The matter appears to me ultimately "to be one purely of construction. Mr. Wigglesworth has "referred me to a convenient statement of the general principle "which must guide the court in such matters as this, which "appears from the judgment of Hall, V.-C., in *In re Hedley's* "*Trusts*.[21] It appears quite clearly from the Vice-Chancellor's "judgment that the court is not entitled to depart from the "strict letter of the will, unless there is some context to enable "the court to do so."

In the will before Wynn-Parry J. there was ample context which compelled him to come to the conclusion that a gift of corpus was intended although not so expressed.

In that state of the authorities, I think it is my duty to apply the ordinary rule of construction, and that I must not insert or read in words which are not there unless the context requires me to do so.

Applying that principle, it seems to me that I cannot, without doing violence to the language the testator has used, imply a gift of corpus to these four grandchildren. It is true that there are certain elements of distinction between this case and *In re Hedley*.[21] This was a specific gift and not a gift of residue. There is no question of disinheriting the heir but the gift will be undisposed of. But in principle, however, although I have a strong suspicion that I am not carrying out the real intentions of the testator, it seems to me that he has not used language which is appropriate to carry a gift of corpus to the grandchildren and I must declare accordingly that on the true construction of the will the grandchildren only take an interest in the income of the property until each attained the age of 25.

Declaration accordingly.

Solicitors: *Ward, Bowie & Co. for Scobie & Beaumont, Hereford; T. D. Jones & Co. for D. J. Treasure & Co., Blackwood.*

I. G. R. M.

[19] (1946) 62 T.L.R. 245; 174 L.T. 367.

[20] 174 L.T. 368.

[21] 25 W.R. 529.

[CHANCERY DIVISION.]

*ROUSOU'S (A BANKRUPT) TRUSTEE *v.* ROUSOU.

1955
Mar. 30.

Danckwerts J.

Practice and Procedure — Writ — Service out of jurisdiction — Quasi-contract—Transfer of assets by bankrupt two months before act of bankruptcy—Claim against transferees by trustee in bankruptcy—Claim quasi-contractual — Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59)—*R.S.C., Ord.* 11, *r.* 1 (*e*).
Bankruptcy—Quasi-contract.

R., a Cypriot by birth, carried on a business in England where he became domiciled in 1935. On August 10, 1951, R. committed an act of bankruptcy, and on December 5, 1951, he was adjudicated bankrupt. On June 17, 1951, R. authorized his attorney to withdraw a sum of money standing in the name of R. and his wife in a church fund in Cyprus, and to deposit this sum in the joint names of R.'s two children, who were both minors and natural born British subjects, with a co-operative society in Cyprus. R. and his children subsequently left England, and in June, 1954, the children accompanied by their father withdrew the sum in question.

R.'s trustee in bankruptcy, who had reason to believe that the children were resident or were to be found in Cyprus, applied for leave to serve a writ out of the jurisdiction upon the children to enable him to bring an action against them for the purpose of attaining payment to him of the sum in question:—

Held, that the claim of the trustee to recover from the proposed defendants moneys formerly the property of the bankrupt was based prima facie of a right of a quasi-contractual nature, so that there was authority under R.S.C., Ord. 11, r. 1 (*e*),[1] to grant leave for the service of the writ out of the jurisdiction.

Sinclair v. *Brougham* [1914] A.C. 398; 30 T.L.R. 315 and *Bowling* v. *Cox* [1926] A.C. 751 applied.

APPLICATION for leave to serve writ out of the jurisdiction.

The trustee in bankruptcy of one Punajis Kyriacou Rousou, a bankrupt, sought leave to serve a writ out of the jurisdiction upon the son and daughter of the bankrupt, both of whom were minors, in respect of the transfer to them on or about June 17, 1951, by the bankrupt of the sum of £1,107 or, alternatively, the sum of £484 7s. 6d.

The action was intended to be brought for the purpose of obtaining (a) a declaration that the transfer in question was void against the plaintiff as trustee of the bankrupt; (b) alternatively, a declaration that the children held the sum in question and the interest accrued thereon, in trust for the plaintiff as such trustee: in either event (c) an order that the children pay to the plaintiff

[1] R.S.C., Ord. 11, r. 1: "Service "out of the jurisdiction of a writ of "summons or notice of a writ of summons may be allowed by the court "or a judge whenever . . . (*e*) the "action is one brought . . . to "enforce, rescind, dissolve, annul or "otherwise affect a contract or to "recover damages or other relief for "or in respect of the breach of a "contract—(i) made within the jurisdiction, *or* (ii) made by or through "an agent trading or residing within "the jurisdiction on behalf of a "principal trading or residing out of "the jurisdiction, *or* (iii) by its terms "or by implication to be governed by "English law. . . ."

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as such trustee the sum in question with the interest accrued thereon.

On August 10, 1951, the bankrupt, who carried on a catering business in this country, committed an act of bankruptcy. On September 7, 1951, the petition in bankruptcy was presented by a creditor, and on December 5, 1951, Rousou was adjudicated bankrupt.

In the affidavit in support of the application it was stated that the bankrupt was born in Cyprus but became domiciled in England in 1935, and he remained in England until August, 1952. The children were natural-born British subjects and were domiciled and resident in England at all material times and, in particular, were so domiciled and resident on June 17, 1951. Subsequently they left England.

On June 17, 1951, there was standing to the credit of the bankrupt and his wife in the bank of the church committee funds of the church of Agios Chrissosdiros, Akanthou, Cyprus, sums amounting to £1,107 1s. 6d., being as to £484 7s. 6d. in the name of the bankrupt, and as to £622 14s. in the name of the bankrupt's wife. On that date, one Sotiris Antoninas, the attorney of the bankrupt, on his instructions withdrew £1,107 1s. 6d. from the church funds and on the same day desposited a sum of £1,107 with the Akanthou Co-operative Credit Society in the joint names of the bankrupt's children. This sum, together with accrued interest, was withdrawn by the children, accompanied by their father, between June 3–6, 1954, and these withdrawals were made after an order had been made by the judge of the District Court of Famagusta, Cyprus, on the trustee's application for a private examination of the bankrupt's attorney relating to the sum in question.

At the date of this application there was reason to believe that the bankrupt's children were residing or might possibly be found at Akanthou, in Her Majesty's Colony or Dependency of Cyprus, out of the jurisdiction.

Muir Hunter for the trustee in bankruptcy.

All cases cited in argument appear in the judgment.

DANCKWERTS J. This is an application by the trustee in bankruptcy of one Punajis Kyriacou Rousou, a bankrupt, for leave to serve a writ out of the jurisdiction. The material dates are these. On August 10, 1951, an act of bankruptcy was committed by the bankrupt, who carried on a catering business in this country. On September 7, 1951, the petition in bankruptcy was presented by a creditor and Rousou was adjudicated bankrupt on December 5, 1951.

The particular transaction which the trustee desires to attack was carried out by the bankrupt through an attorney or a person in that position on June 17, 1951. The bankrupt had a sum of

£1,107 1s. 6d. in a certain church fund or funds which acted like a savings bank, so it would appear. He paid that sum into a co-operative society in the name of his two children. Thereupon, the fund in question was withdrawn by the bankrupt's children and no doubt has been disposed of or taken away by them.

It is said on behalf of the trustee that that transaction being for the purpose of defrauding the creditors was an act of bankruptcy within the meaning of section 1 (1) (*b*) of the Bankruptcy Act, 1914, being " . . . a fraudulent conveyance, gift, delivery, or " transfer of his property, or of any part thereof."

Further, it is contended on behalf of the trustee in bankruptcy that, by virtue of section 37 of the Bankruptcy Act, 1914, the bankruptcy relates back to the earliest act of bankruptcy within three months before the petition, and therefore includes this date of June 7, 1951. Further, by section 38 (1) (*a*) of the Act, the property which belongs to the bankrupt includes " all such " property as may belong to or be vested in the bankrupt at the " commencement of the bankruptcy." Therefore, it is said, the £1,107 1s. 6d. was part of the property which belonged to the bankrupt and vested in his trustee upon his bankruptcy.

Alternatively, it is contended on behalf of the trustee that it was a voluntary settlement under section 42 of the Act and, therefore, void against the trustee in bankruptcy. The trustee has also a third point, that it was a fraudulent conveyance under section 172 of the Law of Property Act, 1925; that is to say, it was a conveyance of property with intent to defraud creditors, and therefore became voidable at the instance of anybody thereby prejudiced.

When the case was first put forward for leave to serve out of the jurisdiction, it was put forward principally in the affidavit as being either a case of tort or breach of trust under sub-rules (*d*) or (*e*) of rule 1 of Order 11 of the Rules of the Supreme Court. I could not see how it came within either of those descriptions, and I therefore refused leave. But Mr. Muir Hunter persisted in his request on behalf of his client for leave to serve out of the jurisdiction and, accordingly, I directed the case to be set down in court for the purposes of argument. That has resulted in a very helpful and useful argument from Mr. Muir Hunter on the law relating to this subject.

Mr. Muir Hunter puts his case under three of the sub-rules contained in R.S.C., Ord. 11, r. 1, namely, (*d*), (*e*) and (*ee*). Sub-rule (*ee*) provides for the case where the action is founded on a tort committed within the jurisdiction; sub-rule (*d*), leaving out the part which does not apply, states: " . . . or for the " execution (as to property situate within the jurisdiction) of the " trusts of any written instrument, of which the person to be " served is a trustee, which ought to be executed according to the " law of England "; sub-rule (*e*) is " The action is one brought " *against a defendant not domiciled or ordinarily resident in* " *Scotland* to enforce, rescind, dissolve, annul or otherwise affect

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" a contract or to recover damages or other relief for or in respect " of the breach of a contract—(i) made within the jurisdiction, *or* " (ii) made by or through an agent trading or residing within the " jurisdiction on behalf of a principal trading or residing out of " the jurisdiction, *or* (iii) by its terms or by implication to be " governed by English law . . ."

It seems to me that the claim of the trustee is one which is entirely statutory in its origin. Whichever of the three ways the trustee puts his case, it is either a claim under section 1 (1) (*b*) of the Bankruptcy Act, 1914, and the accompanying provisions of section 37 or section 38, or it is a claim under section 42 of that Act which requires a settlement to be set aside, or it is a claim under section 172 of the Law of Property Act, 1925, following and re-enacting the position as stated in the earlier statute, 13 Eliz. 1, c. 5, which gives persons who are injured by fraudulent transactions on behalf of another person the right to have the transaction set aside.

Therefore, it seemed to me at first sight, that this had very little, if anything, to do with the law of contract at all. The rights given to the trustee were in each case as it seemed to me rights arising under some statute. But Mr. Muir Hunter has satisfied me by reference to the authorities that, by reason of the nature of the transaction which was carried out, the trustee in bankruptcy became entitled and is entitled, subject to anything which may arise in the action, to have the sum of £1,107 1s. 6d. paid over to him. It is a claim which appears to be recognized by the courts as a right of a quasi-contractual nature. For that purpose, Mr. Muir Hunter referred to *Bowling* v. *Cox*,[1] and *Sinclair* v. *Brougham*.[2] It appears from those decisions that the court has evolved a right which enables a claimant to sue in an action of contract when a sum of money which ought in fact to be paid to him is in the hands of another person. Mr. Muir Hunter has quoted as an analogous case with regard to the bankruptcy law the very common case of where a payment is set aside as a fraudulent preference. Although the Bankruptcy Act merely refers to a fraudulent preference and is silent about repayment, orders for payment to the trustee of any sum so paid are frequently made.

I am satisfied, at any rate for the purposes of a prima facie case, that this case may be brought within that principle, so that there may well be a quasi-contractual right in the trustee in bankruptcy to recover the money from the persons who have acquired this sum of money from the bankrupt.

Bowling v. *Cox*[3] is of particular interest because that was a case where leave to serve out of the jurisdiction was given in a bankruptcy matter upon such a quasi-contract. It was said in

[1] [1926] A.C. 751.

[2] [1914] A.C. 398, 414–7, 433, 452, 454; 30 T.L.R. 315.

[3] [1926] A.C. 751.

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that case that the bankruptcy was much earlier than the transaction in question, the money having been received by the executor of the bankrupt and paid away by him. It was claimed that the creditors had not been fully satisfied, and that there had been a receipt of the money by a person outside the jurisdiction of the court which would otherwise have been concerned with the matter.

In view of that decision it seems to me that this is a case in which the trustee has brought himself within the terms of R.S.C., Ord. 11, r. 1 (*e*), and it is a case in which I might properly allow service out of the jurisdiction of the writ in question. An order accordingly will be made giving leave to serve out of the jurisdiction.

Order accordingly.

Solicitor: *Sidney Pearlman.*

J. A. G.

[CHESTER ASSIZES.]

1955
Feb. 14.

Finnemore J.

* MASON *v.* WILLIAMS & WILLIAMS LD. AND ANOTHER.

Negligence—Safe system of work—Plant and equipment—Latent defect—Injury to workman's eye caused by tool with latent defect—Tool supplied direct by reputable makers—Whether employers under a duty to inspect such tools—Liability of makers—Burden of proof.

A chip of metal flew off a cold chisel which the plaintiff was using at work and struck him in the eye. The head of the chisel was dangerously hard but this defect was not apparent. The plaintiff's employers had bought the chisel from reputable makers and it was a new one which had been in use for only two or three weeks before the accident. The plaintiff's employers had not examined it at any time:—

Held, (1) that an employer who buys tools from reputable makers is entitled to assume that they are such as will be proper for their intended purpose and in the absence of something which suggests a defect in them he is under no duty to inspect them either before issuing them or after they have been in use; and that, therefore, the plaintiff had failed to establish negligence on the part of his employers.

(2) That as against the makers the plaintiff had discharged his burden of proof by establishing (a) that the head of the chisel had not been made unduly hard at his employers' factory; (b) that the chisel had come direct to his employers from the makers; and (c) that the excessive hardness could have been caused by a careless or deliberate act at the makers' factory; and that, accordingly, the plaintiff was entitled to succeed in negligence against the makers.

[Reported by H. EIFION ROBERTS, Esq., Barrister-at-Law.]

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MASON v. WILLIAMS & WILLIAMS LD.

ACTION.

On April 7, 1953, while the plaintiff, Albert Mason, was using a cold chisel issued to him by his employers, the first defendants, and made by Thomas Turton & Sons Ld., the second defendants, he was injured when a bit of the chisel flew off and struck him in the eye, which later had to be removed. He sought to recover damages from both defendants in respect of his injury.

David Pennant for the plaintiff.
Norman Richards for the employers, the first defendants.
W. L. Mars-Jones for the suppliers, the second defendants.

No cases were referred to in argument.

FINNEMORE J. This case has taken some considerable time and it has raised some important issues, especially questions of fact which have not been at all easy to decide. On April 7, 1953, the plaintiff, Albert Mason, using a cold chisel supplied to him by the first defendants, his employers, and made by the second defendants, was injured when a bit of the chisel flew off and struck him in the eye, which subsequently had to be removed. Nobody suggests that the plaintiff did anything wrong or was in any way negligent. Certainly there is no evidence that he was, and he was working in the ordinary way and had no reason to suppose that the chisel provided for him was other than a proper one. It was at one time suggested that he should have worn goggles, and as against that it was said that in doing that work men did not normally wear goggles. The head of this chisel was in fact dangerously hard.

There was some question at one time whether the bit which flew off was from the chisel or from the hammer, which also, of course, was hard; but that would not matter because it is the hardness of the chisel which is the unexpected and wrong thing. Hammers should be harder and even if this hammer had been harder than usual, if used on the ordinary soft headed chisel, nothing would have happened. Further, on the evidence of the witnesses, it seems quite plain that the bit which flew off was in fact from the chisel head, and evidence was given that that was seen by at least one witness immediately after the accident. The real case is whether the first defendants, the employers, or the second defendants, the suppliers of the chisel, are responsible.

I will first consider the question of examination. Mr. Mars-Jones said that it would not be obvious that there was anything wrong with the head of the chisel when it was taken into stores, but he argues that after it had been used for some time, the way in which the head lost pieces would have been obvious on inspection and would have shown that there was something wrong. I take the view that employers, if they buy reputable tools from reputable people who make them, are not bound to set up examinations, either before issuing a tool or after it has been

in use for days or weeks or even months, unless there is something which calls their attention to the suggestion that there is something wrong. Employers have to act as reasonable people, they have to take reasonable care; but if they buy their tools from well-known makers, such as the second defendants are, they are entitled to assume that the tools will be proper for the purposes for which both sides intended them to be used, and not require daily, weekly or monthly inspection to see if in fact all is well. I think, therefore, that there is no point that becomes material to be laid against the first defendants that they did not in fact examine this chisel after it had been put into use, nor do I think there will be anything, therefore, in the argument which might have been made that the second defendants in putting this chisel into circulation did so with the reasonable expectation that there would be an intermediate examination. I am quite sure that they expected no such thing, and they would probably be rather affronted at the mere suggestion.

How did this chisel head get too hard? There are two theories put forward. The suppliers say that it must have happened in the first defendants' factory, that this was an old chisel which must have left their premises before some date in 1948, that it had been in use for a long time, and whether long or short it had been reconditioned in the first defendants' factory. They maintain that the state of the head was due to something that the employers did, and not to anything which the suppliers did before they sent it. The employers turn the argument round the other way and say that as they did not heat or quench the chisel they could not have affected in any way its hardness after they received it from the suppliers. That, I think, is what this case now really comes to.

[His Lordship reviewed the evidence and continued:] I am satisfied that this was a new chisel which had been taken out of stores two or three weeks before; and that it had been used by the plaintiff as it had come from the original manufacturers, and had chipped before anything at all had been done to it at the first defendants' factory.

I appreciate that I am faced with another problem, as was indicated in *Donoghue* v. *Stevenson*,[1] that res ipsa loquitur does not apply and the court has to be satisfied, and therefore the plaintiff has to prove, that there was negligence on the part of the manufacturers. Of course, that cannot normally be proved by being able to say that on such and such a date such and such a workman did this, that, or the other. I think that when one eliminates anything happening in the present case at the first defendants' factory, to which this chisel came direct from the second defendants, there remains the fact that when it came from the second defendants the head was too hard and that undue hardness could have been produced either carelessly or

[1] [1932] A.C. 562; 48 T.L.R. 494.

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Finnemore J.

deliberately to make a harder and more durable head while it was being manufactured by them; and in my opinion that is really as far as any plaintiff can be expected to take his case. What the plaintiff says here is: "This is your chisel: you made "it and I used it in the condition in which you made it, in the "way you intended me to use it, and you never relied on any "intermediate examination; therefore, I have discharged the "onus of proof by showing that this trouble must have hap-"pened through some act in the manufacture of this chisel in "your factory, which was either careless or deliberate, and in "either event it was a breach of duty towards me, a person "who, you contemplated, would use this article which you "made, in the way you intended it to be used." If that is right he would be entitled to succeed against the second defendants.

I come to the question of damages. The plaintiff has lost his eye and has been somewhat troubled with watering since his artificial eye has been inserted, and while he will always be a one-eyed man there are many one-eyed men about the world who are able to do useful work. When one loses one's eye comparatively late in life it naturally takes time to get adjusted. There are, perhaps, certain fine movements to which one would never be fully accustomed; but broadly and substantially a man who has lost an eye becomes as good as a man with two eyes within a reasonable time, for all effective and normal purposes. On the other hand he has to carry with him no slight risk that if an accident does happen again it may destroy his remaining eye, and then he would become completely blind. That is a matter to which the court has to pay attention as well. Taking into account his present loss of earnings, which may continue for some time, but which I do not think is likely to be permanent, I award him £1,900 general damages and there are agreed special damages of £59.

Judgment for the plaintiff against the second defendants.

Solicitors: *Rowley, Ashworth & Co., Manchester; Laces & Co., Liverpool; Neal, Scorah, Siddons & Co., Sheffield.*

[COURT OF APPEAL.]

* DOLBEY *v.* GOODWIN.

C. A.

1954
Nov. 8.

[1952 D. No. 1748.]

Lord Goddard C.J., Hodson and Romer L.JJ.

Fatal Accidents Acts—Damages—Mother's claim in respect of son's death—Mother a widow—Principle of assessment of damages.

The plaintiff, a widow aged 55 years, claimed damages from the defendant under the Fatal Accidents Acts, in respect of the death by accident of her unmarried son aged 29, who was in the defendant's employment. The son was living with his mother to whom he paid £5 a week, out of which she provided him with food. At the time of his death he was not contemplating marriage and was undergoing a course of training which would have qualified him to earn higher wages. The trial judge assessed the plaintiff's damages under the Fatal Accidents Acts at £3,100. The defendant appealed on the ground that the amount was excessive:—

Held, that if the plaintiff had been the wife of the deceased, £3,100 would have been an appropriate sum to have awarded; but that the son would in all probability some day have married and was under no legal liability to support his mother, although in the future, from a sense of moral obligation he might continue to give his mother something, but probably less than he had contributed in the past; and that the sum awarded was excessive and should be reduced to £1,500.

APPEAL from Cassels J.

The plaintiff, Edith Maud Dolbey, a widow, suing as the administratrix of her son Frederick Charles Dolbey, claimed damages under the Fatal Accidents Acts from the defendant, Frederick Goodwin, in respect of the death of her son as the result of an accident while in the defendant's employment; she also claimed under the Law Reform (Miscellaneous Provisions) Act.

Cassels J. held that the plaintiff was entitled to recover damages under the Fatal Accidents Acts. He assessed the amount at £3,100, and also awarded her damages under the Law Reform (Miscellaneous Provisions) Act, 1934. The defendant appealed against the award under the Fatal Accidents Act on the ground that the amount was excessive. The facts, so far as material, are set out in the judgment of Lord Goddard C.J.

F. W. Beney Q.C. and *Ronald Hopkins* for the appellant (defendant).

R. Marven Everett Q.C. and *Sir Shirley Worthington-Evans* for the respondent (plaintiff).

The case cited in argument appears in the judgment.

LORD GODDARD C.J. This is an appeal from an award of Cassels J. who, after having found that the plaintiff, the mother

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of the deceased, was entitled to recover damages under the Fatal Accidents Act, 1846, assessed the damages at £3,100, and gave her in addition £237 10s. under the Law Reform Act, which included £200 for loss of expectation of life and £37 10s. for funeral expenses. There is no objection to the judge's assessment of the damages under the Law Reform (Miscellaneous Provisions) Act, 1934, but it is submitted on behalf of the defendant that the award of £3,100 is so excessive that this court ought to interfere.

It has been laid down in *Flint* v. *Lovell* [1] and other cases that when a judge has not given precise reasons, or one cannot see from his judgment exactly what he took into account, so that the court does not know whether he took into account something which he ought not or omitted something which he should have taken into account, this court can only look at the total amount which has been awarded, and from that must come to a conclusion whether the sum is so excessively high or so unreasonably low that it must amount to an unreasonable estimate. The young man in question in this case seems to have been a very steady fellow, a non-smoker and a non-drinker; he always went home to his mother and he was supporting her. He was 29 years of age, and his mother seems to have been 25 years older than he was. The son appeared to be a young man who took a long view, because he gave up some work at which he was earning more money than he was earning at the time of his death in order to qualify himself to take a more responsible, and no doubt better paid, position in the future than the one he had at the time of his death. His mother paid the rent, as the other members of the family had left, and I suppose it would cost the mother at least £1 a week to keep him, although he bought his own clothes. We all know that in these days food is very expensive, and I should think that it could not have cost the mother very much less than £1, so she was getting the benefit of something like £4 or £4 5s. a week at the time of her son's death.

The plaintiff was not, of course, the boy's wife but his mother, and a matter which has to be borne in mind, and to which we give full effect, is that the moral obligation to keep his mother was very strong. There was, however, no legal obligation, because nowadays the law is different from what it used to be, and while a woman is bound to support her husband and her children if she can, children are no longer bound to support their parents. However, that is not a matter which weighs very heavily in the scale, because, no doubt, this boy had been a good son and would have remained a good son. I think that if it had been the case of a wife, the sum of £3,100 would have been a very proper sum to have given, or, at any rate, it would not have been too small a sum to have awarded. Can we support the award of £3,100 in the case of a mother? After all, although this young man had not yet married—sensible young men do not marry so

[1] [1935] 1 K.B. 354; 50 T.L.R. 127.

early as they used—there must have been a very strong chance that he would marry, and the more prosperous he became the more probable it would be that he would do so; and, if he had married, although no doubt he would have given something to his mother, I expect it would have been very much less than he had given in the past. The court feels that Cassels J. considered the case on exactly the same footing as if he were awarding damages to a widow, and we feel that the sum awarded was excessive in the case of a mother, and is higher than one's experience shows would be awarded in the case of a parent, especially in view of the fact that the son might very soon have married, although it appears that he had not any matrimonial intentions at the time of his death.

This court is always reluctant to interfere in these cases, because we know the difficulty that all judges have in coming to a decision in them. I think it is about as difficult a task as could possibly be put upon a judge, and so I always feel when I am sitting at nisi prius. I have often felt that in really serious cases of this kind it is better to have a jury because the opinion of twelve people is probably more satisfactory than the opinion of one. The court has come to the conclusion that the right sum to have awarded would have been £1,500, added to the sum of £237 10s., making a total award of £1,737 10s.

HODSON L.J. I share the reluctance expressed by the Lord Chief Justice in interfering with an award of damages which has been made by a judge who obviously has considered the matter very carefully. The gross figure awarded to the mother of this young man was £3,300 under the Fatal Accidents Act, reduced by £200 which was awarded under the Law Reform Act, making the net sum awarded £3,100 plus £37 10s. for the funeral expenses. This young man was 29 years of age in April, 1952, when he was killed, and his mother was then 52 or 53 years of age. He was, as Mr. Everett emphasized (and I have no doubt that Cassels J. regarded it as a very important matter) an exceedingly good son who was likely during the rest of his life to recognize the moral obligation which he had to maintain his mother if and so far as she needed it; but the fact remains that he was her son and not her husband. The contribution that he was making to his mother at the time of his death was £5 a week, out of which she was feeding him, and it is difficult to imagine that the cost of his food can have been as little as £1 a week. The prospect of marriage was, of course, considered by Cassels J., but he seems to have discounted that prospect by reason of the fact that in the past this young man had not, according to the evidence, taken much interest in the opposite sex. However, I am bound to say that I cannot see any reason to discount the prospect of this young man's marriage at all. It seems to me exceedingly likely that he would marry, and when he married, however much the moral claims of his mother might

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pull upon him, yet the claims of his wife, who would be the principal person to share in his prosperity, would come first. If he had succeeded in life, as appears likely, he would, no doubt, have required money for other purposes, to invest in the future as well as for his wife's maintenance, and the mother, in those circumstances might have received less. Taking all the circumstances into consideration, I agree with what Lord Goddard C.J. has said, that the figure of £3,100 should be reduced to the sum of £1,500, and to that extent I think that this appeal must be allowed.

ROMER L.J. I agree, and for the same reasons. It appears to me as though Cassels J. had approached this problem as if the deceased man were the husband instead of the son of the plaintiff. There is a fundamental distinction between the two. Apart from the point to which Lord Goddard C.J. has referred in relation to the legal liability to maintain, there is, of course, the very real possibility of a son marrying, and I think that Cassels J. paid a little too much attention to the fact that this son had arrived at the age of 29 without marrying, and concluded that, at the time of the accident, he had no intention of ever marrying. It seems to me, nowadays at all events, and especially in the case of an ambitious and serious minded young man, as this young man obviously was, that one can really attach very little weight to the fact that he has not married by the time he was 29 years of age. This son was going through an apprenticeship in the hope of getting a very much better job later, and it may well have been that when that time came he would have decided to marry, and it is to be observed that if this young man had in fact married instead of having died, the mother would have received nothing whatever by way of a capital sum, and the expectation of her future pecuniary benefit would, I should think, have been very much less than £4 a week. I agree with the order which has been proposed.

Appeal allowed. Damages reduced.

Solicitors: *F. J. Stewart & Co.; G. Howard & Co.*

P. B. D.

[HOUSE OF LORDS.]

* B. *v.* B. (No. 2). H. L. (E.)†

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April 4, 5.

PRACTICE NOTE.

House of Lords—Appeal to—Leave to appeal—Matrimonial cause—Infant—Custody—Religious upbringing—No appeal except by leave of Court of Appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 27 (2).
Infant—Custody—Divorce Court. "Matrimonial cause."

APPEAL from the Court of Appeal.

A wife (the appellant) petitioned successfully for a divorce and on the pronunciation of the decree nisi on July 31, 1952, an order was made that she should have custody of the two children of the marriage. On September 12, 1952, the decree was made absolute. Subsequently it became known that she wished the younger child to be brought up, not in the Roman Catholic religion, that of her former husband (the respondent), but as a member of the Church of England. On June 6, 1954, the respondent applied in the divorce proceedings for directions that the child should be brought up a Roman Catholic. On November 5, 1954, Davies J. dismissed the summons. On November 19, 1954, the Court of Appeal reversed his decision and refused leave to appeal. The Appeals Committee of the House of Lords subsequently granted leave to appeal. When the case came on for hearing before the Appellate Committee on April 4, 1955, objection was taken on behalf of the respondent that there was no jurisdiction to hear the appeal.

Charles Russell Q.C. and *Roger Ormrod* for the respondent. There is no jurisdiction to hear this appeal, since by section 27 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925: "The decision of the Court of Appeal on any question arising "under the provisions of this Act relating to matrimonial causes "and matters . . . shall be final, except . . . on a question of law "on which the Court of Appeal gives leave to appeal." Section 193 (1) confers jurisdiction to make orders such as that in this case in relation to infants. The position was not altered by the Administration of Justice (Appeals) Act, 1934, section 1 (3) of which plainly saved section 27 (2) of the Act of 1925. The fact that the fasciculus of sections in the Act of 1925 relating to matrimonial causes was repealed and re-enacted by the Matrimonial Causes Act, 1950, does not affect the position. The words of section 26 (1) are identical with those of section 193 (1) of the Act of 1925. By section 38 (1) of the Interpretation Act, 1889:

† *Present*: VISCOUNT KILMUIR L.C., LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

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"Where . . . any Act . . . repeals and re-enacts . . . any "provisions of a former Act, references in any other Act to "the provisions so repealed, shall, unless the contrary intention "appears, be construed as references to the provisions so "re-enacted."

J. E. S. Simon Q.C. and *A. R. Ellis* for the appellant. Section 27 (2) of the Act of 1925 should be narrowly construed. The phrase "matrimonial causes and matters" is not all-inclusive. Such a provision as this should be strictly construed: see Maxwell on Interpretation of Statutes, 10th ed., pp. 273–4, 285–6. Questions "relating to matrimonial causes and matters" would include particulars, striking out pleadings and the like. A claim for damages only would not be a matrimonial cause nor would it relate to a matrimonial cause. This proceeding is not one relating to a matrimonial cause or matter within the definition of "matrimonial cause" in section 225 of the Act of 1925, but a proceeding under the Act relating to the custody or education of children. Proceedings relating to the custody of children under this section are considered by the court in the same way that they would be considered if original proceedings had been taken in the Chancery Division. The words "any proceedings for "divorce" in section 193 (1) of the Act of 1925 are only applicable where the order is made before or by the final decree: see *Pryor* v. *Pryor*.[1] An application by a wife for maintenance after final decree is not a matrimonial cause. The words "relating to "matrimonial causes" mean "relating to the actual divorce "suit." They do not include the special statutory jurisdiction which may arise after the suit is ended or even after the death of one of the parties.

[Reference was also made to the Annual Practice (1955), p. 2326; *Shelley* v. *London County Council*[2]; *Rex* v. *Middlesex Justices, ex parte Bond*[3]; *Manders* v. *Manders*[4]; *Hanbury* v. *Hanbury*[5]; *Butchart* v. *Butchart and Hill*.[6]]

VISCOUNT KILMUIR L.C. We have considered all the points put before us and we have come to the conclusion that the case is covered by section 27 (2) of the Act of 1925.

[No order was made as to the costs of the appeal.]

April 5. The House ordered that the petition and appeal be dismissed as incompetent to be heard.

Solicitors: *Theodore Goddard & Co.; Charles Russell & Co.*

F. C.

[1] [1947] P. 64; 63 T.L.R. 208; [1947] 1 All E.R. 381.
[2] [1949] A.C. 56; 64 T.L.R. 600; [1948] 2 All E.R. 898.
[3] [1933] 2 K.B. 1; 49 T.L.R. 247.
[4] (1890) 63 L.T. 627; 7 T.L.R. 149.
[5] [1895] A.C. 417.
[6] [1901] A.C. 266.

[COURT OF APPEAL.]

* B. *v.* B. (No. 3).

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April 5.

Jenkins and Hodson L.JJ.

House of Lords—Appeal to—Leave to appeal—Matrimonial cause—Infant—Custody—Religious upbringing—Whether question of law raised—Question of discretion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 27 (2).
Fact or Law—Judicial discretion. Infant—Custody—Divorce Court.

On December 14, 1954, the Court of Appeal reversed the decision of Davies J. and held that a girl, the child of a marriage which had been dissolved, should be brought up according to the wishes of her father in the Roman Catholic faith. The Court of Appeal refused to the mother leave to appeal to the House of Lords, but she obtained leave to do so from the House. When the appeal came on for hearing the father raised the point, which had been overlooked, that under section 27 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, there could be no appeal in a matrimonial cause or matter of this character "except . . . on a "question of law on which the Court of Appeal gives leave to "appeal." The mother again applied to the Court of Appeal for leave to appeal to the House of Lords, notwithstanding the previous order refusing such leave:—

Held that, this being a case in which the court had reversed an order of the trial judge in the exercise of his discretion, no question of law was raised within section 27 (2) of the Act of 1925 which would justify the court in granting leave to appeal.

Quaere, whether the Court of Appeal could entertain the application, in as much as an order had been drawn up, passed and entered, on the face of which leave to appeal to the House of Lords had been refused.

APPLICATION for leave to appeal out of time to the House of Lords.

The Court of Appeal held, reversing an order of Davies J., in matrimonial proceedings, that a girl of seven years should, in accordance with the wishes of the father, be brought up as a Roman Catholic. The court refused the mother leave to appeal. Subsequently, she obtained the leave of the House of Lords to appeal.

When the appeal came on for hearing in the House of Lords [1] the father took the preliminary objection that, having regard to the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (2),[2] the decision of the Court of Appeal was final, except on a question of law on which the Court of Appeal gave leave to appeal.

[1] *B.* v. *B.* (*No.* 2), ante, p. 557.

[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (2): "The decision of the Court of Appeal "on any question arising under the "provisions of this Act relating to "matrimonial causes and matters "and to declarations of legitimacy "and of validity of marriage shall "be final, except where the decision "is either on the grant or refusal of "a decree on a petition for dissolu-"tion or nullity of marriage or for "such a declaration as aforesaid, or "on a question of law on which the "Court of Appeal gives leave to "appeal."

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The mother applied to the Court of Appeal for leave to appeal notwithstanding its previous refusal to grant leave.

J. E. S. Simon Q.C. and *A. R. Ellis* for the mother.
Charles Russell Q.C. and *Roger Ormrod* for the father.

The following cases were cited in argument: *Evans* v. *Bartlam* [3] and *Willoughby* v. *Willoughby*.[4]

Jenkins L.J. This is a case concerning the religious upbringing of a girl, aged some seven years. The matter came before this court, consisting of my brothers Hodson and Vaisey and myself on December 14, 1954, and on that date we gave directions to the effect that the girl should be brought up in the Roman Catholic faith, reversing an order of Davies J. to the contrary effect. On our stating our decision on December 14, 1954, counsel for the mother applied for leave to appeal to the House of Lords. That leave was refused; but it is fair to say that at the time neither the court nor counsel appearing had in mind the special provisions of section 27 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925.

[His Lordship read section 27 (2), and continued:] The mother applied to the House of Lords for, and obtained, leave to appeal to the House of Lords. On the occasion when that leave was given section 27 (2) was again overlooked. In due course the case came into the list for hearing in the House of Lords. Before it came on, the existence of section 27 (2) had been noticed by the solicitors or counsel for the father, and they advised those on the mother's side that this point would be taken on the hearing of the appeal. The point taken was that this was a matrimonial cause or matter, and, accordingly, that under section 27 (2) there was no appeal from the decision of this court except on a question of law with the leave of this court. That preliminary point was fully argued in the House of Lords and was upheld.

It then occurred to the mother's advisers that it might be possible to remove this procedural obstacle by a further application to this court for the purpose of obtaining leave of this court, notwithstanding the previous order refusing leave to appeal to the House of Lords, on the ground that there was here a question of law which would be a proper subject of leave under section 27 (2). Their Lordships, as I understand it, expressed no view one way or the other whether such a further application to this court ought to be made, or could be entertained, or, if entertained, should be acceded to; but I understand them to have intimated that in the event of such an application being made and succeeding they would be prepared to consider allowing the appeal to go forward on the existing printed documents without putting the mother to

[3] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.
[4] [1951] P. 184.

the necessity of starting all over again with a fresh appeal to the House.

That is the background of the present application, which is an application on behalf of the mother for leave to appeal to the House of Lords on a question of law arising in the case. To my mind it is open to grave doubt whether this court can entertain such an application at all, inasmuch as there is here an order drawn up, passed and entered, on the face of which it appears that leave to appeal to the House of Lords was refused. Assuming that this objection can be answered, on the ground that when leave was refused in this court the court had not present to their minds section 27 (2), and regarding the matter as if it was now being raised for the first time, it remains to consider whether there is here any question of law in respect of which leave to appeal to the House of Lords could properly be given by this court.

Mr. Simon has said all that could possibly be said in support of the mother's application, but he has failed to persuade me that there was here any question of law at all of the kind contemplated by subsection (2) of section 27. He says, in effect (I hope it is not an injustice to his argument if I put it in this way) that there is here a question of law, the question being whether as a matter of law in all the circumstances of the case the Court of Appeal was justified in reversing the decision of Davies J. on a matter decided in the discretion of the judge. That is a question of law in a sense, but, in my view, it is not such a question of law as would warrant this court in giving leave having regard to the terms of section 27 (2). If this amounts to a question of law for the present purpose, then it follows that in every case within the purview of section 27 (2), in which this court reverses an order made by the judge of first instance in the exercise of his discretion there would be a question of law on the strength of which it would be proper for this court to grant leave to appeal to the House of Lords. It seems to me that this would in effect nullify the restriction imposed by section 27 (2).

Accordingly, in my view this is not a case in which it would have been right to give leave to appeal under section 27 (2), if an application under that section, or bringing that section to the notice of the court, had been made at the proper time. In refusing leave we were guided by no different considerations from those which govern the question on the footing that section 27 (2) applies, as it does—as is now recognized—apply to this case. Accordingly, in my view, this applications fails and must be dismissed.

Hodson L.J. I agree. I am not satisfied that this court can entertain this application, leave to appeal having been asked for and having been refused and the order having been drawn up. Looking at the matter as if the application could be entertained, I am of opinion that there is no question of law within the

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meaning of section 27 (2) of the Judicature Act, 1925, which would justify this court in granting the application. I say this on the understanding that the House of Lords has in no way encouraged this application or expressed any view about whether the application to this court could be entertained at all, and also on the understanding that no concession at all has been made by the husband to this appeal as to any points, but simply that if the appeal did go forward no point would be taken on his side as to the defect in the printed record.

Application dismissed.

Solicitors: *Hunters; Charles Russell & Co.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1955
April 27.
Lord Goddard C.J., Hilbery and Pearce JJ.

* REGINA *v.* ASHFORD, KENT, JUSTICES. *Ex parte* RICHLEY.

PRACTICE NOTE.

Crown Practice — Certiorari — Application for extension of time — Respondent to be notified—R.S.C., Ord. 59, *r.* 4 (2).

APPLICATION for order of certiorari.

The applicant, Peter Blair Richley, applied for certiorari to quash an affiliation order made on December 29, 1953, by the Ashford justices whereby the applicant was ordered to pay 20s. a week to Miss Pansy Patricia Mann for the maintenance and education of her bastard child of which the applicant was adjudged to be the putative father.

On February 15, 1955, the applicant applied ex parte to the Divisional Court for leave (which was granted) to apply for certiorari more than six months after the date of the justices' order. No notice was given to the respondent of the application and she did not appear on that occasion. At the present hearing counsel for the respondent indicated that, in the circumstances, he could not oppose an extension of time.

Frank Whitworth for the applicant.
J. H. Gower for the respondent.

LORD GODDARD C.J., having refused the application for certiorari, continued: There is one matter on which I want to say a word of general application with regard to applications for leave to move for orders of certiorari. R.S.C., Ord. 59, r. 4 (2), provides that motions for certiorari must be made

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within six months of the making of the order which it is sought to quash. The court has power, of course, to extend the order, and the present case is one in which it would be right to apply for the order to be extended. But where a person intends to apply to the court for an extension of time he must give notice to the person whom he would serve in the ordinary way as one who would be affected if the order challenged were quashed, that he intends to apply for an extension because the person affected has a right to be heard and to object to such an extension. He very likely has what I will call a vested interest in the upholding of the order. In the same way as if you go to the Court of Appeal out of time you have to give notice of motion for the time to be extended and as you have to do so in this court when justices have not stated a case within the requisite time, so, if you are going to move for certiorari out of time, you must give notice to the person who would be made in the ordinary way a respondent to the motion in order that he may be heard as to whether or not it is a fit case in which to extend the time.

Solicitors: *Kingsford, Dorman & Co., for Kingsford, Flower & Pain, Ashford; Lovell, Son & Pitfield, for Willmott, Elwell & Taylor, Ashford.*

J. D. P.

[COURT OF APPEAL.]

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1955

Apr. 21.

Evershed M.R., Hodson and Parker L.JJ.

*J. W. GRAHAME (ENGLISH FINANCIERS) LD. *v.* INGRAM AND OTHERS.

[Plaint No. L. 114a.]

Moneylender — Memorandum — Copy — Delivery — Joint and several borrowers—Delivery to agent of borrower—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

A moneylender sued for the repayment of money lent to four persons (one of whom had since died). The four borrowers had signed a memorandum of contract jointly and severally promising to repay the money with interest. At the foot of that document they acknowledged that they had received a copy of the memorandum. In fact, however, only one of the borrowers was personally served with a copy of the memorandum, and he was given an extra copy to send to one of the other three borrowers:—

Held, that section 6 of the Moneylenders Act, 1927, had not been complied with. The acknowledgment signed by the borrowers did not say that a copy of the memorandum had been sent or delivered to them. To comply with the statute a copy should have been sent to each borrower within seven days of the making of the contract. Service of a copy on one borrower as agent of another would not be sufficient.

Dictum of Scrutton L.J. in *Eldridge* v. *Taylor* [1931] 2 K.B. 416; 47 T.L.R. 516 applied.

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J. W. Grahame (English Financiers) Ld. *v.* Ingram.

Appeal from Judge Charlesworth sitting at Sunderland County Court.

In August, 1952, one Godfrey desired to borrow money from the plaintiff company (referred to as the moneylender). As the moneylender was not prepared to lend Godfrey money on his promissory note alone, Godfrey's wife, her sister (Mrs. Ingram) and her husband were persuaded to be parties to the contract of borrowing. On August 25, 1952, the four borrowers signed a contract whereby they jointly and severally promised to pay to the moneylender £100, which was then advanced to Godfrey, with interest at 80 per cent. At the foot of the contract the borrowers gave the following acknowledgment: "The above note or memorandum which we have read and of which we acknowledge to have received a true copy was signed before the principal sum was advanced and the security stated above was given." Having signed that memorandum, they also signed a promissory note dated the same date promising to pay that sum and interest. On August 27, the moneylender sent to Godfrey two copies of the memorandum, one for himself and one for Ingram, but no copies were sent then or later to Mrs. Godfrey or Mrs. Ingram, and there was no evidence that Ingram received his copy within seven days of the signing of the contract, though he admitted receiving it at some date.

In an action by the moneylender against Ingram, Mrs. Ingram and Mrs. Godfrey (Godfrey having died), the surviving borrowers sought unsuccessfully to maintain that they were merely sureties for Godfrey. The county court judge found that the three borrowers, with Godfrey, had jointly and severally borrowed the money. The borrowers further contended that section 6 of the Moneylenders Act, 1927,[1] had not been complied with in that a copy of the memorandum of the contract had not been sent to each of the four borrowers within seven days of the making of the contract. On that matter the county court judge found for the borrowers and, accordingly, he dismissed the claim. The moneylender appealed.

D. L. Wilkes for the moneylender.
J. R. Johnson for the borrowers.

In addition to the case referred to in the judgment the following was cited in argument: *S. H. Ellis Ld.* v. *Bridges.*[2]

Evershed M.R. I will ask Parker L.J. to deliver the first judgment.

[1] Moneylenders Act, 1927, s. 6: "No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender . . . shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract."

[2] (1938) 5 L.Jo. Cty. Ct. 254.

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Parker L.J. This is an appeal from a judgment of Judge Charlesworth, sitting at Sunderland County Court, whereby he dismissed a claim brought by the plaintiff, who is a licensed moneylender, against the three defendants, Mr. and Mrs. Ingram and a Mrs. Godfrey. [His Lordship stated the facts, and continued:] Mr. Wickes before this court has taken two points. He has said first that the county court judge overlooked the fact that in the memorandum which the parties signed they gave an acknowledgment at the foot of it in these terms: "The above "note or memorandum which we have read and of which we "acknowledge to have received a true copy was signed before "the principal sum was advanced and the security stated above "was given." It is to be observed that it does not say there, as required by the statute, that there has been delivered to them, or sent to them and each of them, a copy of the memorandum.

Secondly, it is said (and this is the real point) that where there is more than one borrower, as in this case, it is sufficient if a copy of the memorandum is sent or delivered to one of those borrowers; and it is said (and the judge has so found) that a copy was in fact sent to Godfrey.

[His Lordship read section 6 of the Moneylenders Act, 1927, as set out above, and continued:] Reading those words, it seems plain that where, as here, there is more than one borrower, because they are borrowing jointly and severally, a copy must be sent to each borrower. The mischief aimed at by this section, as I understand it, is that the borrower should have this protection, that he should know and have in his possession a copy of the terms on which he has borrowed the money.

There is no authority on the point, but it is to be observed that in *Eldridge* v. *Taylor*,[1] Scrutton L.J., in commencing his judgment, drew attention to the stringency of the regulations relating to moneylenders. He said: "For reasons which appeared "to it satisfactory, Parliament has put money-lenders under "the strictest regulations, and it is not for us to consider "whether that policy is right or not. Section 6 of the Act of "1927 provides that certain contracts for the repayment of money "lent and certain securities for the repayment of money lent shall "be invalid unless a note or memorandum of the contract is "made and signed personally by the borrower, and unless a copy "thereof is delivered or sent to him within seven days of the "making of the contract. Parliament has apparently thought "that the borrower should be protected by having in his posses-"sion a copy of the writing he has signed."

Finally, it is to be borne in mind that it is the borrower himself to whom the copy of the memorandum is to be sent, and from the wording of the section it would appear that sending it to an agent of the borrower is insufficient. Accordingly, although for certain purposes one partner may be the agent of his other

[1] [1931] 2 K.B. 416, 418; 47 T.L.R. 516.

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partners, nevertheless it seems to me that under this section service of a copy on one partner would not be service on the other. For those reasons I think the county court judge came to a correct conclusion, and this appeal should be dismissed.

HODSON L.J. I agree, and have nothing to add.

EVERSHED M.R. I also agree.

Appeal dismissed with costs.

Solicitors: *Gibson & Weldon for S. H. Mincoff, Newcastle-upon-Tyne; Torr & Co. for Wilford, Speeding & Hanna, Sunderland.*

E. D.

[CHANCERY DIVISION.]

1955
March 31.
Vaisey J.

*COMBER v. FLEET ELECTRICS LD.

[1954 C. 2598.]

Landlord and Tenant—Assignment or underletting—Covenant not to assign or underlet without consent—Fine—Covenant not to change user of premises without consent—Compensation moneys payable to tenant by local authority—Agreement by lessors to give consent in consideration of assignment by tenant of compensation money—Whether agreement enforceable—Whether a fine—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 144—*Landlord and Tenant Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 19 (3).

Lessors sought to enforce against lessees an agreement in a document (not under seal) by which the lessees agreed to pay over to the lessors the lessees' proportion of the compensation moneys payable in respect of a compulsory purchase of part of the demised premises by the local authority, in consideration of the lessors granting a licence to assign the lease and a licence to underlet and change the user of the premises:—

Held, (1) that the stipulated payment constituted a "fine" within the meaning of section 144 of the Law of Property Act, 1925, and section 19 (3) of the Landlord and Tenant Act, 1927,[1]

[1] Law of Property Act, 1925, s. 144: "In all leases containing a "covenant, condition, or agreement "against assigning, underletting, or "parting with the possession, or disposing of the land or property "leased without licence or consent, "such covenant, condition, or agreement shall, unless the lease contains an express provision to the "contrary, be deemed to be subject "to a proviso to the effect that no "fine or sum of money in the nature "of a fine shall be payable for or in "respect of such licence or consent; "but this proviso does not preclude "the right to require the payment of "a reasonable sum in respect of any "legal or other expense incurred in "relation to such licence or consent."

Landlord and Tenant Act, 1927, s. 19: "(1) In all leases whether "made before or after the commencement of this Act containing a "covenant condition or agreement "against assigning, underletting, "charging or parting with the possession of demised premises or any

and as such was contrary to those provisions; (2) that, accordingly, there was no consideration for the payment, so that, the payment not having been made, the action failed.

Semble, (1) that if the money had actually been paid by the lessees to the lessors it would have been irrecoverable; (2) had the document been executed under seal the lessors could have enforced it.

ACTION.

The plaintiffs were the owners in fee simple of a shop and premises known as 32 Gallowtree Gate in the city of Leicester.

By a lease dated January 25, 1949, made between the plaintiffs of the one part and the defendant company of the other part, the plaintiffs demised the shop to the defendant company for the term of twenty-one years from December 25, 1948, subject to the payment of the rent and observance and performance of the covenants on the part of the lessee and the conditions therein contained. By the lease the defendant company covenanted, inter alia, not without the plaintiffs' consent to use the shop for any purpose other than the carrying on of the business of sellers by retail of certain specified and other electric domestic appliances, and also, not to assign, underlet or part with the possession of the shop or any part thereof without the written consent of the plaintiffs previously obtained.

Subsequent to the grant of the lease, but before May 22, 1951, Leicester corporation had, under compulsory powers and in order to set back the frontage of the shop, acquired the fee simple of the front portion of the premises, and were liable to pay compensation therefor, but its amount and the proportions to be paid to the plaintiffs and the defendant company respectively had not been agreed or determined. The company had agreed, subject to the consent of the plaintiffs, to assign the lease to one Lennard, who desired to carry on through the medium of a company known as Wards Hollywood Film Star Shoes Ld., to whom the shop was to be sublet by him, the business of ladies' outfitters.

" part thereof without licence or con- " sent, such covenant condition or " agreement shall, notwithstanding " any express provision to the con- " trary, be deemed to be subject— " (*a*) to a proviso to the effect that " such licence or consent is not to be " unreasonably withheld, but this " proviso does not preclude the right " of the landlord to require payment " of a reasonable sum in respect of " any legal or other expenses incurred " in connexion with such licence or " consent; . . . (3) In all leases " whether made before or after the " commencement of this Act con- " taining a covenant condition or " agreement against the alteration " of the user of the demised premises, " without licence or consent, such " covenant condition or agreement " shall, if the alteration does not " involve any structural alteration of " the premises, be deemed, notwith- " standing any express provision to " the contrary, to be subject to a " proviso that no fine or sum of " money in the nature of a fine, " whether by way of increase of rent " or otherwise, shall be payable for " or in respect of such licence or con- " sent; but this proviso does not pre- " clude the right of the landlord to " require payment of a reasonable " sum in respect of any damage to or " diminution in the value of the " premises or any neighbouring pre- " mises belonging to him and of any " legal or other expenses incurred in " connexion with such licence or " consent."

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On May 22, 1951, the defendant company by a document (not under seal) signed by one Greaves, a director, "for and on "behalf" of the defendant company, undertook in consideration of the plaintiffs at the request of the defendant company granting it a licence to assign the lease to Lennard and to underlet it to Wards Hollywood Film Star Shoes Ld., and also to use the premises as a ladies' outfitters, to assign to the plaintiffs the proportion due to the defendant company of the compensation recoverable from Leicester corporation for setting back the frontage to the improvement line, and to pay certain other sums therein mentioned.

The plaintiffs alleged that in reliance of the undertaking on May 23, 1951, they granted a licence to assign and for change of user of the premises. They further alleged that the compensation payable by Leicester corporation and the proportions in which sum was divisible between the plaintiffs and the defendant company had been agreed with the corporation, but that the corporation was not prepared to pay over the defendant company's proportion of that compensation unless and until it had assigned that proportion to the plaintiffs.

The plaintiffs had called upon the defendant company to assign its proportion of the compensation in pursuance of the undertaking, but the defendant company refused so to do. By their statement of claim the plaintiffs claimed specific performance of the undertaking.

The defendant company, by its amended defence, averred (1) that the assignment of its proportion of the compensation was a fine or a sum of money in the nature of a fine; (2) that notwithstanding the terms of the undertaking the lease was deemed to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, was to be payable for or in respect of a licence for the alteration of user of the premises or to assign the lease, and that the defendant company relied on section 19 (3) of the Landlord and Tenant Act, 1927, and section 144 of the Law of Property Act, 1925; (3) that the assignment of its proportion of the compensation money was unenforceable by action; alternatively, that the undertaking to assign the sum in question was an illegal consideration for the grant of the licence; alternatively, that there was no consideration for the undertaking.

E. M. Winterbotham for the plaintiff lessors.
David Stinson for the defendant company.

The following case, not referred to in the judgment, was cited in argument: *Maskell* v. *Horner*.[2]

VAISEY J. In this action the plaintiffs, Mr. and Mrs. Comber, are the freeholders of a shop in the city of Leicester known as

[2] [1915] 3 K.B. 106, 118; 31 T.L.R. 332 (C.A.).

No. 32 Gallowtree Gate. There are two defendants, Fleet Electrics Ld. and Mr. Greaves, whose interests are as follows: Fleet Electrics Ld. are the lessees under the lease in question, and Mr. Greaves is a director of that company, but all proceedings have been stayed against him.

The lease is dated January 25, 1949, and it demises the shop to which I have referred to the defendant company for a term of twenty-one years from Christmas, 1948, at a rental of £1,000 per year. The lease is in common form and contains a number of covenants on the part of the lessees, of which only two are relevant. The first is a covenant by the lessees not to do or permit or suffer to be done to the premises anything which may be a nuisance, and also the lessees covenant not, without the landlords' consent, to use the demised premises for any purpose other than the carrying on of the business of retail sellers of electrical appliances. The other covenant which it is necessary to mention is a covenant by the lessees not to assign, underlet or part with possession of the demised premises without the written consent of the lessor. There is no difference, in my judgment, between the landlord's consent under clause 12 and the written consent of the lessor under clause 13 of the lease.

Some time after the granting of the lease there was an improvement effected by the Corporation of the City of Leicester which involved taking down the front part of the shop and setting it back some feet, thereby, I suppose, widening the highway. For that improvement compensation was payable to the extent of £2,000, which was divisible between the plaintiffs as landlords and the first defendants, Fleet Electrics Ld., as tenants, in equal shares, each being entitled to £1,000.

Fleet Electrics Ld. were anxious to assign this property to a Mr. Lennard, who wished to underlet part of the property to a company known as Ward's Hollywood Film Star Shoes Ld. It was therefore necessary for Fleet Electrics Ld., the lessees, to obtain the necessary leave of the landlord, that is, of the plaintiffs, for two purposes: first, to obtain their permission to the required assignment; and, secondly, to obtain permission for the intended change of user of the property.

The law which governs this matter has, I think, to be considered first from the point of view of the covenant not to assign and, secondly, from the point of view of the covenant which provided for an exclusive kind of user of the property.

The covenant not to assign is dealt with in the Law of Property Act, 1925, s. 144, in these terms: [His Lordship read the section, and continued:] That section replaced an earlier section, section 3 of the Conveyancing Act, 1892. Its terms are well known and I do not think give rise to any difficulty of construction or interpretation. That has to be supplemented by section 19 (1) of the Landlord and Tenant Act, 1927. [His Lordship read the subsection.]

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Therefore under the Act of 1925 there is incorporated in every lease a proviso to the effect that no fine shall be payable in respect of the licence and the later Act of 1927 provides that the licence is not to be unreasonably withheld.

The other provision which is material in the present case is that which concerns the proposed change of user of the property. That is dealt with in section 19 (3) of the Landlord and Tenant Act, 1927. I am bound to say that I find this subsection extremely difficult to understand. [His Lordship read the subsection, and continued:] Under subsection (3), as it seems to me, a landlord, if asked for a licence or consent to the alteration of the user of premises, is perfectly entitled to refuse it; there is no question about a licence being unreasonably withheld in such a case. But if he gives his consent, then the statute for its own good purposes provides that no fine shall be payable in respect of such licence or consent. That apparently is the case notwithstanding any express provisions to the contrary, which may mean prima facie provisions to the contrary in the lease, but which might mean express provisions to the contrary in some other document. Therefore the landlord's decision, when asked to give his consent to a change of user, must either be to refuse it out of hand, or to grant it gratuitously.

The landlord and tenant cannot privately agree to disregard the law and agree that a licence shall be granted in consideration for the payment of a fine.

In my view it is a provision which interferes fundamentally with the ordinary rights of the subjects of Her Majesty in this country to make contracts in this respect, according to their wishes and inclinations. It is a prohibitory provision designed to prevent the passing of money upon the landlord giving his consent to a change of user of the demised premises. Unless it does mean that, then I do not think that it can mean anything at all. However, if money did pass under a bargain made between lessor and lessee for the granting of consent I am very doubtful whether the landlord would be subject to any penalty for having received it, or could be obliged to pay it back or account for it in any way.

But unfortunately in this case that is not what happened. What happened was that on May 22, 1951, the defendants, the lessees, signed a document undertaking, in consideration of the plaintiffs' granting, first, the licence to assign, and, secondly, the licence to underlet and to change the user of the premises, to assign to the plaintiffs their half of the compensation recoverable from the Leicester Corporation. It was in reliance upon that undertaking that the plaintiffs, by a document dated the following day, May 23, granted to the defendants the necessary licence, first, to assign the lease to Mr. Lennard; secondly, permission to underlet to the shoe company; and, thirdly, to use the shop for the new purpose of a ladies' outfitters.

This action is brought by the plaintiffs to enforce the undertaking in question. By this action they call upon the defendant company to assign its proportion of the compensation pursuant to that undertaking and the defendant refused to do so, originally alleging, first of all, that the defendant Greaves had no authority to contract on their behalf, that defence having later been withdrawn, and, secondly, that the undertaking was unenforceable, however much the defendants had pledged themselves to carry it out.

There is no real dispute about the facts of this case. The defendants plead in effect that they, being entitled to their half of the compensation money, had attempted to assign it to the plaintiffs for no consideration or for a consideration which is void. They claim the benefit of the licence. They claim that they are entitled to assign to Lennard, and that they can use the property for the purposes of ladies' outfitters. But they allege that there is no consideration for the undertaking to assign this compensation, and that the assignment in that respect is void. If the money had been paid, I think that there is ample authority to show that if once it had been paid it could not have been recovered. But the question is, now that the matter lies entirely in contract, whether there was consideration to support a contract upon which this action could be founded.

I have been referred to several cases. First I would mention *Waite* v. *Jennings*.[1] In that case there was an attempt to recover money and that attempt did not succeed.

Next, there is *Andrew* v. *Bridgman*.[2] The headnote reads as follows: "Section 3 of the Conveyancing Act, 1892, does not "make illegal the demanding of a fine as a condition of giving "a licence or consent to the assignment of a lease which contains "a covenant against assignment without consent; it merely "makes the payment of a fine something not contracted for. "The parties to the lease may therefore agree that a fine shall be "paid for the granting of the licence."

That was a decision of Channell J., and it was upheld in the Court of Appeal.[3]

This is a very unfortunate case, because if money had passed from the lessees to the lessor I do not think that the lessees would have had any right to recover it, but since the matter lies solely in contract, the question is whether that contract can be given effect to, and there, in my view, lies the plaintiff's difficulty.

I have said that I think the merits of this case on the defendants' side are rather far to seek; these parties were negotiating at arm's length and the defendants, Fleet Electrics Ld., were perfectly willing to allow the landlord to receive this money in exchange for the licence which the plaintiffs gave.

I was somewhat tempted to follow the guidance of *Haigh* v. *Brooks*,[4] where there was a promise by the defendant to see

[1] [1906] 2 K.B. 11; 22 T.L.R. 510.
[2] [1907] 2 K.B. 494.
[3] [1908] 1 K.B. 596.
[4] (1839) 10 Ad. & El. 309, 320.

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certain bills paid at maturity in return for the surrender of a guarantee, and there Lord Denman C.J. said: " . . . the plaintiffs were induced by the defendant's promise to part with " something which they might have kept, and the defendant " obtained what he desired by means of that promise."

In my judgment, however, I ought not to decide the present case on that ground, and I am afraid that this action fails because this undertaking to assign this money was a nudum pactum, there being no consideration for it. If the document had been executed under seal, the matter would have been different. The lessees' undertaking would, however, have to be implemented by their collecting this money and handing it over to the landlords or by the lessees releasing their right to the compensation and so permitting Leicester Corporation to hand it over to the landlords, and that seems to me to be as plainly as possible a fine, or, if it is not a fine, it is money in the nature of a fine. Inasmuch as the very strong words of the statute prohibit the payment of a fine or anything in the nature of a fine, I do not see how the plaintiff can in the particular circumstances of this case succeed. The words of section 19 (3) of the Act of 1927 are very strong. I think it is possible, in spite of the best intentions of the legislature, in many cases to circumvent those provisions, but I do not think it has been done in this case. If money had passed, in my view it would not be recoverable, but where the landlord, as here, has to come to the court to enforce an agreement which lies at the moment entirely in contract, then I do not see my way to give him the relief which he seeks.

It may be said that, the defendants having obtained the licence, it is very inequitable that the plaintiffs should not be paid what the tenant had agreed to pay them for it. That, however, is one of the results of this subsection, which was undoubtedly passed, I suppose, with the idea that it is the tenant who has to be protected and the landlord who has to suffer. The landlord could either refuse his consent or he could grant it, but, if he grants it and if he stipulates for the payment of money or money's worth, that is, for a fine or anything in the nature of a fine, he is contravening that which the law states must be read into the terms of every lease, namely, a proviso that no fine or a sum of money in the nature of a fine shall be paid for or in respect of any such licence or consent. Whatever may be put into a lease in ink or type, or however carefully the engrossment provides to the contrary, this subsection states that this proviso is binding on lessor and lessee and must be enforced whatever the consequences be. Accordingly, this action fails.

Judgment for the defendants.

Solicitors: *Janson, Cobb, Pearson & Co., for F. H. Nye & Murdoch, Brighton; Kimbers, Williams, Sweetland & Stinson.*

J. A. G.

[COURT OF APPEAL.]

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Evershed M.R., Jenkins and Romer L.JJ.

[LVC 13 1953.]

Rates and Rating—Industrial hereditament—Club—Royal Automobile Club—Workshops—Occupier company comprising members of club—Provision of facilities to members—Whether "by way of trade"—Not a factory or workshop—Repair of units of road service fleet—Whether "maintenance of road vehicles"—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149 (1) (*c*)—*Rating and Valuation (Apportionment) Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3. *Club.*

The appellant company was comprised of the members of a club formed to encourage and develop motoring. It was not the object of the club to make a profit and no profits were distributed to its members. There were two types of members of the club: full members, who were required to be members of the company; and associate members who were not members of the company, nor were entitled to use the club premises. All the members were entitled to certain services and facilities afforded by the company to the members as motorists, including the provision of a road service fleet. The cost of providing these services and facilities was met out of a separate fund consisting of the subscriptions of the associate members (which were wholly so used) and the capitation fees of full members of the club. In connexion with the provision of these facilities the company occupied, and was rated in respect of, a hereditament described in the local valuation list as "workshops and appurtenances" and included in Part I of that list. The company contended that the hereditament ought to be treated as an industrial hereditament and be transferred to Part II of the list:—

Held, (1) that on all the facts of the case the principal activities carried on by the company on the hereditament were not conducted "by way of trade" for the purposes of that part of the definition of "non-textile factory" contained in section 149 (1) (*c*) of the Factory and Workshop Act, 1901; and that, accordingly, the hereditament was not an industrial hereditament within section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

Challoner v. *Robinson* [1908] 1 Ch. 49; 24 T.L.R. 38 distinguished.

Inland Revenue Commissioners v. *Eccentric Club Ld.* [1924] 1 K.B. 390, 400; 40 T.L.R. 208 considered.

Quaere whether repairing the units of the road service fleet constituted maintenance of road vehicles within section 3 (2) (*b*) of the Rating and Valuation (Apportionment) Act, 1928 (as amended by section 69 of the Local Government Act, 1929).

Observation of Lord Dunedin in *Potteries Electric Traction Co. Ld.* v. *Bailey* [1931] A.C. 151, 169; 47 T.L.R. 154 considered.

APPEAL from the Lands Tribunal by case stated.

The appellant company, Automobile Proprietary Ld., was assessed for rating purposes in respect of a hereditament described in the valuation list as "workshops and appurtenances,

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"15 Maswell Park Road, Hounslow," and assessed at £1,048 gross value and £870 rateable value. The hereditament was entered in Part I of the valuation list for the Heston and Isleworth rating area, but on June 23, 1952, the company made a proposal that it ought to be treated as an industrial hereditament and be transferred to Part II of the list. The valuation officer objected and the company appealed against the objection. At a hearing on December 18 the local valuation court for South Middlesex confirmed the entry in the list. On January 6, 1953, the company appealed to the Lands Tribunal. The appeal was heard on November 18 and December 18, 1953, and the tribunal affirmed the decision of the local valuation court. The company appealed and the Lands Tribunal stated a case for the opinion of the court.

The following statement of the facts proved or admitted before the Lands Tribunal is taken from paragraph 8 of the case stated. "(a) The appellants are a company limited by guarantee "whose objects are expressed in their memorandum of associa- "tion as inter alia 'to establish, maintain and conduct a club "'for the encouragement and development in Great Britain of "'the auto-motor vehicle and other allied industries and for the "'accommodation of members of the company and their friends, "'and to provide a club-house or club-rooms and other con- "'veniences, and generally to afford to members and their friends "'all the usual advantages, conveniences and accommodation of "'a social club and centre of information and advise on all "'matters pertaining to auto-motor vehicles.' (b) The income "and property of the appellants, whencesoever derived, is to be "applied solely towards the objects of the company as set forth "in the memorandum of association. No portion thereof is to "be paid or transferred directly or indirectly by way of dividend, "bonus or otherwise howsoever, by way of profits to the members "of the company and in the event of the company being wound "up the members are not to receive any part of any surplus "assets but are to be liable each to contribute such a sum not "exceeding £1 as may be required for payment of the debts and "liabilities of the company. . . . (c) The appellants have estab- "lished a club known as the Royal Automobile Club the "members of which are required to be members of the company. "(d) The appellants have provided a club-house in Pall Mall, "London, and a country club at Woodcote Park, Epsom, avail- "able for the use of such members. (e) The appellants also "provide services and facilities in connexion with motoring such "as road patrols, road-side telephone boxes, road signs, assistance "in home and foreign touring, legal aid, etc. (f) There is another "class of members of the Royal Automobile Club termed "'associate members' who are not members of the company "and who are not entitled to use the club-house or country club "but who are entitled to the services and facilities referred to "in paragraph (e). The affairs and finances of the associate

" members are administered by a committee specially constituted " for this purpose. (g) The subscriptions of associate members " are wholly utilized for the services and facilities referred to in " paragraph (e). These services and facilities are paid for out of " a separate fund provided by the subscriptions of the associate " members and by a capitation fee in respect of the full members; " it is not the object of the club to make a profit, but to provide " the maximum services and facilities which the available money " is sufficient to provide, and this fund is wholly spent on the " provision of such services and facilities. (h) On December 31, " 1952, the appellants owned a fleet of 754 vehicles, made up " of 628 motor-bicycles with sidecar boxes, 50 road service vans, " 74 cars, one motor-cycle and passenger sidecar and one invalid " tricycle. (i) The hereditament, the subject of this appeal, is " a collection of single storey buildings with an upper floor, used " as offices, in part of the main building, and there is a gallery " to the main building used principally for the storage of head " office papers. (j) At the hereditament the appellants service, " recondition and repair motor-cars, motor-vans, combinations of " motor-cycles and sidecars and parts of such cars, vans, cycles " and combinations belonging to them. At least four of these " motor-cars and motor-vans are usually housed at the hereditа- " ment. They also make badge fittings for attaching to motor- " vehicles the badges issued by the appellants to members, and " paint, spray and stencil the blue and white traffic signs used in " connexion with the services referred to in paragraph (e)."

The hereditament was described by reference to a plan on which the use to which the various buildings were put was indicated. On the ground floor at the back of the premises furthest from Maswell Park Road was a section indicated on the plan in pink, which was divided into three subsections. In the first subsection the work was carried on in making the brackets for affixing members' badges to motor-vehicles. The second subsection was marked on the plan " Sign painting and stencil- " ling," and there the preparation of the blue and white traffic signs took place. The third subsection was used in part for the storage of metal and boards used in connexion with the bracket making and sign painting, and so forth, and in part for brazing in connexion with the work carried out in the main building.

On the ground floor of the main building the plan referred to showed the following principal divisions, reading from left to right: a yellow area marked " A," a grey area marked " B " (with a small yellow island in the middle marked " C "), and a blue area marked " D." The grey area was thus, broadly speaking, sandwiched between the yellow and blue areas. The area coloured yellow and marked " A " was stated to be used as a " vehicle washing bay, a space . . . for garaging overhauling " and greasing cars or vans with a greasing lift, for vehicles " operated by compressed air, and a space for storing new motor- " cycles which may be awaiting assembly into motor-cycle and

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"sidecar box combinations." The area marked "B" and coloured grey was "the general utility and manoeuvring space "providing access to various parts of the premises." The yellow island marked "C" was a standing place for four motor-vehicles. The blue area marked "D" was stated to be the "dismantling "and assembly area and the work bays in which the overhaul "and repair of motor-cycles and the reconditioning of units" took place. A further part of the blue area was marked "stores, "stores office and foreman's office," and was used "mainly for "the storage of spare parts and other materials used (partly on "the hereditament and partly elsewhere) in the overhaul and "repair of motor-cycles or units such as engines, gear boxes and "clutches and also for the storage of such units" after they had been overhauled and repaired on the premises until they were required for use on the premises or for sending away. There were a number of smaller areas coloured grey used for general utility in relation to the purposes for which the hereditament was occupied, such as lavatories, canteen, battery charging room, boiler house, coal bunker and oil stores. There was also a small pink area used as frame stores, two yellow areas, one used as a standing for a caravan and the other as a tyre stores. The upper floor of the main building was used as offices and for storage of papers.

The case stated that it was the normal arrangement of the appellants to keep at the hereditament a "stock of spare parts, "reconditioned units, of . . . various kinds . . . and other "materials . . . so that they can be dispatched as required to "any part of Great Britain or Northern Ireland for the main- "tenance or repair of a patrol man's vehicle. The part or unit "is then substituted either by the patrol man himself or by a "local motor repairer. Where a reconditioned unit is substituted "for an unserviceable unit, the latter is sent to the hereditament, "overhauled and repaired as necessary and put into stock ready "for use on the hereditament or for sending away. The cars and "vans normally housed on the hereditament are there over- "hauled and maintained as necessary. Motor-cycle combinations "operated by patrol men in the neighbourhood are where "possible also overhauled and maintained on the hereditament "instead of by local motor repairers. (s) If a vehicle is brought "in for a complete overhaul the machine is stripped right down, "any damaged or worn out parts are repaired if possible or (in "most cases) replaced; for this purpose any new or reconditioned "parts required are provided from stock. The sidecar body is "sent away from the hereditament to be repaired and re- "enamelled and another body is usually substituted. Overhauls "of units are carried out by the same methods as overhauls of "machines. (t) In the part marked "A" on the . . . plan "there were carried out during 1952 overhauls to seven cars and "vans costing £840 and maintenance of four cars and two vans

" costing £78 and in the part . . . marked ' D ' complete overhauls of 17 motor-cycles costing £1,955, a total of £2,873 for work of the nature of maintenance of road vehicles. (u) During the same year the work carried out in ' D ' . . . in connexion with units of the various kinds above mentioned was as follows:—171 motor-cycle engine overhauls costing £2,394; 108 motor-cycle gear box overhauls costing £648; 156 motor-cycle cylinder overhauls costing £507; 147 motor-cycle clutch overhauls costing £514 10s.; total cost of unit overhauls £4,063 10s.; and in the parts marked ' A ' and ' D ' . . . there were carried out assemblies of 86 motor-cycles and sidecar combinations costing £838 10s. (v) In the same year there were issued from the stores articles of stock amounting to a value of £4,596 for use on the hereditament and to a value of £12,733 for sending out to motor-vehicle patrol men for use in the repair of their vehicles; both of these figures being exclusive of the value of reconditioned units. The space occupied in the stores by articles (excluding reconditioned units) ultimately issued for use on and off the hereditament respectively was roughly proportionate to the values set out above. Only a very small proportion of units reconditioned on the hereditament was used thereon, such units seldom remained long in the stores before being issued for use elsewhere. About one-third of the store space was used for articles (including reconditioned units) used on the hereditament. The valuation of stock in store on December 31, 1952 (including reconditioned units), was £13,827, and stocks were maintained at a fairly even level throughout the year."

The conclusion reached by the tribunal was stated in paragraph 12 of the case: " We were satisfied upon the evidence that the primary purpose for which the hereditament was in fact occupied and used was the overhauling, repairing and reconditioning of units . . . and that . . . such work did not constitute ' the maintenance of road vehicles ' . . . We took the view that . . . all the work done on the premises . . . was done ' by way of trade.' We were, however, also satisfied that the . . . maintenance of cars, . . .," etc., of the company, was maintenance of road vehicles and that some of such work as well as the . . . repairing . . . of ' units ' took place in the part . . . marked 'D.' It seemed to us therefore that by reason of the provisions of section 3 (2) (*b*) " of the Act of 1928, such part was excluded from the definition of a ' factory or ' workshop ' and that all the purposes for which such part is used must therefore be ' purposes which are not those of a ' factory or workshop.' We took the view that we must look at the whole hereditament to ascertain the primary purpose for which it was occupied and used and . . . we determined that the hereditament was not an industrial hereditament; . . . Had we regarded it as permissible in law to treat the purposes of overhauling, repairing and reconditioning units carried out

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" in the part of the hereditament coloured blue and marked ' D ' " on the said plan as purposes of a factory or workshop we would " have reached the contrary conclusion."

G. D. Squibb for the appellant company.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

In addition to the cases referred to in the judgments, the following were cited in argument: *Inland Revenue Commissioners* v. *Westminster (Duke)* *; *Cornish Mutual Assurance Co. Ld.* v. *Inland Revenue Commissioners* †; *Inland Revenue Commissioners* v. *Westleigh Estates Co. Ld.* ‡; *Trebanog Working Men's Club and Institute Ld.* v. *MacDonald* §; *Religious Tract and Book Society of Scotland* v. *Forbes* ¶; *Moon* v. *London County Council.* ||.

EVERSHED M.R. At the beginning of his interesting argument in opening this case Mr. Squibb told the court that in order to succeed he must show that this hereditament was occupied by the company by way of trade or for the purposes of gain. The latter alternative, I think, has no application and, therefore, I amend Mr. Squibb's sentence: " In order to succeed I must show " that the hereditament is being occupied by way of trade," that being, as will be seen, a reflection of certain language in the Factory and Workshop Act, 1901. The tribunal from whom the appeal comes was of opinion that the condition stated by Mr. Squibb had been satisfied. The tribunal's view, as is stated in the case was that, having regard to a dictum of Lord Wright in *National Association of Local Government Officers* v. *Bolton Corporation*,[1] and the decision in *Challoner* v. *Robinson*,[2] all the work done on the hereditament " being work done in carrying on " a proprietary club was done ' by way of trade.' " With all respect to the tribunal I have come to a different conclusion on that point; for, in my judgment, it is not true to say that the activities (which I will describe presently in more detail) with which we are concerned are activities undertaken by the company by way of trade; and if that view is right then, as Mr. Squibb conceded, he cannot succeed here.

Certain other points have also been raised but I shall confine my conclusion to the view which I take on that point, and I shall not express any concluded view on those other matters.

The facts are stated at considerable length in the case stated. [His Lordship read sub-paragraphs (c) to (f) inclusive of paragraph 8, and continued:] I note that we are not told how the

* [1936] A.C. 1; 51 T.L.R. 467.
† [1926] A.C. 281; 42 T.L.R. 255.
‡ [1924] 1 K.B. 390, 391; 40 T.L.R. 208.
§ [1940] 1 K.B. 576; 56 T.L.R. 404; [1940] 1 All E.R. 454.
¶ (1896) 3 T.C. 415.
|| [1931] A.C. 151, 152; 47 T.L.R. 154.
[1] [1943] A.C. 166, 184; 59 T.L.R. 1; [1942] 2 All E.R. 425.
[2] [1908] 1 Ch. 49; 24 T.L.R. 38.

committee [referred to in paragraph (f)] is in fact constituted, though Mr. Lyell stated that, as he understood it, it was a committee of the members of the club and, therefore, of the company. [His Lordship read sub-paragraph (g) and continued:] The case then proceeds to state in great detail the facts in regard to the company's fleet of vehicles, their upkeep, and so on—the fleet which is maintained for the purpose of providing the services mentioned in paragraph (e). The hereditament with which we are concerned is substantially devoted in one way and another to various aspects of the upkeep of these road vehicles and their component parts.

Upon this hereditament are, first of all, the means for the service of and repair of the vehicles which I have mentioned and of separate parts of those vehicles. Generally speaking, the parts are sent to the company's premises for reconditioning, and the company sends out to the patrolman (whose vehicles may be a very long way from London) another part out of its stock, either a new part which has been acquired or a similar part which previously has been reconditioned by the company, in order that the vehicle should be kept efficiently on the road and that time should not be wasted by bringing the whole vehicle, for example, all the way from Newcastle-upon-Tyne to London to have the particular part replaced.

In addition to those activities of service and repair a few vehicles are housed on these premises. There is also an activity of making badge fittings. I assume that it is generally known that members and associate members of the Royal Automobile Club are entitled to carry upon their vehicles a badge indicating such membership, and it is at this place that badge fittings are made in large quantities for the benefit of members and associate members. Finally, there is a place for the painting of the road signs which I have referred to earlier. All those activities, in addition to what may be called offices and store premises, are to be found at this hereditament.

The ground floor of the premises consists at the back, that is the part most remote from Maswell Park Road, of a section which is referred to as the "pink" section [being indicated by that colour on the plan attached to the stated case]. In area that would amount to something like a quarter of the whole ground floor area. The pink section is divided into three distinct parts, separated one from another by partitions: in one the bracket making takes place, in another the activity known as brazing occurs, and for the purposes of this case it has been conceded by Mr. Lyell that the brazing can be taken to be an activity so connected with the bracket making that, since the bracket making part is, for reasons which I shall later state, certainly a "factory "or workshop" within the language of the Act of 1901, that part of the "pink" which is occupied for the brazing should also be taken to be occupied as a factory or workshop. The third part is devoted to the painting of the signs. That is not in terms

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within the Sixth Schedule to the Act of 1901, and if it is to be regarded as a factory for the purposes of section 149 (1), it must be because that activity is being undertaken "by way of trade."

The larger ground floor section (roughly, perhaps, three times in area the size of the pink part) is made up of parts coloured on the plan yellow, grey or neutral, and blue. The grey part (in so far as it is not used as canteens, lavatories and other such uses which are incidental to the main purpose for which the premises are used, being for the convenience and needs of those employed there) may be called the general manoeuvring part; vehicles would be coming in to the grey part and going thence to whatever other section of the building is appropriate. In the middle there is, coloured yellow, the standing place to accommodate four vehicles. The section which is lettered "A" and which is coloured yellow is, perhaps, itself a quarter of the total of this part of the ground floor in space. It is not suggested that the uses to which "A" is put are in themselves purposes of a factory or workshop within the meaning of the relevant statute. Some service takes place there of motor-cars: there is a washing bay, and so forth. But the most important section for present purposes is the blue part, which is lettered "D"; for it is on that part, save in so far as it is made up of stores, that the repair and maintenance of the vehicles and of the units of parts of vehicles takes place. As will be seen later, a very great deal depends, in the view taken by the tribunal, on the appropriate answer to the question: for the purposes of the de-rating is this blue part, lettered "D," occupied for factory purposes or not?

There is upstairs a much smaller area, consisting of a gallery and general offices, but this area, which is used in fact for storing documents or records of the town or country club, does not play, for the purposes of the present argument, any significant part.

The claim on behalf of the company is for what is commonly called de-rating, on the ground that this hereditament is being occupied as an industrial hereditament. The expression "industrial hereditament" is defined in section 3 of the Rating and Valuation (Apportionment) Act, 1928. Subsection (1) reads: "In this Act the expression 'industrial hereditament' means a "hereditament . . . occupied and used as a mine or mineral "railway or, subject as hereinafter provided, as a factory or "workship: Provided that the expression 'industrial hereditament' does not include a hereditament occupied and used as "a factory or workshop if it is primarily occupied and used for "the following purposes or for any combination of such purposes, "that is to say—(*a*) the purposes of a dwelling-house; (*b*) the "purposes of a retail shop; (*c*) the purposes of distributive whole-"sale business; (*d*) purposes of storage; (*e*) the purposes of a "public supply undertaking; (*f*) any other purposes, whether or "not similar to any of the foregoing, which are not those of a "factory or workshop." If it is permissible to make some criticism of the choice of language, it will be noticed that there

is a certain lack of uniformity. Opening with the formula "the "purposes of a dwelling-house," the legislature changes that form in (*c*) to "the purposes of distributive wholesale business," and in (*d*), again, to "purposes"—without any article—"of "storage." Those slight variations do not altogether assist the argument which in a case like this arises. Subsection (2) in its original form contained what is now sub-paragraph (*b*) of that subsection (sub-paragraph (*a*) having been added by [section 69 of] the Local Government Act, 1929. Sub-paragraph (*b*) reads: "For the purposes of this Act any place used by the occupier "for the housing or maintenance of his road vehicles or as "stables shall, notwithstanding that it is situate within the "close, curtilage or precincts forming a factory or workshop and "used in connection therewith, be deemed not to form part of "the factory or workshop, but save as aforesaid, the expressions "'factory' and 'workshop' have respectively the same meanings "as in the Factory and Workshop Acts, 1901 to 1920." The selection, as a means of defining those expressions "factory" and "workshop," of the Factory and Workshop Act, 1901, strikes the reader as somewhat strange: since that was an Act which, as Jenkins L.J. observed, was concerned with a wholly different subject-matter, namely, the protection of workpeople from injury; and it made, accordingly, a distinction between factories or workshops of a special character from the point of view of danger and other factories. The former class, the more dangerous class, are stated by name or description in Part I of the Sixth Schedule to the Act. They include such factories or workshops as paint works, lucifer match works and cartridge works; and No. 13 of Part I is "Metal and india rubber works." It is to be noted that by virtue of the provisions of section 149 (1) of the Act of 1901, a factory, or, more specifically, a "non-textile factory," includes, first, "any works, warehouses . . . named in Part I of the Sixth "Schedule" to the Act.

Reverting for a moment to the plan, it is not in dispute in this case that the activities of the company conducted in the bracket making part of the pink area fall within the phrase "metal and india rubber works," being No. 13 of the list of non-textile factories in Part I of the Sixth Schedule. That part of the pink, therefore (and, for reasons which I have given, the part devoted to brazing), is clearly a "factory" by what I think Lord Dunedin called "direct" definition,[3] by virtue of section 3 of the Rating and Valuation (Apportionment) Act, 1928; for that part of the hereditament is a factory or workshop, having expressly the meaning assigned to those words by the Act of 1901. It is, however, equally clear that no other of the activities of the company is a factory or workshop within the special list of identified factories or workshops in the Sixth Schedule to the Factory and Workshop Act, 1901. If any others of the activities of the

[3] [1931] A.C. 151, 166; 47 T.L.R. 154, 158.

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company are such as to bring the area where they are performed into the definition of "factory," it must be under the later language of section 149 (1). For present purposes it is sufficient to read the part of that subsection which follows the reference to the Sixth Schedule: "The expression 'non-textile factory' means— ". . . (*c*) any premises wherein or within the close or curtilage or "precincts of which any manual labour is exercised by way of "trade or for purposes of gain in or incidental to any of the "following purposes, namely—(i) the making of any article or of "part of any article; or (ii) the altering, repairing, ornamenting "or finishing of any article; or (iii) the adapting for sale of any "article. . . ." Later the expression "workshop" is given a corresponding definition. Again, to pick the matter up by reference to section 3, it follows that, prima facie, an industrial hereditament means a hereditament occupied and used as a factory, if it is occupied and used in any of the manners indicated in section 149 (1) (*c*) of the Act of 1901. The company claims that the activities conducted, first, in the sign painting and stencilling section of the pink and, second, in the blue section marked "D," must be treated as factory purposes, and so the area occupied by those activities must be regarded as an area used or occupied as a factory.

It will now be appreciated why Mr. Squibb has said that he must show that the activities of the club are by way of trade, for that is a necessary condition to what follows in paragraph (c). But, given that they are, then I think that so far as the sign painting is concerned there would be little difficulty in concluding that such an operation amounted to the ornamenting or finishing of any article. In "D," the greater part of the work done undoubtedly consists (because the tribunal has so found) of repair, not of the vehicles themselves, but of the units sent for reconditioning in the way I have tried to explain. Such an activity, if done by way of trade, would fall within the definition in paragraph (*c*) as being the repairing of any article. So much, I think, is not in doubt. It is, however, at this point that the further complication is introduced by the terms of section 3 (2) (*b*) of the Rating and Valuation (Apportionment) Act, 1928. I will read the opening words again: "For the purposes of this "Act any place used by the occupier for the housing or main- "tenance of his road vehicles or as stables shall, notwithstanding "that it is situate within the close, curtilage, or precincts form- "ing a factory or workshop and used in connection therewith, be "deemed not to form part of the factory. . . . It is also the fact, as I have earlier stated, that in addition to the primary function on this part of the premises of repairing units, there is also some repair or maintenance of the vehicles themselves, belonging to the company, which are brought in for such services. Therefore, it is undoubtedly the fact that part of the space is used by the occupier for maintenance of his road vehicles; and there is no railing-off or separation of that part of the premises which is

used for that purpose of maintaining the road vehicles from the other parts which are devoted to what the tribunal held to be the much more substantial operation of repairing units.

Mr. Squibb has felt bound to concede that the whole of the area where maintenance of these vehicles in fact takes place must be excluded from the definition of factory, although on that area the more significant activity of the repair of units is performed. Mr. Squibb has felt bound, therefore, to concede that the area marked " D " cannot itself be regarded as a factory.

So far the situation may be put thus: if (as the tribunal held) what the company is doing is being done by way of trade then, says Mr. Squibb, in this hereditament, which is a single unit, there is undoubtedly on the pink part, a factory, since the sign painting falls within the language of section 149 (1) (*c*) of the Act of 1901; and there is no question about the bracket making and the brazing. This hereditament therefore is being used as to a part, and a significant part, as a factory. Further, and with regard to the rest of the premises, as the tribunal found, the primary purpose for which they are occupied is for repairing units; and the tribunal took the view, having regard to certain authorities, that repair of the units was not the same thing as maintenance of vehicles from which the units came. " Therefore," says Mr. Squibb, reverting to the opening words of section 3 (1) of the Act of 1928, " I have shown that my hereditament is " occupied as a factory, and it cannot be successfully said against " me that it is excluded from being an industrial hereditament " on the ground that it is primarily occupied for non-factory " purposes." It may well be that the part marked " D " is not itself a factory because of the performance there also of maintenance of the company's road vehicles. But, says Mr. Squibb, that is not to say that, in view of the findings of the tribunal, the hereditament as a whole is being primarily used for non-factory purposes; it is being primarily used, according to the findings of the tribunal, for the purposes of repairing road units, which is not an excluded occupation, so to speak, even though the area marked " D " where that occupation is in substance carried on, is not itself a factory by reason of the maintenance there also of the road vehicles. It was that latter part of Mr. Squibb's argument which the tribunal rejected; for it held that since the area " D " could not be regarded as a factory, therefore, equally it could not be said on behalf of the company that the repair of those units was a factory purpose: they had, so to speak, been disqualified altogether for derating purposes. The result was, as a piece of logic, a little surprising, for the tribunal was saying in one and the same breath that the primary purpose for which this blue, yellow and grey area is being occupied is the purpose of repairing units (which is not the maintenance of the company's road vehicles and is, because it is being done by way of trade, the purpose of a factory); and at the same time, since the area " D " cannot itself be called a factory, therefore, the

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primary purpose for which this hereditament is being occupied must be said to be a non-factory purpose. If it were necessary to decide this case on that point I should myself feel some hesitation in accepting the conclusion of the tribunal. The anomaly and apparent lack of logic appears if one refers to paragraph 12 of the case. [His Lordship read paragraph 12 and continued:] I should myself feel some reluctance in accepting a conclusion which, it seems to me, involves what looks very much like an illogical result. But it is not, in the view that I take, necessary to express a final opinion upon that matter; for, in my judgment, the necessary premise to the vital conclusion about the repair of units (namely, that those are factory purposes) is not established, that is, the condition that it is being done by way of trade.

The tribunal took the view that, as a matter of law, the case was in effect governed in this respect by *Challoner* v. *Robinson*,[4] a case which was not connected with rating but was one in which a landlord was seeking to distrain upon certain premises for non-payment of rent. He found on the premises certain pictures which were being exhibited. He claimed, and was held by this court entitled to claim successfully, that he could take those pictures by way of distress. The action was brought by the plaintiff, who said that the pictures were not liable to distraint on the ground that he was the proprietor of an institution known as the United Arts Club, and that these pictures had been committed to him to be managed in the way of his trade. If that had been so, they would have been exempt from distress. The headnote states the decision of Neville J. in the court of first instance thus: "the pictures were liable to distress unless the "plaintiff could bring his case within the exceptions laid down in "*Simpson* v. *Hartopp*, (1744) Willes, 512; 1 Sm.L.C., p. 437 "(11th ed.), as 'things delivered to a person exercising a public "'trade to be . . . managed in the way of his trade or employ.' "In the present case the plaintiff was not carrying on the trade "of a commission agent with all who chose to deal with him; "his trade was essentially a private trade, and for this reason the "pictures were not within the exemption." Upon appeal it was held: "that it was not necessary on the facts to consider the "meaning of the words 'public trade,' but that the word "'managed' must be taken to include, if not to be equivalent to, "'disposed of'; that the pictures were not delivered to the "plaintiff, but to the picture committee, and even if they were "delivered to the plaintiff, they were not delivered to him 'to "'be managed in the way of his trade,' which was that of a club "proprietor, and not that of a picture dealer." It is in those last few words which I have read that, it is said, the answer to the present problem resides. Cozens-Hardy M.R., delivering the reserved judgment of the Court of Appeal, said[5]: "These being

[4] [1908] 1 Ch. 49.

[5] Ibid. 60.

" the facts, we think the true view is that the pictures were not " delivered to Mr. Challoner, but were delivered to the picture " committee; and, further, that if, contrary to the above view, " they were delivered to Mr. Challoner, they were certainly not " delivered to him to be ' managed in the way of his trade.' " If the language had stopped there, the case would not have been of any real assistance to Mr. Squibb, but there then occurs the sentence: " His trade or business is that of a club proprietor, " and not that of a picture dealer." I think on the facts of that case the statement which I have just read is not one at which it would be possible to cavil. Mr. Challoner was running, to use the popular word, the institution known as the United Arts Club for his personal profit or gain. His trade or business was that of a club proprietor. But does it follow from that statement, as Mr. Squibb contended, that as a matter of law any person, whether an individual person or a persona ficta like the present company, who is a proprietor of a club is, therefore, necessarily carrying on a trade consisting of the activities inherent in that proprietorship? I do not think that it does follow.

Another instance given in the course of the argument which in some respects is closer, I think, to the present case was that of *Inland Revenue Commissioners* v. *Eccentric Club Ld.*,[6] the circumstances of which were considered by the Court of Appeal upon a claim for corporation profits tax. The Eccentric Club Ld., as its name implies, was a company incorporated under the Companies (Consolidation) Act, 1908, and its purpose, as stated by its memorandum of association, was to own and manage an ordinary social club known as the Eccentric Club. The full facts of the incorporation of the company and so forth are set out in the report.[7] It was said that since the company was carrying on the trade or business of proprietorship of a club it was liable to the impost of corporation profits tax, but the court held, as is stated in the headnote,[8] that the company being limited by guarantee and carrying on a social club in the ordinary way, that club was a members' club and not a proprietary club. " By " the memorandum of association profits were not distributable " among the members nor, in the event of the winding up of " the company, was any surplus distributable among them, but " was to be applied as the committee might determine." It was, therefore, held that the company was not carrying on an undertaking of a similar character to that of a trade or business and was, therefore, not liable to the tax. We were referred to a number of passages and I will cite one passage from Sargant L.J.[9]: " They ", referring to the club company, " insist that " this limitation of activities to a system of self-supply ", referring to the activities of the social club, " altogether differentiates their " enterprise from that of an individual or company carrying on " an ordinary proprietary club with the object of making a profit

[6] [1924] 1 K.B. 390, 400.
[7] Ibid. 400.
[8] Ibid. 391.
[9] Ibid. 430.

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"out of the supply of club amenities." The Lord Justice went on to rely on certain reasoning which he derived from the speech of Lord Watson in *New York Life Insurance Co.* v. *Styles*.[10] As Mr. Lyell indicated, the conclusion which Sargant L.J. drew from the language of Lord Watson was later disapproved in the House of Lords [11]; but that does not, I think, indicate any doubt about the validity of the passage which I have just read where Sargant L.J. said (and the other members of the court used language to the same effect) that the substance of that case was that a social club was being carried on in all material respects as a members' club. As in the present case, the members of the club had to be members of the company. The headnote states [12] (and the same considerations are found in the present case) that any profits made were not distributable nor was excess property liable to be distributed among members of the company or the club on winding up. The case, therefore, was different for the purposes then in hand from what Sargant L.J. called the ordinary case of an individual owning and running a proprietary club for gain. It may be true, as Mr. Squibb said (referring to a passage at the end of the judgment of Pollock M.R.) that if a company is incorporated under the Companies Act there is a presumption that it is a trading company. But, if that be so, it is still a presumption which may be rebutted. It was rebutted in the *Eccentric Club* case [12] and it is certainly capable of being rebutted in very many cases in which, as Jenkins L.J. pointed out, a company is formed to carry on an activity which is plainly not a trading activity. Yet it may well be that not in every such case can the use of the word "limited" be dispensed with.

Mr. Squibb drew our attention to the terms of the memorandum and articles of association of the company in the present case, and it is true that clause 3 of the memorandum, the objects clause, contains many commonform powers or provisions in the widest terms, such as (f) "To carry on or conduct any "other businesses or proceedings which may seem to the "company capable of being conveniently carried on." There is also later in (m) power, which is one of the objects, "to sell "or dispose of the undertaking of the company, or any part "thereof." And then it was shown by reference to the articles, among other things, that by article 8 which is headed: "Applica- "tion of profits of company," "the income and property of the "company, whether arising from subscriptions of members of "the club . . . or from any other source, shall be applied solely "towards the promotion of the objects of the company as set "forth in its memorandum." As Mr. Squibb observed, that in terms covered any of the objects in the memorandum. But even if those considerations are of some force in distinguishing the present case in some degree from the facts in the *Eccentric*

[10] (1889) 14 App.Cas. 381; 5 T.L.R. 621.
[11] [1926] A.C. 281, 287.
[12] [1924] 1 K.B. 390.

Club case,[13] still, in my judgment, the facts in this case bring it much nearer to the *Eccentric Club* case [13] than to *Challoner* v. *Robinson*.[14]

Another point taken by Mr. Squibb was that in the present case the club, properly so-called, consisted of the premises in Pall Mall and Woodcote Park and the amenities there provided which were the exclusive privilege of full members. In addition to those activities this company was carrying on a separate enterprise in providing road services to full members and to associate members. It might, therefore, according to Mr. Squibb, fairly be said that the company was selling to each and every one of its associate members these services and that it was, in the ordinary sense, trading. That is not an analysis of its activities which I am prepared to accept. The full members as well as the associate members are equally entitled to these privileges and amenities and, as the tribunal found as a fact, this company is bound to apply and does apply the whole of the funds, which are made up from the associate members' subscriptions and capitation fees in respect of full members, in the provision of these services. That activity, though distinct and different no doubt from the activity of providing the amenities of a social club in the West End of London, is, nevertheless, an activity more akin to a club activity than to a trading activity in the ordinary sense of it.

On all the facts of this case I am of opinion that the activities carried on by the company at 15 Maswell Park hereditament are not there conducted "by way of trade"; and I do not think that *Challoner* v. *Robinson* [14] compels us to hold the contrary. I do not think, indeed, that this case is at all parallel upon its facts with *Challoner* v. *Robinson*,[14] the decision in which was, as I have already said, directed to an entirely different subject-matter. I do not lose sight of the significance and weight appropriate to be attached to the language of Lord Wright which the tribunal mentioned,[15] to the effect that the word "trade" is a word of very wide import. But the task which falls upon the court is to determine whether the activities being carried on in those premises are a trade being carried on by way of trade. I am unable, for my part, to accept the proposition that because this well-known institution known as the Royal Automobile Club, consisting of full members and of associate members, enjoys those amenities which are rendered possible by the activities carried on at the Maswell Park Road hereditament, and because the club and these activities are managed and conducted by the limited company as a proprietor, therefore, this company is carrying on this activity (and, indeed, it follows, all its activities) "by way of trade." If that conclusion be right, it follows, as I have earlier said, that Mr. Squibb cannot succeed, because he

[13] Ibid. 415.
[14] [1908] 1 Ch. 49.
[15] See *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 184.

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is left only with the bracket making and brazing activities; and beyond question, as the tribunal found, the primary purposes of the occupation of the hereditament cease to be factory purposes.

Another point was raised upon which also I do not propose to express a conclusion; but it would not be right, since the matter was argued before us, that I should pass it by unnoticed. In paragraph 12 of the case, which I read, it is stated at the beginning that the activities of repairing units, in the view of the tribunal, "did not constitute the 'maintenance of road "'vehicles,'" and it felt itself governed in that respect by the decision in the House of Lords of *Potteries Electric Traction Co. Ld.* v. *Bailey*.[16] Mr. Lyell, for the valuation officer, contended, and I think rightly contended, that on its facts the present case was materially different from the *Potteries Electric Traction Company's* case[16] and for this reason: the potteries company, among other things, owned a fleet of trams or omnibuses and upon the hereditament in question in that case it manufactured certain component parts for the omnibuses. If the company had not manufactured those parts, as was pointed out, it would have had to have bought them, and, probably, paid more money for them. But, as the House pointed out, the essence of the matter was that the company was carrying on the distinct enterprise of manufacturing the parts and it did not cease to be a factory for rating purposes and become merely an activity of maintenance of vehicles because, when the parts had been manufactured and had left the premises, they were then used for maintaining the vehicles. The question is, what is done on the premises; not what is done afterwards with what has been made on the premises? In the present case there is no such separate activity of manufacture. What is done at Maswell Park is to repair and recondition units which are sent for such purposes by servants of the company from various parts of the country. As I earlier said, as a matter of efficient maintenance of this fleet of vehicles, it is far better that the unit should be sent and a new unit sent back at once so that the vehicle can be got again on to the road, than that the vehicle should itself be brought all the way to Maswell Park Road and there remain out of action while some part of it is put right.

During the course of the argument Mr. Lyell was asked the question: If, in connexion with repairing units, the company is maintaining vehicles, what vehicle is being maintained when an individual unit is being in fact repaired? The answer given was that no individual vehicle can be identified, but the proper way to look at the matter is to say that the vehicles, as a fleet, as a whole, are being maintained by the activities of repairing units which have come from one or other of the vehicles to Maswell Park Road. I see the force of that contention. On the other hand, in the *Potteries Traction* case[17] certain language was used by Lord Dunedin, and, I think, also in the same sense by Lord

[16] [1931] A.C. 151. [17] Ibid.

Tomlin, which indicates that in their view the phrase "maintenance of road vehicles" necessarily imported the notion that the vehicle being maintained should be at the place where the alleged maintenance was being conducted. Lord Dunedin so stated in clear terms, for he said [18]: "Now the Court of Appeal held that, inasmuch as the spare parts manufactured in the factory were used for the omnibus fleet, this was a case in which the place was used for the 'maintenance' of road vehicles. I cannot assent to this. Maintenance is taken along with housing, and points, I think, to something done to the vehicle on the premises." Lord Tomlin used somewhat different language, but, as I have said, I am inclined to think that the matter struck him in the same way as it struck Lord Dunedin. He said [19]: "The only question therefore is whether or not having regard to the facts found by the learned recorder the premises are a 'place used by the occupier for the housing or maintenance of his road vehicles or as stables.' Now these words seem to me to refer to what is done on the premises. The manufacture of spare parts for use elsewhere is not in my view within the contemplation of the subsection." I, therefore, prefer to express no view of my own upon this matter. To accept the contention of Mr. Lyell would certainly involve dissenting from the opinion so clearly expressed by Lord Dunedin, and, although it is quite true that that particular point was not essential to his conclusion, it would be going further than I am prepared to do in this case (where it is also not necessary for the decision) to express a contrary opinion in acceptance of Mr. Lyell's argument. For the reasons I have stated, however, and because as I think the company is not doing the activities on the part marked "D" or elsewhere on the hereditament by way of trade, it follows, as Mr. Squibb conceded, that the company has failed to show that this hereditament is an industrial hereditament within section 3 of the Act of 1928. The appeal, therefore, in my judgment, should be dismissed.

JENKINS L.J. I entirely agree with the judgment which my Lord has just delivered, and he has dealt with all the relevant facts so fully that I do not find anything that I can usefully add to what he has said.

ROMER L.J.: I also agree, and I find myself in the same position in this matter as my brother Jenkins. I cannot usefully add anything to the very careful and exhaustive judgment which the Master of the Rolls has delivered.

Appeal dismissed with costs.

Solicitors: *A. J. A. Hanhart; Solicitor of Inland Revenue.*

E. D.

[18] Ibid. 169.

[19] Ibid. 180.

[QUEEN'S BENCH DIVISION.]

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Feb. 15, 16.

McNair J.

* KELMAN AND ANOTHER *v.* LIVANOS.

Shipping—Sale of ship—Hull damage—Class maintained—Whether purchaser entitled to refuse ship until repaired—Meaning of "free "from average"—"Average"—Priam Terms—Lloyd's survey—Repairs deferred to owner's convenience.

In an agreement for the sale of a steamer on "Priam Terms" it was agreed, inter alia, "(4) The vendors shall deliver the "steamer to the purchaser free from average . . . (6) For the "inspection by Lloyd's surveyor of steamer's bottom and all out-"side parts below the waterline . . . the vendors agree to place "the steamer in dry dock. . . . In the event of the bottom or any "outside parts below water line being found broken or damaged, "and purchasers decline to accept steamer in such state, it shall "be repaired and put in good and seaworthy condition to the satis-"faction of the surveyor at Lloyd's at the vendors' expense."

On inspection, the Lloyd's surveyor found that repairs of indents to the keel plates and shell plates might be deferred until the owner wished the work to be done. He considered that the vessel was in good and seaworthy condition and could maintain her class; he made a recommendation to Lloyd's and issued an interim classification certificate to that effect. The purchaser refused to accept the vessel with those defects and requested that they should be made good. The vendors refused to pay for the repairs, taking the view that as the surveyor had thought no repairs were necessary to put the ship into a good and seaworthy condition they were under no obligation to pay. The contract was completed subject to the arbitration to decide who should bear the cost of the repairs:—

Held that, construing clause 6 by considering it in relation to the whole group of clauses in which it was found, as the arbitrator found that the Lloyd's surveyor in carrying out the survey under clause 6 considered the steamer to be in good and seaworthy condition without any repairs, the purchaser was not entitled under that clause to decline to accept the steamer unless the indents were repaired.

Held, further, that "free from average" in clause 4 in this particular agreement meant "free from claims against the ship" and not "free from damage" and accordingly the vendors were not in breach of their obligation under clause 4 to deliver the steamer "free from average."

SPECIAL CASE stated by an arbitrator.

The claimants, Richard Cameron Kelman and Andrew Gordon Shirreffs, were, by a trust deed dated November 21, 1952, entered into by the partners of a firm called the Gwent Co., appointed trustees on behalf of the firm's creditors and its partners of all the partners' property. That property included the steel crew steamer *Goodmar*, built in 1943 as a minelayer for the Admiralty, but converted in 1949 into a trawler. The effect of the deed was to vest the property in the *Goodmar* in the claimants, subject to the rights of the mortgagees of the vessel. Kelman at all material times dealt with the matter of the *Goodmar* on both claimants'

behalf. On March 9 and 10, 1953, an agreement was entered into between the claimants and the respondent, George John Livanos, by which the claimants agreed to sell and the respondent to buy the *Goodmar*. The agreement was for the most part on a printed form, which was commonly known as an agreement for sale on "Priam Terms." The agreement included the following clauses: "(1) The steamer shall be able to proceed under her own "steam, and shall be in a seaworthy condition at the time of "delivery. (2) The purchase price to be £19,000 . . . (3) The "purchaser shall deposit . . . £1,900 . . . on the signing of this "agreement. (4) The vendors shall deliver the steamer to the "purchasers free from average and with clean swept holds and "class maintained in Aberdeen not later than April 15, 1953. In "the event of the vendors failing to deliver the steamer within "the time herein specified, the purchasers shall have the option "of maintaining or cancelling this agreement, but any delay not "exceeding 30 days caused by force majeure and/or caused by "repairs in order to pass inspection by Lloyd's surveyor at port "of delivery, under clause 6 of this agreement, to be accepted by "the purchasers . . . (6) For the inspection by Lloyd's surveyor "of steamer's bottom and all outside parts below the water line "including the drawing of tail shaft the vendors agree to place "the steamer in drydock in Aberdeen as soon as possible . . . "In the event of the bottom or any outside part below the water "line being found broken or damaged, and purchasers decline to "accept steamer in such state, it shall be repaired and put in "good and seaworthy condition to the satisfaction of the surveyor "to Lloyd's at the vendors' expense. (7) If the bottom, tail shaft "or any outside part below the water line be found damaged or "broken, the expense of putting in and taking out of drydock, "drydock hire, and surveyor's fee shall be paid by the vendors, "but if the same be found in good order and passes the said "inspection without repairing, the purchasers shall bear these "expenses. (8) The steamer shall be deemed ready for delivery "as soon as the bottom and outside parts (including tail shaft) "below the water line have been approved by Lloyd's surveyor "in drydock, or any repairs required to obtain such approval have "been effected as provided in clause 4. (9) The purchasers "and/or vendors agree to order the surveyor to proceed with the "inspection of the steamer's bottom and outside parts below the "water line on receipt of written notice that the steamer is ready "for such inspection in drydock . . . (13) The vendors agree to "deliver the steamer to the purchasers free from all debts and "incumbrances."

On the signing of the contract the respondent made the deposit of £1,900 called for by clause 3. At the time the contract was signed the *Goodmar* had been laid up since about March, 1952. Her last Lloyd's special survey had taken place in 1949 and her classification certificate issued thereafter and dated December 19, 1949, carried as an endorsement on the back: "The following

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"items relating to the condition of this ship have been noted, "but do not affect the maintenance of classification. Indents "in keel plates and shell plates A. 3 and 4 (port side) and A. 4 "(starboard side)."

The practice of Lloyd's Register of Shipping regarding deferred repairs and classification certificates was that deferred repairs were divided into two groups: (*a*) those which would prejudice class maintenance if not dealt with within a specified time; and (*b*) those which, not affecting seaworthiness, might be left to the owner's convenience. Deferred repairs in group (*a*) were dealt on the face of the classification certificate, but those in group (*b*) were noted only on the back of the certificates in the form of an endorsement.

Shortly before the contract was signed the respondent and one Lambelle, his consultant marine engineer and naval architect, visited Aberdeen and made a superficial inspection of the ship, then afloat. During the course of that visit Kelman handed to Lambelle for a few minutes the classification certificate of December 19, 1949. Lambelle attached little importance to it, but he did know of the endorsement before the contract was signed.

On March 25, 1953, the Ministry of Transport sanctioned the transfer of the *Goodmar* to the respondent, and pursuant to clause 6 of the contract the steamer was drydocked at Aberdeen on April 3, 1953. She was rapidly inspected that evening by Lambelle and the respondent and more fully inspected so far as her bottom and outside parts below water line were concerned on the following day by Douglas, surveyor to Lloyd's Register, Lambelle and Campbell, a consulting marine surveyor acting on behalf of the claimants.

In paragraph 9 of his award the arbitrator stated: "As the "result of his inspection Mr. Douglas formed the opinion that "the indents to the keel plates and shell plates had not "deteriorated since the previous inspections of the vessel and that "their repair might be deferred until the owner wished the work "to be done. He considered that without any repairs being then "carried out the *Goodmar* was in good condition and was "satisfied that she could maintain her class. He accordingly "recommended to Lloyd's Register that the vessel was in good "order and eligible in his opinion to remain as classed and "at a later date issued an interim certificate to that effect." Lambelle, on behalf of the respondent, immediately after the inspection, informed Kelman that he refused to accept the *Goodmar* with the above-mentioned indents and requested that they be made good. At the time of that refusal and request Kelman was not fully informed of Douglas's opinion and he immediately instructed Campbell to obtain estimates from two ship repairers. On Monday, April 6, the ship was inspected by two repairers and estimates were given amounting to £1,850 in one case and £1,830 in the other. On April 8, Kelman was told of

Douglas's opinion and thereupon refused on behalf of the claimants to undertake any repairs and insisted on the respondent completing the contract, which he in his turn refused to do. The parties were able to reach agreement to resolve the deadlock, while reserving the rival claims of the parties to be decided by arbitration. They agreed that the respondent should take delivery of the *Goodmar*, that the claimants should deliver a valid bill of sale, that the respondent should pay the remainder of the purchase price and release the deposit, but that £1,850, being the estimated costs of repairs, should be paid by the claimants out of the purchase price into a joint account to await the result of the arbitration.

Having stated the facts as set out above, the arbitrator continued: "The major issues argued before me" (and they were substantially the same as the issues argued before McNair J.) "were (*a*) whether the respondent was entitled under clause 6 "to decline to accept the *Goodmar* unless the indents to her keel "plates and shell plates were repaired, and (*b*) whether the "claimants were in breach of their obligation under clause 4 to "deliver the *Goodmar* free from average."

The arbitrator, in paragraph 16 of his award, made the following further findings of fact: "(*a*) On April 4, 1953, and at all "material times thereafter the *Goodmar* was seaworthy and free "from damage other than the indents to her keel plates and shell "plates; (*b*) at the inspection in drydock on April 4, 1953, Mr. "Douglas, Lloyd's surveyor at Aberdeen, considered that without "any repairs the *Goodmar* was in good and seaworthy condition "to his satisfaction (see clause 6); at that time no repairs were "required to pass inspection by Mr. Douglas (see clause 4); she "was then found by Mr. Douglas to be in good order and passed "his inspection without repairing (see clause 7) and her bottom "and outside part below the water line were without repairs "approved by Mr. Douglas (see clause 8); (*c*) there was no "material change in the condition of the vessel or the opinion of "Mr. Douglas at any relevant date after April 4, 1953; (*d*) on "and after April 4, 1953, the class of the *Goodmar* was at all "material times maintained and she had clean swept holds; "(*e*) on April 4, 1953, and at all material times thereafter there "were no outstanding claims against the vessel and she had no "unrepaired insured damage; (*f*) the indents to the keel plates "and shell plates set out in the endorsement to the classification "certificate . . . were seen to be present and to that extent were "'found' at the inspection in drydock by Mr. Douglas on "April 4, 1953. These indents admittedly constituted damage to "the vessel's bottom and although not affecting seaworthiness "were more than trivial blemishes. They were not due to wear "and tear. Mr. Douglas described them as 'obvious defects' and "said that when he had first inspected the vessel for the purpose "of her previous special survey in 1949 he had regarded the "indents as a borderline case and had been in doubt whether

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" to deal with them by ' endorsement ' only or to make them a " ' subject ' in his report to Lloyd's Register. He considered, " and I accept his view, that they would be expensive to repair " and would depreciate the value of the vessel; (*g*) . . . so far " as it is a question of fact I find that for the purpose of the " contra proferentem doctrine the respondent was the proferens; " (*h*) evidence was adduced by the respondent and was not " objected to by the claimants as to the meaning of ' free from " ' average ' on the ground that this was a technical term. From " the evidence of a very experienced shipbroker it appeared that " the printed form of contract used in this case, known as Priam " Terms (hence the letters P.T. in the top left hand corner) " dated back to shortly after 1903, that the phrase ' free from " ' average ' had no generally accepted meaning in the trade, that " it was thought to be a term in favour of the buyer and as such " was often objected to by or on behalf of sellers, that he had " always used it as meaning ' free of damage other than fair wear " ' and tear,' that he had never known it to be given in the trade " the meaning of ' free from average claims ' against the vessel, " but that it had no settled meaning and was vague and nebulous. " I find that there is no settled technical meaning to the phrase " ' free from average ' when used of the sale of a ship; . . . " 17. Subject to the decision of the court on the questions of " law set out in paragraph 23 hereof I formed the opinion that " the claimants were right on the construction of clause 6 . . . " ' free from average ' in clause 4 meant ' free from damage " ' other than fair wear and tear ' or ' free from damage ' (it was " unnecessary for me to decide which) as contended by the " respondent, but I considered that in view of the detailed " provisions of clause 6 and the related provisions of clauses 4, 7 " and 8 ' free from average ' in clause 4 could not be read as " applying to damage to the bottom and outside parts below " water line of the vessel."

In paragraph 23 the arbitrator stated the questions of law on which he had been requested by the respondent to state his award as follows: " . . . whether upon the facts found and upon " the true construction of the contract (i) the claimants are liable " (by reason of the provisions of clause 6 of the contract) for the " cost of repairing the defects in the vessel's bottom and outside " parts below the water line found on the drydock inspection; . . . " (iii) the claimants are liable (by reason of the provisions of " clause 4 of the contract) to allow to the respondent a diminution " in the price of the vessel or to pay damages to the respondent " by reason of the defects in the vessel's bottom and outside parts " below the water line found on the drydock inspection."

The arbitrator, subject to the decision of the court, decided that the claimants were not liable under either clause, and

awarded that they were entitled to be paid £1,850, the sum paid into the joint account to await the result of the arbitration.

The respondent appealed.

Eustace Roskill Q.C. and *John Honour* for the respondent (purchaser).

Michael Kerr for the claimants (vendors).

The following cases were cited in argument: *Shirlaw* v. *Southern Foundries (1926) Ld.*[1]; *In re Comptoir Commercial Anversois & Power, Son & Co.*[2]; *Uchida Kisen Kabushiki Kaisha of Kobe* v. *C. Henry Smith*[3]; *In re Grainger, Dawson* v. *Higgins*[4]; *Suzuki & Co. Ld.* v. *Benyon (T.) & Co. Ld.*[5]; *Fowkes* v. *Manchester and London Life Assurance and Loan Association.*[6]

McNAIR J., having stated the facts and the relevant parts of the arbitrator's award as set out above, continued: Although the two points tend to merge into each other, it is convenient that I should first deal with the purchaser's argument as to the effect of clause 6. In substance, the argument advanced on behalf of the purchaser is, that the clauses in the contract do not, as a matter of construction, involve that the Lloyd's surveyor is appointed the arbiter of the parties in any respect save one, namely, in the respect that if the purchaser does decline to accept the ship on an examination below water line it is admitted that the Lloyd's surveyor, or the surveyor appointed under the clause, is the arbiter as to what repairs are necessary. It was further argued that in fact Douglas, who carried out the inspection, was not (as I understand it) carrying out an inspection under clause 6 for the purpose of determining whether she was in good and seaworthy condition under this contract, but was primarily, and I think, the argument went, wholly, concerned with determining whether the vessel could be said to be a vessel with "class maintained." It was urged further that if the vendors' construction of that clause was right it might happen, and indeed would happen on the facts of this case, that the purchaser would be compelled to take this vessel, though seaworthy, even though she had damage in her bottom which would cost some £1,800 to repair, that being about 10 per cent. of the purchase price, and it is said that that is a startling result which should not be arrived at unless the contract, by its clear terms, drove the court to the conclusion that that was the right result on the construction of the contract.

I think that the only sound way of approaching the construction of clause 6 is to consider it in relation to the whole fasciculus

[1] [1939] 2 K.B. 206; 55 T.L.R. 611; [1939] 2 All E.R. 113.

[2] [1920] 1 K.B. 868; 36 T.L.R. 101.

[3] (1922) 10 Ll.L.R. 456.

[4] [1900] 2 Ch. 756, C.A.; [1902] A.C. 1.

[5] (1926) 42 T.L.R. 269; 31 Com. Cas. 183; 24 Ll.L.R. 49.

[6] (1863) 3 Best & Smith 917.

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of clauses in which it finds its place. It is clear that it is of the essence of this contract that when or shortly before the vessel is tendered for delivery there shall be an inspection of the bottom and underwater parts, and that that inspection shall normally be carried out by the vessel's classification society; and, as it seems to me, these clauses really provide, quite neatly and logically, for two situations. The first is where, on an inspection of the vessel's bottom and underwater parts, the surveyor comes to the conclusion that the vessel is in a good and seaworthy condition, and approves the condition of the bottom. In that situation clause 8 provides that "The steamer shall be deemed ready for "delivery as soon as the bottom and outside parts . . . below the "water line have been approved by Lloyd's surveyor . . . "; and clause 7, which is in the same group of clauses, provides that the drydocking expenses and surveyor's fee, in the event of the bottom and underwater parts being "found in good order and" pass "the said inspection without repairing, the purchasers shall "bear these expenses."

The second situation is where on inspection it is found that the bottom and underwater parts are broken or damaged, which, I think, in that context must clearly be read in contrast with "in good and seaworthy condition." If they are so found broken or damaged, so that the surveyor is unable to pass the bottom as being in good and seaworthy condition and approve it without repairs, the purchaser is given the right, if he so desires, of declining "to accept steamer in such state." He can, of course, if he wants the steamer urgently, take the steamer with those defects; but if he exercise his right to decline to accept the steamer in that state then the clause provides "it shall be "repaired and put in good and seaworthy condition to the satis-"faction of the surveyor to Lloyd's at the vendor's expense." If that event happens, provision is made in clauses 7 and 8 for the consequences. Under clause 7 it is provided that if the bottom or underwater parts are "found damaged or broken, the expense "of putting in and taking out of drydock, drydock hire, and "surveyor's fee shall be paid by the vendors"; and when one comes to clause 8, one finds that as regards delivery this same contingency is provided for by the words "The steamer shall be "deemed ready for delivery as soon as . . . any repairs required "to obtain" Lloyd's approval "have been effected, as provided "in clause 4." That, as it seems to me, is a perfectly logical and reasonable way of reading these three clauses together, and it does no violence to any single word in the clauses and, indeed, it carries out what I conceive to be the perfectly plain object of such a provision in a sale contract.

If one applies the facts as found by the arbitrator to that construction (which, as it seems to me, is plainly the construction which he favoured) one finds two decisive findings in the vendors' favour. The first is that contained in paragraph 9, that Douglas considered that without any repairs being carried out the *Goodmar*

was in good condition, and he was satisfied that she could maintain her class; and, the second is in paragraph 16 (*b*) of his award that the vessel was found by him to be in good order and passed his inspection without repairing (and it is clear to my mind that the arbitrator meant his findings to be findings in relation to these particular clauses).

In my judgment those findings are quite conclusive of the case in favour of the vendors under this clause. Mr. Roskill asked me to find or infer that the Lloyd's surveyor had no authority from either party to do anything under this clause other than to deal with the question of maintenance of class. But it is clear from the contract itself that it was intended that the Lloyd's surveyor should do more than that; and it is clear from the findings which the arbitrator has made that he took the view that Douglas, Lloyd's surveyor, in forming the views that he found him to have formed, was acting in pursuance of clause 6. In the points of claim on which the arbitration was held it was expressly pleaded that this inspection took place pursuant to clause 6, and I think it clear that the arbitrator found that as a fact, as he was entitled to do.

The next point is one of some difficulty arising under clause 4 of the agreement, and it turns primarily on the meaning which has to be given to the words "free from average." In order that one may get those words into their context, it is right that I should read this clause again: "The vendors shall deliver the "steamer to the purchasers free from average and with clean "swept holds and class maintained in Aberdeen . . ." It is argued that, in order that this vessel may satisfy the requirements of the contract so far as they relate to her physical condition, it must be proved, first, that she was seaworthy; secondly, that she had clean swept holds; thirdly, that she was in a condition to qualify for maintenance of class; and fourthly, that she was "free from average," meaning "free from physical "damage."

That construction of the meaning of the phrase "free from "average" was, to some extent, based on the submission that, in its context in clause 4, it is to be found with two other requirements, both relating to the physical condition of the ship, namely, "clean swept holds" and "class maintained." In the first place, I do not accept that submission because, in my view, the phrase "class maintained," in clause 4, does not relate to the physical condition of the vessel but to a condition of affairs in her classification society. The vessel would, in my judgment, under clause 4 be properly described as "class maintained" although her physical condition was such as not to justify the maintenance of her class. Accordingly, one can approach clause 4 without the necessity of finding a meaning for the words "free from average," which is in the same field of thought as "clean swept holds" and a condition sufficient to justify maintenance of class.

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Before I deal with the textbooks on the subject, I should refer to the findings of the arbitrator as to the evidence which was given before him with regard to the meaning of the phrase "free from average." [His Lordship read sub-paragraph (*h*) of paragraph 16 of the arbitrator's award, and continued:] The arbitrator concludes: "I find that there is no settled technical "meaning to the phrase 'free from average' when used of the "sale of a ship." That is a finding of fact, and, accordingly, the task which is left to me is to construe that phrase without the assistance of any finding as to any technical meaning of that phrase in a particular trade.

Mr. Roskill, on behalf of the purchaser, has urged that this is, in effect, a phrase borrowed from the language of marine insurance and that in marine insurance "average" connotes physical damage, and he submits that it is in that sense that the phrase is used in section 64 (1) of the Marine Insurance Act, 1906, which provides that "A particular average loss is a partial "loss of the subject-matter insured, caused by a peril insured "against, and which is not a general average loss." I was referred, in support of that argument, to the views expressed by Sir Mackenzie Chalmers, the draftsman of the Marine Insurance Act, which are to be found in Chalmers' Marine Insurance Act, 1906 (4th ed., p. 162), where the author appends an interesting note under the heading "Definitions of average," and states: "Much learning and ingenuity have been spent on the endeavour "to define the true meaning of the term 'average' . . . The "fact is that the term is used in different senses, and its meaning "in each case must be sought in its context." He continues: "The word is derived from the French 'avarie' or Italian "'avaria' which themselves are of uncertain derivation . . . "Originally the term 'average' signified a toll or duty"—for which reference is made to the Oxford Dictionary. "In ordinary "shipping law it denotes an extra charge, as in the expression "'primage and average as accustomed,' or when such charges "as pilotage or anchorage are referred to as 'petty average.' "In fire insurance it has a special meaning. When a fire policy "is made 'subject to average' the effect is that if the assured "has not insured the subject-matter for its full value he is treated "as his own insurer for the difference between the sum insured "and the real value." Then he continues: "In marine insurance "the use of the word 'average' is very puzzling. The fact is the "law has been developed piecemeal by decisions, and no uniform "theory has been worked out. A partial loss, as distinguished "from a total loss, may be either a general average loss or a "particular average loss, that is to say, it may be a loss which "gives rise to a right of contribution, or a loss which does not "do so." Then he continues in a passage which deals with the familiar complication as to the difference between particular charges and sue and labour charges, and finally refers to the section of the Act which I have already cited.

It does not seem to me, with respect, that that note lends much support to the view that the term "average" means physical damage, although it well may, in certain contexts, have the meaning of a claim arising out of physical damage.

If one turns to its dictionary meaning (and I turn, for the purposes of convenience to the Shorter Oxford English Dictionary, although I have had reference made to the larger Oxford English Dictionary) in the Shorter Oxford Dictionary one finds, as I think, no support for the view, that as a matter of English language, the word "average" ever means "physical damage." Apparently, it is clear from this dictionary that originally it meant "a duty charged upon goods; a customs duty or the like." A secondary meaning is "any charge over and above the freight "incurred in the shipment of goods and payable by their owner." Then a special meaning is given of "the expense or loss to "owners, arising from damage at sea to the ship or cargo"; and, finally, "the incidence of any such charge, expense or loss; "especially the equitable distribution of such expense or loss "among all the parties interested." From those four rather archaic meanings there has developed the modern meaning of the arithmetical mean determined by calculation.

In Scrutton on Charterparties, 15th ed., p. 368, there is to be found an interesting and informative note dealing with the phrase "with primage and average accustomed," a form of words which is still to be found in many bills of lading, and I think it is clear from that passage that Scrutton L.J. certainly took the view that in that context "average" was used as meaning some form of charge or expense and was not used in any way in relation to physical damage.

I was also referred to passages in an early edition of Abbott's Law of Merchant Shipping and Lowndes' General Average, which do not, to my mind, give any very clear answer to the meaning.

As I have stated, the arbitrator has taken the view that, in this contract, the words mean damage to the ship other than fair wear and tear, but that they should not be read as applying to damage to the bottom or outside parts below water line of the vessel. It seems to me, with respect, that that is a great deal to get out of those three words. I would prefer to take the view that, inasmuch as clause 6 deals with the bottom damage and underwater damage and inasmuch as another clause of the contract gives the purchaser a right to inspect, the words "free from "average" in clause 4 relate not to physical damage at all but to the freedom from claims against the ship, of whatsoever nature.

It is clearly of importance to the prospective purchaser that he should know (whether under English law or under some foreign system of law) whether there may be claims against a ship, or extra charges, which Sir MacKenzie Chalmers says, in the passage I have read, is the meaning of these words in ordinary shipping law. If I adopt that construction, I avoid

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any conflict at all between clause 1, which contains the obligation that the vessel shall be seaworthy, and clause 6 which deals with damage to the bottom. If, on the other hand, one takes the view that "free from average" in clause 4 means "free from physical damage to the ship" one gets a most awkward conflict between clause 1 and clause 6 in relation to clause 4; and, applying what I conceive to be the right method of construction, namely, to adopt a construction which does not involve conflict with other provisions of the document, and taking the view that there is a reasonable and accepted meaning of the phrase "free from average" which does not connote damage, I take the view, as a matter of construction, that in this context "free from average" does not mean "free from damage to the "ship," but means "free from claims against the ship."

It is true that that view involves, or may in certain circumstances involve, some surplusage in the contract, because there is in clause 13 a provision, "The vendors agree to deliver the "steamer to the purchasers free from all debts and incum- "brances" but there may well be claims against a ship, either in English law or in foreign law, which are not debts or incumbrances, in respect of which a prospective purchaser would wish to be guaranteed that the ship is free.

In the result, therefore, I decide the questions of law stated in paragraph 23 in the same way as the arbitrator has done, and accordingly the award stated will take effect.

Award upheld.

Solicitors: *Constant & Constant; Staddon, Pyke & Barnes.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

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May 2.

Lord Goddard C.J., Hallett and Havers JJ.

*REGINA *v.* GODALMING LICENSING COMMITTEE. *Ex parte* KNIGHT AND ANOTHER.

Licensing—Justices—Jurisdiction—Power to accept surrender of an existing licence for the purpose of granting a different licence—Licensing Act, 1953 (1 & 2 *Eliz.* 2, *c.* 46), *s.* 7.

The applicants, the owners of an hotel, applied to the licensing committee for an annual unrestricted licence offering to surrender their existing term licence, in respect of the premises, which was subject to certain conditions:—

Held, that a current licence could be surrendered and another licence granted in its place and, accordingly, the justices had jurisdiction to accept the surrender of the term licence and grant a new licence if they thought fit.

Rex v. *Corfield* (1922) 86 J.P. 216 followed.

Rex v. *Taylor*, *Rex* v. *Amendt* [1915] 2 K.B. 593; 31 T.L.R. 317 distinguished.

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APPLICATION for an order of mandamus.

Francis Warnford Osborn Knight and his wife, Peggy Knight, were the proprietors of the Thorshill Hotel, Hindhead, Surrey, and the joint holders of a licence in respect of the premises. The licence was granted on February 10, 1954, authorizing them to sell intoxicating liquor from April 5, 1954, the date of the confirmation of the licence, until July 5, 1957, subject to certain conditions which included that no bar for the sale of intoxicating liquor should be opened on the premises, that intoxicating liquor should be sold only to residents and their guests, and that the monopoly value in respect of the licence for the term was £105 payable as to £35 on October 1 in each of the years 1954, 1955, and 1956.

On March 2, 1955, the applicants applied to the Godalming Licensing Committee for the grant of an annual licence to be without conditions save as to monopoly value and to be in substitution for the current licence which would be surrendered.

The licensing committee held that it had no jurisdiction to grant the application on the ground that the licence applied for could not be granted while the licence granted on February 10, 1954, was in force, and that the latter could not be surrendered for the purpose.

Harold J. Brown Q.C. and *N. H. Curtis-Raleigh* for the applicants.

The justices did not appear and were not represented.

The cases cited in argument are referred to in the judgment.

LORD GODDARD C.J. Mr. Harold Brown moves in this case for an order of mandamus to justices for the County of Surrey sitting for licensing purposes at Godalming to hear and determine an application by him for a new licence in respect of the Thorshill Hotel, Hindhead.

The circumstances show that the applicant and his wife own this hotel in respect of which a term licence, that is to say, for something like three years, had been granted to them with a condition that they should not have a bar on the premises. They have now spent a great deal of money on the premises and they are desirous of having a full unrestricted licence, and they, therefore, applied to the justices at their licensing sessions to grant a full licence provided they surrendered, as they were willing to do, the existing licence.

The justices evidently took a great deal of trouble over the case and heard arguments submitted to them, but came to a wrong decision in saying that they had no jurisdiction. I think, perhaps, they were confused by some of the cases cited to them and they do not now appear to show cause and take part in this argument, no doubt having been advised that their decision was wrong. It is perfectly true that in *Rex* v. *Taylor* and *Rex* v.

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Amendt,[1] in 1915, there was a licence in force to which there were certain conditions attached with regard to the payment of monopoly value. The applicants asked for another licence of exactly the same sort, but with a reduced monopoly value, and the court said: "You cannot do that." But I do not think in that case the court meant that the licence could not be surrendered and a new licence granted; if it was to be exactly the same, but at a reduced monopoly value, it was a very different thing because they could not reduce the monopoly value. The present case is quite different. It is a case in which the applicants are willing to surrender a restricted licence and apply for a new licence if the justices would accept the surrender of the restricted licence. That seems to be covered by the reasoning in *Rex* v. *Corfield*,[2] which shows that if a licensee who is the holder of a licence with conditions attached wishes to get rid of those conditions, his right course is to apply for a new licence and not a renewal of the old licence.

Another case to which attention has been called is *Carter* v. *Pickering*,[3] which shows by inference that the court there thought it was perfectly possible for a licensee to surrender an existing licence and ask for another licence, but we were only pointing out in that case that what had happened there did not amount to a surrender. The justices had refused to grant a new licence and the licensee wanted his licence back. As a matter of fact a fellow licensee, I should have thought somewhat churlishly, prosecuted him for selling beer without a licence, but of course the licensee had not surrendered his licence; he had offered to surrender it, but the justices refused to accept the surrender and Humphreys J.[4] called attention to the fact that the decisions in *Rex* v. *Taylor* and *Rex* v. *Amendt*[5] "are, no doubt, still good "law, subject to the Finance Act, 1947, section 73." That section is now reproduced in section 7 of the Licensing Act, 1953, and that in its terms clearly shows that a current licence can be surrendered and another licence granted in its place. Accordingly, I think that in the present case the justices were wrong and this matter must go back with a direction that they have jurisdiction to grant a new licence if they see fit, which, I suppose, they will do because apparently they were satisfied on the merits. We send the case back, saying that they had jurisdiction to consider the application and they must consider it and determine according to law.

HALLETT J. I agree and have nothing to add.

HAVERS J. I agree.

Order of mandamus.

Solicitors: *Gibson & Weldon, for Burley & Geach, Petersfield.*

C. J. E.

[1] [1915] 2 K.B. 593; 31 T.L.R. 317.

[2] (1922) 86 J.P. 216.

[3] [1949] 1 All E.R. 340.

[4] Ibid. 341.

[5] [1915] 2 K.B. 593.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION. (COSTS.)

1955 *May 5.*

Costs—Taxation—Probate and Divorce Division—Objection to taxation —Informal reference to registrar—R.S.C., Ord. 65, *r.* 27, *reg.* 39.

Any party dissatisfied with the decision of a taxing officer of the Probate and Divorce Registry may, in accordance with R.S.C., Ord. 65, r. 27, reg. 39, lodge formal written objections, which will be dealt with by a registrar. In order to save expense and delay, however, it is the practice of the registrars to hear informal references from the taxing officers on disputed items in unopposed taxations, or, by agreement, in opposed taxations. Practitioners wishing to take advantage of this procedure should at the end of the taxation merely request the taxing officer to refer the items about which they are dissatisfied to a registrar.

B. LONG,
Senior Registrar.

May 5, 1955.

[COURT OF APPEAL.]

* HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL *v.* HUNTER.

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Denning, Birkett and Romer L.JJ.

Highway—Private street works—Objection to proposals—Jurisdiction of justices — Evidence — Objection that alleged street is highway repairable by inhabitants at large—Onus of proof on local authority —Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 5, 6, 7, 8.
Justices—Case stated—Jurisdiction of Divisional Court—Must not retry questions of fact. Burden of Proof—Nature of onus—Provisional burden — Evidence pro and con — Determinate conclusion — Irrelevance of onus.

A local authority proposed to make up a road at the expense of the frontagers under the Private Street Works Act, 1892. A frontager raised an objection which was heard and determined in his favour by justices who found that the road was a public highway and repairable by the inhabitants at large. The council appealed by case stated to the Divisional Court, which examined the nature of the evidence adduced before the justices, and allowed the appeal, holding that the absence of any evidence that public money had ever been spent on the road in question placed on the frontager the onus of proving that it was a public highway and that the evidence had not conclusively discharged that onus in his favour. On appeal by the frontager:—

Held, that where a local authority sought to charge frontagers

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under the Act of 1892, the onus of proof rested on the local authority to show that it was a "street not being a highway repairable by the inhabitants at large" within the definition in section 5; that as the tribunal of fact, namely, the justices, had come to a determinate conclusion that the road was a public highway, the only question which the Divisional Court was thereafter entitled to consider was whether in law there was any evidence on which the justices could so find; and that as there was material before the justices on which they could find as they did, no question as to onus of proof arose, and the frontager's appeal should be allowed.

Dicta of Channell J. in *Rishton* v. *Haslingden Corporation* [1898] 1 Q.B. 294, 301; 14 T.L.R. 155; and Lord Dunedin in *Robins* v. *National Trust Co. Ld.* [1927] A.C. 515, 520; 43 T.L.R. 243 applied.

Decision of Divisional Court (Lord Goddard C.J., Cassels and Streatfeild JJ.) reversed.

APPEAL from the Divisional Court (Lord Goddard C.J., Cassels and Streatfeild JJ.) on a case stated by justices for the County of Lancaster sitting in petty sessions at Prescot.

The following is a statement of those parts of the evidence summarized in the case stated and referred to by the Court of Appeal:

On March 2, 1953, the Huyton-with-Roby Urban District Council resolved that works should be executed by the council under the Private Street Works Act, 1892,[1] in making up a street known as Thingwall Lane. Samuel P. Hunter, an owner of a property with a frontage on to the lane, was treated in a provisional apportionment of the cost of making up the street as liable to be charged the sum of £36 3s. 6d., and notices and other matters as required by section 6 of the Act of 1892 were duly made, served, published and deposited.

Pursuant to section 7 of the Act, the frontager objected to the council's proposal on the ground that the street was a highway

[1] S. 5: "In this Act, if not "inconsistent with the context,—. . . "The expression 'street' means (unless the context otherwise requires) "a street as defined by the Public "Health Acts, and not being a highway repairable by the inhabitants at "large. . . ." S. 7: ". . . any owner "of any premises shown in a provisional apportionment as liable to be "charged with any part of the "expenses of executing the works "may, by written notice served on "the urban authority, object to the "proposals of the urban authority "on any of the following grounds; ". . . (*b*) That a street or part of a "street is (in whole or in part) a "highway repairable by the inhabitants at large; . . ." S. 8: "(1) "The urban authority at any time "after the expiration of the said "month may apply to a court of summary jurisdiction to appoint a time "for determining the matter of all "objections made as in this Act mentioned, and shall publish a notice of "the time and place appointed, and "copies of such notice shall be served "upon the objectors; and at the time "and place so appointed any such "court may proceed to hear and determine the matter of all such objections in the same manner as nearly "as may be, and with the same "powers and subject to the same provisions with respect to stating a "case, as if the urban authority "were proceeding summarily against "the objectors to enforce payment "of a sum of money summarily "recoverable. . . ."

repairable by the inhabitants at large, and made application to the justices to appoint a time for determining the matter.

A map of 1786, made by the first qualified surveyor to make a survey of the County of Lancaster, showed Thingwall Lane, and at the end of the lane a gentleman's residence, marked as Summerhill; the lane was shown in the same manner as Thomas Lane, which had been a public highway and on the rates from time immemorial, though the mapmaker did not distinguish roads as public or private.

One part of the lane, now in the City of Liverpool, was shown on the West Derby Tithe Award Map of 1838, and that map showed what might well be a guide-stone in the centre of the roadway at the junction of Thingwall Lane with Thomas Lane; but nothing was specified as to the character of Thingwall Lane in the Tithe Award of 1840. The remaining part of the lane was shown in the Much Woolton Tithe Award Map of 1840 as an occupation road, ending in a cul-de-sac at a point adjacent to a farm now known as Thingwall Hall Farm; and the Tithe Award of 1842 described Thingwall Lane as an occupation road, but made no tithe charge in respect of the lane.

At the junction of Thomas Lane with Thingwall Lane there was a stone or guide-stone which on one side bore an inscribed cross, on another side the letters I. C. or J. C. and the date 1776, on the third side the words "Road to Broad Green," and on the fourth side the words "Road to Thingwell" and some letters not completely decipherable, with the word "Thorough" underneath and also writing which might be the word "By." The stone was very old and worn by the elements and the date 1776 was likely to be the correct date. There was no record that the stone had been put up by any surveyor of highways, and it might have been erected by James Clements, whose name appeared on the map of 1786, for his own private purposes. It was the practice for the rich man of the locality to provide the amenities such as signposts for the area.

The portion of Thingwall Lane lying in the urban district of Huyton-with-Roby was not made up or at any time repaired by the council of the Huyton-with-Roby Urban District or by any of its predecessors in title.

Title deeds of the residence referred to as Summerhill had been produced, extending back to an abstract of title dated July 27, 1846, which conveyed by reference to a description of the property in 1812, and there was no conveyance or reservation of a right to use the road Thingwall Lane; the plan attached to the abstract of title showed Summerhill coming to the boundary of Thingwall Lane but did not include the site of that road; the absence of the reservation indicated that Thingwall Lane was a public highway in respect of which the purchaser did not require an express grant to give him a right of way over it; and if it had been an occupation road it would have been necessary for a purchaser to obtain an express grant of a right of way over it.

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It was contended by the council that Thingwall Lane originated as an occupation road, that it was never a public highway before the coming into force of section 23 of the Highway Act, 1835, and that accordingly under that section it was not repairable by the inhabitants at large.

It was contended for the frontager that the lane had been dedicated by its owner to public use and had been used by the public and so had become a public highway before the coming into force of section 23 of the Highway Act, 1835, and that accordingly it was at common law a public highway repairable by the inhabitants at large.

The justices heard and determined the matter of all objections on April 5, 1954, and having viewed Thingwall Lane and inspected the guide-stone, found the following facts: that Thingwall Lane was a public highway and repairable by the inhabitants at large. They accordingly upheld the frontager's objection and awarded him costs.

The council appealed to the Divisional Court, and on January 12, 1955, the court allowed the appeal. Lord Goddard C.J., delivering the judgment of the court, stated that the road was undoubtedly an ancient track. His Lordship continued: "I think, and thought from a very early stage, that one of the "most important things is on whom the onus of proof lies in this "case. . . . The finding" (of the justices) "is challenged on "the ground that the evidence does not support it, and I do not "think one can lightly dismiss the case by saying that this is a "pure question of fact for the justices. We must examine the "evidence which was before the justices and see whether it "justifies the finding; and in my opinion, once it is agreed or "shown that public money never has been spent on the road, "the onus shifts or is placed on the person who alleges that it "is a road repairable by the inhabitants at large to prove it. If "you find a road which is said to be a public highway but the "public has never spent any money on it, either, as far as the "evidence goes, before 1835 or since 1835, it seems to me that "it raises a presumption that it is a road which is not repairable "by the inhabitants at large and therefore I think the onus in "this case must be on the respondent." His Lordship had then considered the evidence of the old maps on which, as stated in the case, the lane had been shown as ending in a cul-de-sac, and said that he was not inclined to decide the present case entirely on the ground that it was a cul-de-sac in the country because he doubted whether a road which led from a main road to a village or a hamlet could be called a cul-de-sac in the sense in which that expression was generally used. But his Lordship concluded that the evidence adduced was more consistent with the road being an occupation road than a highway and that the appeal should accordingly be allowed. The judgment referred to the conveyance but did not mention the guide-stone. The court gave

leave to the frontager to appeal before leave was asked for. The frontager appealed.

Frank Gahan Q.C. and *J. Edward Jones* for the frontager.
Basil Nield Q.C. and *G. B. H. Currie* for the council.

The following cases were cited in argument: *Cababé* v. *Walton-upon-Thames Urban Council*[2]; *Robins* v. *National Trust Co. Ld.*[3]; *Attorney-General* v. *Antrobus*[4]; *Copestake* v. *West Sussex County Council*[5]; *Rishton* v. *Haslingden Corporation*[6]; *Vyner* v. *Wirral Rural District Council*[7]; *Attorney-General* v. *Watford Rural District Council*[8]; *Bourke* v. *Davis*[9]; *Moser* v. *Ambleside Urban District Council*[10]; *Austin's Case*[11]; *Attorney-General and London Property Investment Trust Ld.* v. *Mayor, etc., of Richmond and Gosling & Sons*[12]; *Wakelin* v. *London and South Western Railway Co.*[13]; *Jones* v. *Great Western Railway Co.*[14]

DENNING L.J. The Huyton-with-Roby Urban District Council propose to make up Thingwall Lane, a road within their district, and they seek to charge the frontagers with the expense of so doing. The frontagers object on the ground that the road is a highway repairable by the inhabitants at large. The justices, having inquired into the matter, decided in favour of the frontagers that it was such a highway. The Divisional Court, however, reversed their decision, and found in favour of the council, but gave leave to appeal to this court.

The history of Thingwall Lane is given in the case stated by the justices. In the eighteenth century the road led to a hamlet called Thingwall, which consisted of a large house, a farm, and some cottages. It branched off from another road which led to Broad Green. At the fork of the road in 1776 someone put up a guide-stone—an impressive stone some seven or eight feet high—to show the way. It was made of one solid block of stone. On one side of the stone there was carved: "Road to Broadgreen," and on the other side of the stone there was carved: "Road to "Thingwell. No thorough by." That stone showed people the way when they came to the fork in the road. If a man wanted to get to Thingwall, he took the way indicated; but the stone, by saying "No thorough by," warned him that there was no through road to anywhere else. That stone has been there from 1776 until the present day. It has recently been moved a few feet because

[2] [1912] 2 K.B. 432; [1913] 1 K.B. 481 (C.A.); [1914] A.C. 102 (H.L.).
[3] [1927] A.C. 515; 43 T.L.R. 243.
[4] [1905] 2 Ch. 188; 21 T.L.R. 471.
[5] [1911] 2 Ch. 331.
[6] [1898] 1 Q.B. 294; 14 T.L.R. 155.
[7] (1909) 7 L.G.R. 628.
[8] [1912] 1 Ch. 417.
[9] (1889) 44 Ch.D. 110; 6 T.L.R. 87.
[10] (1924) 89 J.P. 59.
[11] (1672) 1 Vent. 189.
[12] (1903) 89 L.T. 700; 20 T.L.R. 131.
[13] (1886) 12 App.Cas. 41; 3 T.L.R. 233.
[14] (1930) 144 L.T. 194; 47 T.L.R. 39.

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it interferes with modern traffic conditions. This road to Thingwall has been open to the public ever since 1776, if not before. There has never been any obstruction or interruption of it.

At the beginning of the nineteenth century the big house at Thingwall was conveyed to a new owner. The site of Thingwall Lane was not conveyed to him, and there was no grant to him of any right of way along Thingwall Lane. That indicates that there was a public way along it; otherwise the new owner buying the house would surely have stipulated expressly for a right of way.

Those matters go to show that the road was dedicated to the public at least by 1776; and it is clear that if the road was dedicated to the public at any time before 1835, the inhabitants at large became at common law under a duty to repair the same. I pause to say that if a highway was created after 1835 by dedication or otherwise, it would not be repairable by the inhabitants at large unless the conditions laid down in section 23 of the Highway Act, 1835, had been complied with: see *Cababé* v. *Walton-upon-Thames Urban Council*.[1]

On the other hand, there are indications that it was a private road. In particular, there is no trace of any public money having been spent on this lane to keep it up at all, and in a tithe map of 1840 it was described as an occupation road. So there were indications each way, some pointing to its being a public way repairable by the inhabitants at large, others indicating that it was a private road. In that state of affairs it was for the justices, as the tribunal of fact, to give their decision, and they said: "Having viewed Thingwall Lane and inspected the guide-stone "at its junction with Thomas Lane we found the following facts, "that Thingwall Lane is a public highway and repairable by the "inhabitants at large." That being a finding of fact by the justices, it cannot be reversed on case stated unless there was no evidence to support it, and in my view there was evidence to support it.

But the Divisional Court have taken a different view. They said that, once it appeared that no public money had been spent on this road, the burden of proof shifted on to the frontagers to show that it was a highway repairable by the inhabitants at large. I cannot share that view. In my judgment, on the true interpretation of the Private Street Works Act, 1892, if the local authority desire to charge a frontager with the cost of making up the road, the burden is on them to prove that it is a "'street' "... not being a highway repairable by the inhabitants at large." They must prove the negative, that it is not repairable by the inhabitants at large. That is the legal burden which rested on them throughout the case from beginning to end. This view is supported by *Rishton* v. *Haslingden Corporation*,[2] where Channell J. said that in such a case, the onus probandi was clearly on the

[1] [1914] A.C. 102.

[2] [1898] 1 Q.B. 294, 301.

council; and that decision has been followed in other cases such as *Vyner* v. *Wirral Rural District Council*.[3]

The mistake made by the Divisional Court was that they failed to distinguish between a legal burden which is imposed by law and a provisional burden which is raised by the state of the evidence. Although the legal burden rests throughout on the local authority, they go some way to discharge it when they call evidence to show that no public money has ever been spent on the road. When this is done, there is a provisional presumption that the road is not a public road, but it is by no means conclusive. As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden—sometimes apparent, sometimes real—which may shift from one party to the other as the case proceeds, or may remain suspended between them. That is, however, not a legal burden, but only a provisional burden—a burden raised by the state of the evidence—from which the court may draw an inference one way or the other, but it is not bound to do so. At the end of the case the court has to decide as a matter of fact whether the road is repairable by the inhabitants at large or not. If it can come to a determinate conclusion, no question of the legal burden arises; but if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play and requires the court to say that the council have not proved the case.

I would like on this point to refer to an article which I wrote in 1945 in the Law Quarterly Review (at p. 375) in which I tried to point out the distinction between a legal burden imposed by law and a provisional burden raised by the state of the evidence. The part played by a legal burden of proof was well stated by Lord Dunedin in *Robins* v. *National Trust Co. Ld.*[4]: "onus "as a determining factor of the whole case can only arise if the "tribunal finds the evidence pro and con so evenly balanced that "it can come to no such conclusion. Then the onus will deter- "mine the matter. But if the tribunal, after hearing and "weighing the evidence, comes to a determinate conclusion, the "onus has nothing to do with it, and need not be further "considered." It seems to me that that is what happened in this case. The justices, after hearing and weighing the evidence, came to a determinate conclusion that this was a public highway repairable by the inhabitants at large, and so no question of onus came into it.

An argument was put before us on the ground that this land was a cul-de-sac, and that therefore, following observations in some of the cases—such as in the Stonehenge case (*Attorney-General* v. *Antrobus*[5]), *per* Farwell J.—it was a very important factor that no public money had ever been spent on it. I do

[3] (1909) 7 L.G.R. 628.
[4] [1927] A.C. 515, 520.
[5] [1905] 2 Ch. 188, 206–7.

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not regard this lane as a cul-de-sac. A cul-de-sac, as I understand it, is a blind alley, which this is not. There are innumerable villages and hamlets throughout the length and breadth of the land where the highway leads only to the one place, whether it be a hamlet underneath the downs or one beside a river, and the like. They are not cul-de-sacs. So in this case. It must be determined according to the principles applicable to ways in general and not as a cul-de-sac.

It appears to me that this case was an issue of fact for the justices. They have determined the matter on the facts, and have stated a very careful, complete and instructive case. In my view they have come to no error in point of law. The decision of the Divisional Court should be reversed accordingly, and the decision of the justices restored. I would allow the appeal.

BIRKETT L.J. I am of the same opinion. The proceedings with which we are concerned are proceedings under the Private Street Works Act, 1892; and when one reflects on the hearing before the justices, the proceedings before the Divisional Court, those before this court, and what further hearings I know not, it is a remarkable fact to think that the frontager in this case is liable for only £36 3s. 6d., and the whole collective body of frontagers are liable for £1,000.

But the point is obviously one of considerable importance, not merely to the frontagers, but to the local authority, and it is important to remember that it was taken under the Private Street Works Act, 1892, and the definition of "street" in section 5: "The expression 'street' means (unless the context otherwise "requires) a street as defined by the Public Health Acts, and not "being a highway repairable by the inhabitants at large." The local authority, therefore, could have no claim against the frontager unless this first fact was firmly and clearly established, that this is a street within the meaning of the Act of Parliament; and all the evidence which was given before the justices (which is set out in the case stated) went to that point, whether this was or was not a public highway repairable by the inhabitants at large. In the case stated with severe simplicity, the justices said: "On "April 5, 1954, we proceeded to hear and determine the matter of "all such objections, and having viewed Thingwall Lane and "inspected the guide-stone at its junction with Thomas Lane, "found the following facts, that Thingwall Lane is a public high-"way and repairable by the inhabitants at large." That is the only fact that they found; and they set out in great detail the evidence which was before them on which that conclusion of fact had been made.

I can summarize the evidence in this way: by the co-operation of the local record office, the goodwill of the local council, and the co-operation of the frontagers, there was a great deal of material before the justices in the form of ancient maps, including an interesting map of the area, being the first map, according

to the record office, that was made of that district at all, in which Liverpool, which we know today as a great city, is shown as merely a little collection of houses and great areas of countryside. There were tithe maps, and we had considerable argument about the weight of authority a tithe map ought to have, particularly the one which bore the words "occupation road," and so on. The maps were regarded as very important evidence in the case, as indeed they were, showing this particular track or lane or road or way, and its very ancient character.

In addition to that, there were other matters dealt with by the justices, and set out in the evidence, and notably one dealing with the guide-stone. One does not want to be critical about these things, but Lord Goddard C.J. says nothing at all about the guide-stone, whereas I regard the guide-stone as being a matter of prime importance, having regard to the evidence. He does refer to the conveyance, which was another matter produced in evidence, which went back by reference at least to 1812, and he refers generally to these maps. But I am not going into them now. If I may venture to say so with great respect to the Divisional Court and to the Lord Chief Justice, I think that the whole of the judgment in that court was really based on the onus of proof. Lord Goddard C.J. said: "The onus of proof is very "important in this case. I think the onus of proof shifted the "moment it was made plain that there has been no expenditure "of public money on this road, and the inhabitants at large have "never been called on to repair the road, and the onus thereupon "shifted to the frontager to make good his case that this was a "highway repairable by the inhabitants at large." He said later: "I do not think that onus has been discharged."

With great respect, the real question before the court—the plain and straightforward finding of the justices being that Thingwall Lane is a public highway, and repairable by the inhabitants at large—ought to have been, aye or no, was there or was there not any evidence to support that finding by the justices? Though I say it with reluctance, that is the kind of question that comes before the Lord Chief Justice and the Divisional Court almost every day, and it comes before the Court of Criminal Appeal almost every week. Sometimes the question is in the form: Is the verdict of the jury against the weight of evidence? which is an entirely different thing from saying: Is there, or is there not, any evidence? The judgment of the Divisional Court seems to be based on the second matter, what is the weight of the evidence? For example, the Lord Chief Justice says: "I think (and I "thought from a very early stage in this case) that one of the "most important things is on whom the onus of proof lies in "this case. The justices have obviously taken a great deal of "pains over this case. I think they have applied their minds to "the proper points, and they have come to the conclusion "that it is a road repairable by the inhabitants at large, and "therefore the respondent is not liable to contribute. That

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" finding is challenged on the ground that the evidence does not " support it." That is a rather curious phraseology; it is not: " That finding is challenged on the ground there is no evidence " to support it," but " challenged on the ground that the " evidence does not support it."

The Lord Chief Justice goes on: " I do not think one can " lightly dismiss the case by saying that this is a pure question " of fact for the justices." With great respect, if my view is right, that *was* the question. This is a pure question of fact for the justices. The Lord Chief Justice continued: " We must " examine the evidence which was before the justices and see " whether it justifies the finding." Again, with respect, that is language which does not accord with the test (if it be the right test) aye or no, was there evidence? It is as though the Lord Chief Justice said: " We must weigh it; we must examine the " texture of the evidence to see where it leads "—that is, not " Is there evidence? ", but " What is its nature? "

Perhaps I may quote one other sentence from the judgment: " At any rate, I think, taking all the circumstances and position " into account, once it is agreed or admitted that there has been " no expenditure of public money on this road, and it is never " shown that the inhabitants at large have ever been called upon " to repair the road, the onus is on the respondent to show that " this is a public highway." And again: " I have come to the " conclusion that it is more consistent with it being an occupation " road than being a highway, and I think, therefore, the respon- " dent fails in this appeal." I have quoted those passages from the judgment to show that the Lord Chief Justice was not applying the proper test. It being admittedly a question of fact for the justices, was there or was there not evidence to support the finding, he is saying: " Let us examine the evidence and see " where it leads; does it justify this conclusion, or does it not? "

The second criticism which I would venture to make is on the question of onus of proof, and there I need not repeat what my Lord has said. I am not at all satisfied that when there are proceedings before justices under the section, and it is shown, for example, that one facet of the evidence is that no money has been spent by the inhabitants at large, the whole onus of proof thereafter falls on the frontager. Indeed, we were referred to section 8 of the Act of 1892, and I think it is important. On the question of the hearing and the determination of objections by the justices, the section provides: " . . . at the time and " place so appointed any such court may proceed to hear and " determine the matter of all such objections in the same manner " as nearly as may be, and with the same powers and subject " to the same provisions with respect to stating a case, as if " the urban authority were proceeding summarily against the " objectors to enforce payment of a sum of money summarily " recoverable." That is the procedure that the justices must follow, as though the local authority were merely presenting a

summons against the frontager for the payment of £36; no one could doubt that the onus would be on the local authority to show that the £36 was due, that this was in fact a street, and that this was the frontager's share of the cost of making it up.

Mr. Nield said on this point that one ought to view the frontagers as being appellants coming to the court really to appeal against the administrative act of the local authority. I think it wrong to say that. The frontagers come to the court not as appellants against the administrative act of the local authority, but come (as they are entitled to do by the statute) to say to the local authority: "We have been granted these facilities of "coming to the justices, to state our objections to your pro-"cedure. We have come, and we put you to the proof of what "you allege against us"; and I think that is the true position.

On the facts of this case, I do not think that the question of onus of proof really arises. My Lord has cited the passage from the speech of Lord Dunedin in *Robins* v. *National Trust Co. Ld.*[6] which was read to us in argument, and I think that it applies here. What the justices have done here appears clearly from the case stated; admittedly they addressed their minds to all the proper points. It may be said: The fact that there was no evidence that payment had been made by the inhabitants at large is indeed a very strong point against the frontager; and it is; and it is calmly and fairly stated there; it is one point. But when we come, for example, to the guide-stone—which is not referred to in the judgment of the Divisional Court—that as a matter of evidence for the consideration of the justices is exceedingly important.

I listened with the greatest interest to Mr. Nield on that point, but I am afraid that he did not convince me. Here is a guide-stone which on one side says "Road to Broadgreen"—a clear indication to the public: "That is the way to Broadgreen, and "you may go." On the other side it says: "Road to Thingwell, "no thorough by"—clearly an indication to the public: "That "is the way to the hamlet of Thingwall, but remember there is "no through way there." Mr. Nield argued that it really meant, in effect, "No thoroughfare." It is easy to suggest that one might put on it "Private Road," or indeed the words "No "thoroughfare," but why put on the stone: "Road to Thing-"well, but you cannot come along it"?

At any rate, those were questions for the consideration of the justices, and they considered them with great care. They went to view this ancient stone with these initials "J. C." on it, and traced out apparently who J. C. was, when the stone was erected and why, and so on; but they came to the conclusion in the case stated, in regard to this matter: "There is no record of the said "stone having been 'put up' by any surveyor of highways and "that the said stone may have been erected by James Clements,

[6] [1927] A.C. 515, 520.

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"whose name appears on Yates's map of 1786, for his own "private purposes, and that it was the practice for the rich man "of the locality to provide the amenities for the area such as "signposts. That there was no surveyor of highways in 1776 "and that the date of the first appointment of such an official "is not known." They felt that that was some evidence that this was a public highway, and that the "rich man of the "district" had erected this guide-post for the guidance of the public, "Road to Thingwell." It was entirely a question for the justices.

Then there was the matter of the conveyance in 1846 of the residence known at one time as Summerhill and later as Thingwall Hall. The Lord Chief Justice did consider that. That conveyance makes reference to a document of 1812, and it was said that there was no conveyance or reservation of a right to use the road; and the justices thought that that was some evidence that it was a public road. I am satisfied for my own part that there was very considerable evidence on which the justices could come to the conclusion which they did. The Divisional Court came to a wrong conclusion; and I would support restoration of the view taken by the justices in this case.

ROMER L.J. I agree. If Mr. Nield is wrong in his submission in regard to the onus of proof, it seems to me there is really very little left in this case. His submission was that, without admitting that the onus was originally on the urban district council, in any event it shifted to the frontager because of the combination of two reasons; firstly, that this lane, Thingwall Lane, was a cul-de-sac—a cul-de-sac in the country, as Mr. Nield described it—and, secondly, because the justices found that the lane had never been repaired at the public expense. That was the view which the Divisional Court took in the matter, and it resulted in the defeat of the frontager at the hearing before that court.

I think the argument fails, and that the Divisional Court erred in the view they took of it, if only because this lane cannot, in my opinion, on the facts that appear from the case, be described as a cul-de-sac at all within the meaning of that phrase as used in the relevant authorities, because it was a way leading from a highway to a hamlet; and it does not seem to me that that is the kind of way which can, for any material purpose, be described as a cul-de-sac. But the suggestion that it was a cul-de-sac lay at the very foundation of this argument on onus; and accordingly, without that foundation, the argument necessarily fails. I would only desire to add that on the general question of onus I entirely and respectfully agree with what my Lord has said on the question with regard to applications such as the present.

Once the question of onus is out of the way, the question (and the only question) is whether there was material on which

the justices could arrive at the conclusion which they did in fact reach; and I do not propose to repeat what my brethren have said on the two most material matters, namely, the presence of the guide-stone, and the conveyance which was executed in 1846. I should, however, say that in regard to the guide-stone, Mr. Nield relied on the presence of the word "No" which appears on the stone before the word "thorough," as indicating that the evidence which is provided by that guide-stone is rather in his favour than against him; but it appears to me, for reasons which Birkett L.J. has given, that that argument cannot prevail. Mr. Nield then said that, at the lowest, the evidence which emerges from the guide-stone is equivocal. I do not think it is equivocal, but that it points very directly towards the conclusion at which the justices arrived, and supports it.

In regard to the conveyance, I would only say that it does appear from the tithe map of 1840 that the suggestion made by Mr. Nield—to the effect that the purchaser of Summerhill in 1846 might well have been content to have relied on the means of egress which lay to the west of the house Summerhill, and therefore would not need the use of the lane in question—in my opinion is not one which can legitimately be accepted when one sees from this plan that the road or way which leads from Thingwall Lane to Summerhill itself, was included in the conveyance; and I should imagine the obvious inference is that the purchaser of the house would assume that he was to be entitled to use, and would require to use, Thingwall Lane itself. That conveyance in itself amply justifies the result at which the justices arrived, or at the lowest (and this is all that we are concerned with) was material on which they could properly reach their finding.

I accordingly agree that the decision of the justices should be restored, and this appeal allowed.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *W. F. Foster, Hedge & Clare, for A. Stephen Cawson, Liverpool; Sharpe, Pritchard & Co., for H. E. H. Lawton, Huyton.*

M. M. H.

[COURT OF APPEAL.]

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Apr. 26.

Singleton, Jenkins and Morris L.JJ.

*REILLY *v.* ORANGE.

[Plaint No. K. 260.]

Easement—Prescription—Period of user until action—No possibility of interruption for a year—Right of way—Contiguous plots of land—Agreement—Grant of conditional user by defendant of plaintiff's entrance drive—Action by plaintiff to terminate user—User for period of over 19 *years—Prescription Act,* 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 2, 4.

To establish an easement under the Prescription Act, 1832, a claimant must show that he has enjoyed a user for the full period of twenty years without interruption, and such period is by section 2 of the Act [1] to be deemed to be the period next before the commencement of some suit or action wherein the claim or matter to which such period may relate shall have been brought into question. The commencement of such a suit or action is not an interruption within the meaning of section 4 of the Act,[1] but is the event marking the date down to which the requisite period of user must be shown.

Where, therefore, the defendant, owner of a plot of land, had had uninterrupted user of a driveway over a contiguous plot belonging to the plaintiff for over 19 years, when the plaintiff claimed a declaration that the defendant's right to use it had been determined:—

Held, that the defendant could not establish a right of way notwithstanding that, at the commencement of the action, there could no longer be an interruption acquiesced in for one year before the completion of the full period of 20 years.

Flight v. *Thomas* (1841) 8 Cl. & Fin. 231 distinguished.

APPEAL from Deputy Judge Coplestone-Boughey, sitting at Birkenhead County Court.

The plaintiff, Ernest Reilly, and the defendant, John Orange, in October, 1932, and June, 1933, respectively, became by conveyance the owners of contiguous plots of land on the west side

[1] Prescription Act, 1832, s. 2: "... That no claim which may be "lawfully made at the common law, "by custom, prescription, or grant, to "any way or other easement, ... "when such way or other matter as "herein last before mentioned shall "have been actually enjoyed by any "person claiming right thereto without interruption for the full period "of twenty years, shall be defeated "or destroyed by showing only that "such way or other matter was first "enjoyed at any time prior to such "period of twenty years, but nevertheless such claim may be defeated "in any other way by which the same "is now liable to be defeated."

S. 4: "... That each of the "respective periods of years hereinbefore mentioned shall be deemed "and taken to be the period next "before some suit or action wherein "the claim or matter to which such "period may relate shall have been "or shall be brought into question, "and that no act or other matter "shall be deemed to be an interruption, within the meaning of this "statute, unless the same shall have "been or shall be submitted to or "acquiesced in for one year after the "party interrupted shall have had or "shall have notice thereof, and of the "person making or authorizing the "same to be made."

of Thurstaston Road, Thurstaston, Chester. The two plots, of which the northern one was the plaintiff's, had formerly been in the common ownership of one person, and the only building erected on either of them was a commercial garage situate on the plaintiff's plot. The conveyances had apparently been drawn, and the plans upon them prepared, without the precaution of first viewing the property. In the result the conveyances were effected on the footing that the plots were two rectangular plots and provision was made for access from Thurstaston Road to the western parts of the two plots by showing on the plans a central strip, running from east to west, of 9 ft. in width, 4 ft. 6 ins. of which width was to be contributed by each plot. The conveyances contained appropriate provisions for the use by the two parties of this 9 ft. way as a means of access to and from the more western parts of their plots. The part of the defendant's plot which, according to the conveyances, should have provided the site of the eastern portion of the 9 ft. road, was on a level lower than the plaintiff's property, and on a level lower than Thurstaston Road, and it would have been a quite impracticable proposition to attempt to make up the 9 ft. roadway as contemplated by the conveyances.

In these circumstances in 1934 the parties, being then on friendly terms, agreed to exchange certain parts of their properties, the defendant being granted permission to use a driveway made by the plaintiff on his own land as a means of access to the western part of his (the defendant's) property, and in particular to a bungalow and garage which he had erected on his plot. In 1940 the plaintiff sold the Heatherland Garage and the eastern portion of his property, but he retained the strip of land which was the site of the means of access above referred to. Subsequently the parties fell out, the plaintiff complaining that the defendant was using the drive for the purposes of his business, whereas the agreement, the plaintiff asserted, only provided for access for domestic purposes. In December, 1953, the plaintiff by his solicitors gave notice to the defendant determining any right of the defendant to use the way over the plaintiff's property and by proceedings in the county court he claimed a declaration that the defendant's right to use the drive had been determined; an injunction to restrain the defendant by himself, his servants or agents from using the drive; and damages for trespass. The defendant counterclaimed for a declaration that he was entitled to a right of way over the plaintiff's land. His case was that as part of the agreement of 1934 he was to have in perpetuity a right of way for all purposes over the plaintiff's land, in the nature of an easement annexed to his (the defendant's) plot.

The deputy judge gave judgment for the plaintiff and dismissed the counterclaim. He accepted the plaintiff's evidence that under the agreement the user by the defendant of the drive was only to continue until the defendant had created a new means

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of access on his own land, which he had in fact done at the end of 1953.

The defendant appealed.

W. Lyon Blease for the defendant.
K. Graham Routledge for the plaintiff.

Cooke v. *Ingram* [2]; *Kinloch* v. *Nevile* [3]; *Tickle* v. *Brown* [4]; *Battersea* v. *London City Sewers Commissioners* [5]; *Flight* v. *Thomas* [6]; *Ward* v. *Robins* [7]; *Wright* v. *Williams* [8]; *Richards* v. *Fry* [9]; *Hyman* v. *Van den Bergh*,[10] referred to.

SINGLETON L.J. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. stated the facts and continued: The matter came before Deputy Judge Coplestone-Boughey at Birkenhead. He gave judgment in favour of the plaintiff and dismissed the defendant's counterclaim. He made a declaration that the defendant's right to use the plaintiff's drive had terminated, and he awarded the plaintiff £12 damages for the various acts of trespass and so forth complained of. In the reasons for his judgment, the deputy judge said: "The only conflict of fact is "about the agreement. I am satisfied that both parties are doing "their best to recollect what was agreed." With that preface he said that he preferred the plaintiff's evidence to that of the defendant. His finding, based on the plaintiff's evidence, was that the plaintiff granted the defendant permission to use the drive for access to his premises for domestic purposes, but only until such time as the defendant should construct a separate means of access to his premises over his own land. The defendant's evidence had been to the effect that as part of the agreement of 1934 he (the defendant) was to have in perpetuity a right of way for all purposes over the plaintiff's land, in the nature of an easement annexed to the defendant's plot.

Mr. Blease, for the defendant, very properly admits that for the purpose of this appeal he must accept the deputy judge's finding as to the nature and terms of the agreement, but he says that notwithstanding this he is entitled to succeed. He says that on two grounds: (1) that he has had 20 years' uninterrupted enjoyment of the right claimed, as required by the Prescription Act, 1832; (2) that although the right he claims had its origin in the agreement of 1934, and although that agreement, as found by the deputy judge, would only give him a right to use the drive for domestic purposes, and only until such time as he made a

[2] (1893) 68 L.T. 671.
[3] (1840) 6 M. & W. 795.
[4] (1836) 4 Ad. & El. 369.
[5] [1895] 2 Ch. 708.
[6] (1841) 8 Cl. & Fin. 231.
[7] (1846) 15 M. & W. 237.
[8] (1836) 1 M. & W. 77.
[9] (1838) 7 Ad. & El. 698.
[10] [1908] 1 Ch. 167.

drive of his own, that permission did not prevent the 20 years' user on which he relies from establishing his right under the Prescription Act, 1832. The second of those points can only arise if Mr. Blease is entitled to succeed on the first.

The evidence as to the date of the agreement under which the defendant used the drive seems to have been somewhat indefinite. The defendant appears to have thought that the agreement was made in September, 1934. The plaintiff could give no nearer date than that it was in May, June or July. The action was commenced, taking the date of the particulars of claim as the date of commencement, on July 1, 1954. So, on the evidence, the defendant failed to prove 20 years' user down to the date of the commencement of the action, because to do that it was necessary for him to prove that the agreement was made not later than July 1, 1934. But Mr. Blease seeks to surmount that difficulty by an argument on the Prescription Act, 1832, which makes it necessary to refer to the two sections of that Act which are material for the present purpose. [His Lordship read sections 2 and 4 of the Act and continued:]

Mr. Blease's argument on this part of the case is of this nature: He says that what must be shown is 20 years' uninterrupted user, and that, according to section 4, no act or matter counts as an interruption unless the same shall have been or shall be submitted to or acquiesced in for one year. It follows, says Mr. Blease, that inasmuch as in this case over 19 years' user down to the commencement of the action is proved, the defendant's right is made good inasmuch as there could be no interruption acquiesced in for one year between the date of the commencement of the action and the completion of the full period of 20 years.

In support of that proposition he referred us to the well-known case of *Flight* v. *Thomas*.[1] In that case: "A. had the free "access of light and air through a window of his house for nineteen "years and 330 days, and B. then raised a wall which obstructed "the light, and the obstruction was submitted to only for 35 days, "when A. brought an action to remove it." It was held: "that "the right of action was complete; that the twenty years' enjoy-"ment was to be reckoned from the commencement of the "enjoyment to the time of bringing the action; and that an "interruption of the enjoyment, in whatever period of the twenty "years it may happen, cannot be deemed an interruption within "the meaning of the Act, unless it is acquiesced in for a whole "year."

Mr. Blease seeks to apply that to the present case in this way: he says that the commencement of the action constituted an interruption, and that, inasmuch as the action was not commenced until after the alleged easement had been enjoyed for more than 19 years, the interruption so constituted could

[1] (1841) 8 Cl. & Fin. 231.

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not last for the required period of one year, so that his title was complete at the time of action brought. In my view that argument cannot prevail. What the Prescription Act requires, as appears from the combined effect of section 2 and section 4, is the full period of 20 years, being "the period next before "some suit or action wherein the claim or matter to which such "period may relate shall have been or shall be brought into "question." The commencement of the suit or action in my view is clearly not an interruption within the meaning of section 4, but is the event marking the date down to which the requisite period of user must be shown. What must be shown is a full 20 years reckoned down to the date of action brought. That must be an uninterrupted period, but in considering whether it is an uninterrupted period or not, interruptions not acquiesced in for at least a year are not to be counted as interruptions.

Accordingly, in my view Mr. Blease's first argument must fail, unless it can be said that the present action was not a suit or action wherein the claim or matter to which the period relates has been brought into question. Mr. Blease suggested that the present action was not such a suit or action. I cannot agree. Substantially the whole subject-matter of the action, as set out in the particulars of claim, concerned the use by the defendant of the plaintiff's drive and the question whether the defendant was entitled to continue the use of it or not. In my view, therefore, this was a suit or action wherein the claim or matter to which the relevant period related was brought into question; and it follows, to my mind, that inasmuch as that action was commenced before the full period of 20 years' user had been completed, the defendant's claim based on prescription must fail.

The view I have formed on that first point makes it unnecessary for me to express any view on the second point, that is to say, Mr. Blease's submission to the effect that if 20 years' user could be made out the fact that such user was referable in its origin to the agreement of 1934 would not prevent it from establishing a prescriptive right. That, on the authorities (and Mr. Blease referred us to some of them) seems to me to be a matter of some difficulty. Mr. Blease has pointed to various observations which appear to afford some support for his view, but on the other hand it would, to my mind, be surprising if in a case such as this a matter which was intended to be a purely personal arrangement of a temporary character between two neighbours as, for example, an arrangement that one can use a way on the other's land until he has a way of his own, should produce, contrary to the intention of either of them, a prescriptive right of way for all time, not merely personal to the party for whose convenience the agreement was made, but, also, enuring for the benefit of anyone for the time being occupying what would then be the dominant tenement.

Be that as it may, the permission given was in fact revoked and the action was brought before the necessary period of 20

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years' user had been completed. Accordingly, even if Mr. Blease were right in his submission that an agreement or licence such as this does not affect the running of time, the defendant could not succeed, because the necessary period of user has not been made out. For these reasons I am of opinion that this appeal fails and should be dismissed.

MORRIS L.J. I agree and do not desire to add to what my Lord has said.

SINGLETON L.J. I agree.

Appeal dismissed.

Solicitors: *Ranger, Burton & Frost for G. F. Lees & Son, Birkenhead; Kinch & Richardson for Percy Hughes & Roberts, Birkenhead.*

A. W. G.

[COURT OF APPEAL.]

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Mar. 31.
Evershed M.R., Jenkins and Romer L.JJ.

* DOLTON BOURNES & DOLTON LD. *v.* OSMOND (VALUATION OFFICER).

[LVC 414, 1953.]

Rates and Rating — Industrial hereditament — Timber merchants' premises — Whether retail shop, or "premises of similar character "where retail trade or business . . . carried on"—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1), (4).
"*Shop.*" "*Retail.*" "*Wholesale.*"

A company of timber importers, merchants and saw millers appealed against a direction that its business premises should be transferred to Part I of the valuation list on the ground that it was not an industrial hereditament, but was a retail shop or "premises of a similar character where retail trade or business . . . "is carried on" within the proviso to section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, as expanded by section 3 (4):—

Held, (1) that the test to be applied in determining whether a hereditament came within the expanded definition of retail shop was twofold: first, the hereditament must be a retail shop or premises of a similar character and, secondly, it must be shown that retail trade or business or transactions of a similar character were carried on there.

(2) That in applying that test the words used in the definition must be given their ordinary every-day meaning.

Turpin v. *Middlesbrough Assessment Committee* [1931] A.C. 446; 47 T.L.R. 308 applied.

(3) That in applying the first limb of the test, the essential characteristic of a shop was that it was a place to which the public, in the sense of the ordinary man in the street, were encouraged to resort for the purpose of having their particular

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wants supplied, that is for shopping, and to which they did in fact resort for that purpose; and that physical characteristics and the appearance of the hereditament were inconclusive.

Ritz Cleaners Ld. v. *West Middlesex Assessment Committee* [1937] 2 K.B. 642; 53 T.L.R. 588; [1937] 2 All E.R. 368 and *Toogood & Sons Ld.* v. *Green* [1932] A.C. 663; 48 T.L.R. 463 applied.

(4) That the hereditament was not, on the facts, a retail shop or premises of a similar character to a shop since the company did not deal or want to deal with the public in the ordinary sense of that term but dealt with and solicited the trade of the more limited class of trade customers.

Quaere, whether if the first limb of the test had been satisfied, the sales of timber to builders could be regarded as retail sales.

Observation in *W. S. Shuttleworth (Slough) Ld.* v. *Lane* (1953) 46 R. & I.T. 103 disapproved.

Revenue Officer of Surrey v. *Gridley Miskin & Co. Ld.* (1931) 2 Eng.De-Rating Cas. 236 distinguished.

APPEAL by case stated from decision of Mr. Erskine Simes Q.C., sitting as the Lands Tribunal.

The appellant company, who were timber importers, merchants and saw millers, carried on business in a hereditament situated in Roper Road, Canterbury, which was included in Part II of the valuation list for the county borough of Canterbury, being assessed therein at £436 gross value and £360 rateable value. On March 20, 1953, I. J. Osmond, the valuation officer for the Canterbury valuation area, made a proposal that the hereditament should be transferred to Part I of that list, on the ground that it was not occupied and used as an industrial hereditament within section 3 of the Rating and Valuation (Apportionment) Act, 1928.[1] The company, who were owner occupiers, served a notice of objection, and the valuation officer appealed to the local valuation court. On November 26, 1953, the local valuation court for East Kent and Canterbury gave directions that the hereditament should be transferred to Part I of the list and therein be assessed at the same figure. The company appealed to the Lands Tribunal and on December 1, 1954, Mr. Erskine Simes Q.C. confirmed the decision of the local valuation court.

The company appealed.

The following facts proved or admitted before the Lands Tribunal were set out in paragraph 8 of the case stated: "(a) The "appellants are timber importers and merchants and saw "millers. (b) The hereditament is registered as a factory

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In this "Act the expression 'industrial here-"'ditament' means a hereditament "... occupied and used ... as a "factory or workshop: Provided that "the expression industrial heredita-"ment does not include a here-"ditament occupied and used as a "factory or workshop if it is primarily "occupied and used for the following "purposes or for any combination of "purposes, that is to say: ... "(*b*) the purposes of a retail shop; "(*c*) the purposes of distributive whole-"sale business. ... (4) ... 'Retail "'shop' includes any premises of a "similar character where retail trade "or business (including repair work) "is carried on."

" under the Factory and Workshop Acts. (c) Upon the here-
" ditament the appellants employ a manager, a clerk, five saw-
" mill operatives, eight general labourers, one of whom is
" employed in the saw mill, and one lorry driver. (d) The
" appellants import timber and on the hereditament cut and
" process about 77 per cent. of it to meet the needs of the
" individual customer, the remainder being sold without pro-
" cessing. (e) The customers of the appellants are as to about
" 92 per cent. builders and as to about eight per cent. merchants
" or factories. The appellants occasionally sell small quantities
" of timber to members of the public and dispose of the sawdust
" to butchers. They neither seek nor welcome small customers
" and the sales to such customers, and of the sawdust, may be
" regarded as negligible. (f) Before incorporating the timber
" purchased from the appellants into a building, the builder has
" to do work on the timber to cut and fit it for its place in the
" building. (g) There is no window display or show of timber
" to attract prospective purchasers. (h) When in March, 1951,
" the appellants were first granted an import licence after the
" war they inserted an advertisement in each of two local papers
" circulating in the district, and these advertisements appeared
" every fortnight until December, 1953."

A copy of the advertisement was attached to the case. Having given the name of the company, which was described as " timber importers and saw millers," and the address, the advertisement continued: " Large stocks of Swedish and Finnish " redwood, imported direct from the Baltic to Ramsgate under " private import licence. Enquiries and inspection invited." The case continued: " At the time when these advertisements first " appeared licences to purchase softwood, which represents over " 93 per cent. of all timber sold by the appellants, could only be " obtained by builders. (i) It is the invariable practice for a " builder to inspect timber at the hereditament before giving an " order unless he knows that he can order a particular brand " of which he has had previous experience. (j) The words " ' Enquiries and inspection invited ' in the advertisements men-" tioned in paragraph (h) referred to such practice. (k) The " usual practice of a builder desiring to purchase timber from " the appellants is to take out from the architect's drawings " details of the timber he requires, to take those details to the " office of the appellants on the hereditament and there obtain " the prices quoted by the appellant company for the timber " required. Not infrequently a verbal order is given which is " subsequently confirmed in writing. If a branded timber can " be obtained the above procedure might take place by telephone " and, in the case of a repeat order, e.g., where a number of " identical houses are being erected, a written order only is " employed. (l) All orders, whether verbal, telephonic or written, " are given at or are sent to the office of the appellant on the " hereditament and the clerk there employed has the duty of

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" receiving such orders and attending to any person calling at " the office. (m) There is no counter in the office but there is " a sliding window between the office and the passage to which " a visitor gains admission, through which customers can and do " communicate with the clerk referred to in the last preceding " subparagraph. . . . (n) Some of the timber is collected by " purchasers in their own lorries, and the remainder delivered " by the appellant company in their own lorry. In a typical " month 1,736 cubic feet of timber were collected by customers " and 7,263 cubic feet delivered by the appellants. (o) The " hereditament is not a ' retail shop ' in the ordinary meaning of " the words."

The plan attached to the case showed that the hereditament, which covered a considerable area, had a frontage to Roper Road of over 200 ft. and a depth of over 200 ft. A number of buildings was erected on the site, which consisted of several separate sections, the largest of which was where the saw-milling took place. In other parts the timber received by the company was stacked and photographs exhibited to the case showed that in some parts the timber stacks were roofed. A small part of the hereditament near the frontage to Roper Road consisted of the office referred to in paragraph 8 (1).

Percy Lamb Q.C. and *John Widgery* for the appellant company.

Cyril Harvey Q.C. and *Patrick Browne* for the valuation officer.

In addition to the cases referred to in the judgments the following were cited in argument: *McGowan* v. *Osgoldcross Assessment Committee*[2]; *M. & F. Frawley Ld.* v. *The Ve-Ri-Best Manufacturing Co. Ld.*[3]; *Deeble* v. *Robinson*,[4] and *Railway Assessment Authority* v. *Great Western Railway Co.*[5]

EVERSHED M.R. The question raised in this appeal as formulated in the special case was " whether the hereditament is within " the meaning of ' premises of a similar character where retail " ' trade or business . . . is carried on ' in section 3 (4) " of the so-called " De-rating " Act, 1928 [the Rating and Valuation (Apportionment) Act, 1928]. That question was answered by the Lands Tribunal affirmatively.

At first sight it would appear, applying ordinary standards of common sense and language, that the opposite answer should have been given; for we are here concerned with a hereditament (and there is no question of any division in any material respect

[2] [1936] 2 All E.R. 170.
[3] [1953] 1 Q.B. 318; [1953] 1 W.L.R. 165; [1953] 1 All E.R. 50.
[4] [1954] 1 Q.B. 77; [1953] 3 W.L.R. 975; [1953] 2 All E.R. 1348.
[5] [1948] A.C. 234; 63 T.L.R. 635; [1947] 2 All E.R. 794.

between its component parts) which is "occupied" by the company for their business of timber importers and merchants and saw-millers. [His Lordship referred to the plan and photographs of the hereditament as summarized above and continued:]

This considerable area would not appear naturally to fall within the description of a "retail shop," or even of "premises of a "similar character" to a retail shop. But Mr. Browne reminded us that it is unsafe in rating cases to assume that these matters are governed exclusively by the standards of common sense. Further, the phrase "retail shop" in the Act of 1928 is expanded by the definition in section 3 (4) to include "any premises of a "similar character where retail trade or business (including repair "work) is carried on." Nevertheless, I have no less sanction for having some regard to common sense than the speech of Lord Dunedin in *Turpin* v. *Middlesbrough Assessment Committee*,[1] one of the series of cases of which the first is *Sedgwick* v. *Watney, Combe, Reid & Co. Ld.*[2] Lord Dunedin said[3]: "The matter "seems to me simply a question of attributing an every day "meaning to the words used in the definition."

[His Lordship read the facts recited in the case stated, commenting that having regard to the figures the sales to the public not only might be but must be regarded as negligible. He continued:] Attributing every day meanings to the words used in the statute which I have already mentioned, it would be difficult I should have thought to say that this hereditament was in the least like a "retail shop," even when regard is had to the expansion afforded by the definition. But there has been a number of cases in which consideration has been given to these words; and the Lands Tribunal felt that the effect of those decisions was, contrary to what at any rate would appear to me to be the prima facie conclusion proper to be drawn, that here the conditions of the paragraph were satisfied; in other words, that this hereditament was being used for the purposes of a retail shop, that is, that these were premises of a similar character to a retail shop where retail trade or business was being carried on.

I agree with Mr. Browne that the words in section 3 (1) are "used for . . . the purposes of a retail shop," which no doubt give a somewhat wider effect to the relevant words than if the language had more simply been to the effect that the premises were primarily a retail shop. But before I consider some of the cases and the inferences which ought properly to be drawn therefrom in the present case, I cite and proceed to apply hereafter what Greene L.J. said in *Ritz Cleaners Ld.* v. *West Middlesex Assessment Committee*[4]: "Under section 3 of the Act, read in "conjunction with the definition section, a hereditament is not "an industrial hereditament if it is 'primarily occupied and used "'for . . . the purposes of a retail shop including premises of

[1] [1931] A.C. 446, 470; 47 T.L.R. 308.
[2] [1931] A.C. 446.
[3] Ibid. 473.
[4] [1937] 2 K.B. 642, 671; 53 T.L.R. 588; [1937] 2 All E.R. 368.

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" ' a similar character where retail trade or business (including " ' repair work) is carried on.' Now the premises must be ' of " ' a similar character ' to a retail shop and this similarity must " exist not only with regard to ' retail ' character (which is already " provided for in the words ' retail trade or business ') but also " with regard to ' shop ' character. It is not sufficient that retail " business is carried on upon the premises if the premises are not " a shop or similar to a shop. Now the essential element in a " shop is that people can shop in it ": and then the Lord Justice considered the kind of case in which the operations were not such as would have made it a shop. Greene L.J. was, after all, doing what Lord Dunedin had said should be done—attributing an everyday meaning to the words used. It is, therefore, necessary first of all to see whether, on the facts as here found, this hereditament is a " shop," or has a character " similar to " that of a shop; and I hope I shall not be thought to be speaking too much in the language of assertion if I say again that to my mind it seems quite plain that this hereditament is not, by any ordinary standard or use of language, and notwithstanding anything that has been said in the cases, either a " shop " or a hereditament having a " character similar to " that of a shop.

If the matter were res integra I should be disposed to leave the matter there; but, most properly, Mr. Harvey and Mr. Browne have drawn our attention to other parts of the speech made by Lord Dunedin in the series of cases from which I have already taken one extract; and it is said that according to the authority of those cases the word " shop " really means no more and no less than this: a place where in fact transactions of purchase and sale by retail are carried on; and that here such transactions are in truth carried on.

The series of cases included two which were concerned with garages. In one [*Turpin's* case [5]] the premises were those of a garage of the character which must bring to the mind of everyone a fairly clear picture. There is an area or space on which repairs to motor-cars are carried on; there are petrol pumps whereat motorists are invited to call and buy petrol; and there are also exhibited for sale and sold all kinds of small accessories; but, as was pointed out, the main activity at the premises then in question (on which the main part of the argument turned) was related to the repair work. I think I may properly say (though all summaries, no doubt, are dangerous without some qualification) that, since the effect of the definition was to include the doing of repairs as part of retail trading for the purposes of the section, therefore a repair shop was a " retail shop," and this garage, being a repair shop, was held to be within the definition.

The case of the other garage [*Kaye* v. *Eyre Bros. Ld.* [6]] was perhaps stronger, because the activities conducted thereon were more confined to those of repair, and the sales, whether of petrol

[5] [1931] A.C. 446, 470. [6] Ibid. 475.

or other accessories, were very much smaller. But Lord Dunedin used this language in *Turpin's* case [7]: "Nor do I agree with the "view that has prevailed as to the effect of the words 'of a "'similar character.' For myself I am unable to state what are "the physical features the existence of which is essential to or "distinctive of a retail shop. I am familiar with many physical "features which are frequently and even commonly found in "retail shops, such as counters and shop windows; but I am "equally familiar with retail shops where no such features exist. "In my opinion it is not possible to say that the words 'of a "'similar character,' even if they include, are limited to, physical "features of the premises. They must, as I read them, include "also similarity of character in other respects. The character of "the premises must be similar to the character of a retail shop. "Now if we compare the hereditament here in question with a "retail shop, do we find any common characteristics? My Lords, "I think we do; for they are both buildings to which the public "can resort for the purpose of having particular wants supplied "and services rendered therein. Moreover, once you include "repair work in the words 'retail trade or business,' it can be "truthfully said that there is a similarity between the type of "business carried on in this building and the type of business "carried on in a retail shop."

Before I comment upon that extract I will refer to one other passage in a later case in the series, *Finn* v. *Kerslake*,[8] which related to a wholly different type of business, namely, that of a bakery. The question mainly debated in that case was whether the fact that the greater part of the hereditament was occupied for the purpose of making bread which was later sold in the smaller or (more strictly) "shop" part, qualified the result that primarily the premises were being used for the purposes of a shop, the bakery being, so to speak, merely the supplying end of the shop premises. In the course of the case it was said by Lord Dunedin [9]: "In the present case, the hereditament is all occupied "and used for the one trade or business—namely, a retail trade "or business in bread and confectionery, for it cannot be doubted "that the sale to hotels, clubs, restaurants, etc., is typical retail "trade." That last phrase must be taken in conjunction with the facts as set out in the report of the case in the court below, from which it appears that about half the sales from this bakery were, in the words of the case, "sold to hotels, clubs, etc., for "re-sale." I know not, of course, what discussion upon it took place, and I hope that I shall not be thought in any sense disrespectful of Lord Dunedin if I say that I should not have thought, without very considerable assistance, that selling bread to hotels for re-sale to hotel customers was "typical retail trade." However, Lord Dunedin so stated, in a speech with which all

[7] Ibid. 473.
[8] Ibid. 485.
[9] Ibid. 487.

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other members of the House concurred. It is, therefore, proper and necessary that faithful acceptance should be given to Lord Dunedin's opinion. But, as in every other case, the judgments of the judges are to be read in relation to the facts of the cases which they are deciding, and in saying so much in connexion with these cases I am doing no more than Lord Thankerton himself did in the House of Lords in 1932 in *Toogood & Sons Ld.* v. *Green.*[10] In any event, we are, fortunately, not concerned here with the sale of articles of foodstuffs to hotels and restaurants. Naturally, however, Mr. Browne has relied upon that case to show that the word "shop" must, in its context, not be given a restricted meaning, confined to the sort of premises that are commonly seen in an ordinary shopping street.

I think that Mr. Harvey was well entitled to observe at the beginning of his submission that the court is, in this case and in other like cases, concerned to interpret the words of an Act of Parliament rather than to interpret the words of other judgments in other cases, and it is to be noted that Parliament has not thought fit to define what it meant by "shop," or indeed what it meant by "retail trade or business." As regards "retail shop," therefore, I should assume that no very special or unusual significance was intended by Parliament in using an ordinary English word, and I revert again to what Greene L.J. said,[11] that, as a foundation for any application of the words to particular facts in particular cases, one may safely start by bearing in mind that the essential characteristic of a shop is that people can shop in it, and no one, I think, would really feel very much difficulty in comprehending that phrase.

But, paying respect to the language that I have already read from Lord Dunedin's opinion, it is clear that the matter is not to be determined by mere regard to the physical characteristics or appearance of the premises, nor, of course, to their size. Perhaps the most significant pointer in most cases (and, I will assume, in this case) was that to which Lord Dunedin made express reference and which I can put in the form of a question: Is it a place where the public resort for the purpose of having their particular wants supplied? Lord Dunedin said "can "resort." It was pointed out (I refer again to *Toogood's* case[12]) that the vital thing is not whether they do resort in fact but whether they really are invited to come; and that inevitably involves some understanding of what one means by the words "the public." It is at this stage that a link, but also (in my view) a distinction, is, or may be, observed between the first part of the requirement of the expanded definition. "'Retail shop' "includes any premises of a similar character," and the second part, "where retail trade or business . . . is carried on"; for it has been the argument of the Crown here that these sales of timber

[10] [1932] A.C. 663; 48 T.L.R. 463.
[11] [1937] 2 K.B. 642, 671.
[12] [1932] A.C. 663, 674.

to builders, which represent 92 per cent. of the whole, represent retail trade. As I earlier indicated, it was put very plainly that, according to the Crown's case, where there is retail trade or business being carried on there, prima facie, one has a shop. I am not prepared to accept that: to put it another way, I should regard such a proposition as an oversimplification. If Parliament had wished to say simply that premises ceased to be an industrial hereditament if they were primarily used and occupied for the purposes of conducting retail trade or business, they would have said so. But a double requirement is postulated: there must be a "retail shop," or something like it, and "retail trade or "business" must be "carried on" at the "retail shop."

I will come back in a moment to consider (to the extent to which I feel it proper to do so) the nature of these sales to builders, but to my mind the vital facts found in this case include (and I put it in the forefront among them) the statement which may be extracted from the facts set out in the case, that to any appreciable extent members of the public (as ordinarily understood) are not invited, are not encouraged, to come to these premises, and do not in fact resort to them, except to a negligible extent. I am not thereby saying that builders are not "members "of the public"; no doubt they are; but when Lord Dunedin spoke, in the case I have cited, of members of the public resorting or being invited to resort to a place, he meant to refer, I think, to what one might call the ordinary man in the street—that all and sundry were invited to come. And that, as it seems to me, is significantly not the fact in this case. To that most significant fact may, I think, be added also the other circumstances—the character of the premises; the absence of any sort of display or show of timber to attract prospective purchasers; the characteristics and numbers of the persons employed (a manager, a clerk, saw-mill operatives, general labourers and a lorry driver), and indeed the whole general lay-out and appearance of the place and the nature of the business done; and it will be recalled that that business is conducted substantially at the suit of builders who come and make orders, after inspection, for the purposes of themselves incorporating what they buy in the houses which they are in turn building for others. Whether or not for any purpose these builders can be fairly said to be participating in retail sales, no one, I should have thought, could by any proper use of language say of them, when engaged in these activities, that they were "shopping." In my judgment, therefore, I am in no way being disloyal to anything that fell from Lord Dunedin or departing from his opinion if I say that in my judgment, on the facts which I have mentioned in this case, this hereditament is neither a "retail shop" nor is it a place having "a similar character" thereto.

In opening the case for the Crown, Mr. Harvey placed great emphasis on the distinction between the 92 per cent. of sales to builders and the eight per cent. of sales to the merchants or

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factories; and he seemed to indicate a possible threat on behalf of the valuation officer that if the court were to hold that the sales to the builders were not retail sales then they must be wholesale operations, and that the victory which the company might gain in the present case would be of a somewhat Pyrrhic character, since the valuation officer would then seek to remove the company from the privileged list on the ground that it was using the hereditament primarily for the purposes of a distributive wholesale business. Again I venture to think that the argument of Mr. Harvey involved an oversimplification, for it took broadly this form: there is, said he, a vital and essential distinction in the Act between manufacturing on the one hand and selling on the other; these two activities must be regarded as mutually exclusive, and if you are selling then you must be selling either wholesale or retail; if you show you are not selling retail, then you must be selling wholesale. I do not think that that is a fair interpretation of the section, and, if the matter had been regarded as susceptible of so simple and short an antithesis, I should have supposed that the Act would have taken a very different form. In any case, as regards wholesale business the words in section 3 (1) (*c*) are not merely "wholesale" but "distributive wholesale business." I do not say anything about what those words may mean. It may be, as I have said, that for some purposes selling timber to builders for the purposes of being used in building houses can be properly regarded as a retail sale, though I cannot regard as other than fanciful in the extreme the analogy that Mr. Harvey sought to draw between a builder who requires timber of a certain length (so that a foot or two is cut off at the end) and a lady who goes into a draper's shop and orders a few yards of ribbon. But, whether the sales to builders can be for any purposes regarded as "retail" sales or not (and upon that I express no concluded view), and whether builders can be fairly regarded (as I assume for most purposes that they can) as "members of the public," still, for the reasons which I have already tried to state, I do not think that the nature of the operations carried out in the present case, and the invitation for business which the company extended, can fairly be said to involve a "resorting" to its premises by "the public," or an invitation to the public so to resort.

The tribunal, in deciding the present case, followed, and almost inevitably followed—and I say "almost" advisedly—the previous decision of *W. S. Shuttleworth (Slough) Ld.* v. *Lane*.[13] The President of the tribunal [Sir William Fitzgerald] used this language in his judgment[14]: "Generally speaking I should say "a wholesale business is a sale in bulk to a person who will sell "the same commodity in retail to several other persons. A sale "in retail is where the purchase is conditioned to the needs of "the individual customer." I do not desire to add attempted

[13] (1953) 46 R. & I.T. 103. [14] Ibid. 107.

definitions of my own to what may already be found in the books; but I am bound to say, with all respect, that I am not satisfied that either of those simple sentences, though they may be useful in particular contexts, should be regarded as exhaustively correct and generally applicable. The first sentence does not indeed seem entirely easy to reconcile with what Lord Dunedin said about the sale of the cakes and buns by the baker to the hotel buyers; but in any case I should have thought that to say that "a sale in retail is where the purchase is conditioned to the needs "of the individual customer" might be an oversimplification of the matter. The President proceeded to hold in that case that the premises (which were also those of timber merchants) were a shop; but upon that matter he relied on one feature in the case which is not to be found in the present case. Thus, it is stated in the headnote: "There was no counter on the premises, but "there was a raised platform where building material was dis-"played for prospective customers to examine"; and that point did undoubtedly influence the President in reaching his conclusion. "Many cases emphasize," he said,[15] "the difficulty of "stating with precision what physical factors constitute a retail "shop. The fact that premises possess a counter does not "necessarily constitute them a retail shop, nor would the absence "of a counter debar them from being considered a retail shop. ". . . I consider the fact that the goods were displayed obviously "to entice customers to come in and purchase them, enables me "to answer this question," that is, whether it is a shop, "in the "affirmative." As I have said, it is expressly found in the present case that there was no similar display to entice or attract prospective customers.

We were also invited to consider and to follow *Revenue Officer for Surrey* v. *Gridley Miskin & Co. Ld.*[16] That was a case of timber merchants and in all material respects it may be regarded as parallel, on its facts, with the present case. The Divisional Court, consisting of Lord Hewart C.J., Avory J. and Humphreys J., decided (adversely to the company, Gridley Miskin & Co. Ld.) that the hereditament was not an industrial hereditament. But it does not appear to me that they based their decision on the view that the hereditament there in question was, within the language of section 3 (1) (*b*) as expanded by the definition in subsection (4), a "retail shop." The contentions for the revenue officer were more generally expressed, as I understand the report, in that it was said that those premises were being used within the terms of paragraph (*f*) of the subsection, for "other purposes, whether or not similar to any of the fore-"going, which are not those of a factory or workshop." I think that that view follows also from the way in which Mr. Pearson, for the revenue officer, put the argument. He said[17]: "So long

[15] Ibid. 107.
[16] (1931) 2 Eng.De-Rating Cas. 236.
[17] Ibid. 238.

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" as both the primary and the ancillary purposes can be found " upon the hereditament in question, it is unnecessary to fall " back upon tests such as area. This is a timber merchants' " business, and incidentally minor adaptations are carried out for " customers "; and response is found to that argument in this paragraph from the judgment of Lord Hewart C.J.[18]: " I think, " therefore, the true view is that this was a mercantile or com- " mercial undertaking, as distinguished from an industrial " undertaking, and that the sawing and planing which took place " were processes ancillary to the primary business of timber " merchants." At any rate, if the decision of the Divisional Court in that case meant, and was intended to mean, that the hereditament there in question was a " retail shop " within the meaning of the section, I venture to think that it was wrong.

We have been referred to other cases, but I have, I hope, sufficiently referred to such of them as I find it necessary to mention in giving the reasons for my conclusions. I think, for the reasons which I have tried to state, that this hereditament is not being used for the purpose of a " retail shop " within the meaning of the proviso to section 3 (1); and since it seems on the facts quite clear that, unless it is taken out by the proviso, it is within section 3 (1) as an " industrial hereditament," I think that this appeal should be allowed.

JENKINS L.J. I agree, and have very little to add. The question is whether the company's hereditament in Roper Road, Canterbury, is, within the meaning of the proviso to subsection (1) of section 3 of the Rating and Valuation (Apportionment) Act, 1928, " primarily occupied and used for . . . (*b*) the purposes of a " retail shop." In considering that question regard must be had to the definition of " retail shop " in subsection (4) of the same section, which gives to that expression a somewhat more extended meaning than it would otherwise bear. The definition is in these terms: " ' Retail shop ' includes any premises of a similar " character where retail trade or business (including repair work) " is carried on." The question, therefore, is whether the hereditament is primarily used for the purposes of a retail shop or for the purposes of any premises of a similar character where retail trade or business is carried on.

These words, relatively simple and ordinary words as they are, have been the subject of much judicial discussion, and various attempts have been made to arrive at definitions or expositions of their meaning; but I hope I will not be disrespectful to the learned authors of various observations upon the meaning of this language if I say that to my mind the most helpful observation, in all the wealth of authority to which our attention has been directed, appears in the speech of Lord Dunedin in *Turpin* v. *Middlesbrough Assessment Committee*,[19] in the passage to which

[18] Ibid. 239.

[19] [1931] A.C. 446, 473.

my Lord has already referred, where he said: "My Lords, the "matter seems to me simply a question of attributing an every- "day meaning to the words used in the definition." One must, therefore, consider the facts and apply an everyday meaning to the words used in the definition, and see whether that everyday meaning, applied to those facts, results in the conclusion that the hereditament is being "primarily occupied and used for the pur- "poses of a retail shop," including in that expression what is included by the definition clause.

[His Lordship described the hereditament and continued:] It is said, as I understand it, that the presence of the small office produces the surprising result that this hereditament is being primarily used for the purposes of premises of a character similar to a retail shop where retail trade is carried on; and the question is whether that, in all the circumstances of the case, is right.

It is not in dispute, and the Lands Tribunal found, that the case did not come within the unexpanded language of section 3 (1) (*b*). Thus the premises are not being used for the purposes of a retail shop. But it is said that the purposes for which they are used have a sufficient affinity with those of a retail shop to bring the case within the proviso as extended by the definition clause. Now the primary object of the company's use and occupation of this timber-yard is to sell timber: that this is the company's primary object I apprehend admits of no doubt. The use to which the hereditament is put seems to be the storage of stocks of timber, its treatment to suit the needs of customers, and its sale and delivery or despatch to customers. That last operation is "carried on" on the premises in the sense that customers call at the office, state their demands, if so minded inspect the timber available, and place their orders. That, I gather, is the way in which some of the business is done. Alternatively, business may be done over the telephone and confirmed in writing. Timber that has been sold is delivered or despatched to purchasers, sometimes in their own lorries but more frequently in those of the company. So far one reaches the position that sales are effected on these premises and that customers come to these premises to give orders and to inspect the stocks available. But it does not necessarily follow from that that a "retail trade" is being here carried on; and in order to form a view on that question it is necessary to bear in mind these findings of fact in the case. [His Lordship read paragraphs 8 (*d*), (*e*), (*f*) and (*g*) of the stated case and continued:]

As my Lord has already pointed out, Lord Dunedin, in *Turpin's* case [20] came to the conclusion that the distinctive characteristic of a "retail shop" was that it should be a building to which the public can resort for the purpose of having particular

[20] [1931] A.C. 446, 474.

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wants supplied and services rendered therein, and attached little importance to the absence of physical features commonly found in a typical retail shop. I have already said that the company's customers do resort to the hereditament in this case, and I think the question really resolves itself into this: Are the customers so resorting members of the general public who choose to come in and who are invited to come in or welcomed if they come by the company for the purpose of making purchases of such quantities of timber, great or small, as they may think fit? If the timber were in the position of the stock-in-trade of a retail shop, that is what would happen. The general public, including casual passers-by, would come in and be welcomed and make purchases, great or small, according to their needs; but, as will have been seen from the extracts I have read from the facts found, the customers are not members of the general public in this case: they are a limited class, and, with exceptions so small as to be negligible, they consist entirely of trade customers, that is to say builders and merchants and factories, who purchase timber in substantial quantities for the purposes of their respective trades or businesses. So far from inviting, the company is averse to, small orders such as have to be met in the ordinary course of retail trade.

Accordingly, giving the words "retail shop" and "retail "trade" what I understand to be their ordinary significance as ordinary words, I come to the conclusion that, while it is clear that timber is sold by the company on these premises, they are not of such a character, and the company is not carrying out sales of timber in such way or to such customers, as to make it possible to hold that the hereditament is being used "for the purposes "of a retail shop or premises of a similar character where retail "trade or business is carried on," and, accordingly, I agree with my Lord that this appeal should be allowed.

ROMER L.J. I also agree, and I would only say that it appears to me that the most cogent element which makes it impossible to regard these premises as being "of a similar "character to a retail shop" is that the company does not deal, and does not want to deal, with the public as a whole, but substantially confines the invitations to resort to the premises for commercial purposes to a small section of the public, namely, builders. The potential customers do not, in those circumstances, constitute the "people" to whom Greene L.J. referred in *Ritz Cleaners Ld.* v. *West Middlesex Assessment Committee*,[21] or "the public" to whom Lord Dunedin referred in the *Sedgwick* case,[22] but constitute merely a small section, and a specialized

[21] [1937] 2 K.B. 642. [22] [1931] A.C. 446.

section, of the public as a whole. There are other reasons as well, to which my brethren have referred. I think for myself that that is the most important. I agree that the appeal should be allowed.

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Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *William A. Crump & Son; Solicitor of Inland Revenue.*

E. D.

[QUEEN'S BENCH DIVISION.]

* McCOMBE *v.* READ AND ANOTHER.

[1950 M. No. 2926.]

1955
April 19, 20, 21; *May* 9.
Harman J. (sitting as an additional judge of the Q.B.D.).

Injunction—Nuisance—Trees—Continuing nuisance from roots of trees on adjoining land—Injunction granted.

An injunction will lie to restrain a continuing nuisance to property caused by encroachment by the roots of trees growing on the land of another person.

Dicta in *Butler* v. *Standard Telephones and Cables Ltd.* [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121 and *Middleton* v. *Humphries* (1913) 47 Ir.L.T. 160 applied.

ACTION.

The plaintiff and the defendants were respectively the owners of adjoining leasehold properties. The defendants' property lay to the south of the plaintiff's property; it stood in three-quarters of an acre of land and was bounded on the north by the plaintiff's property.

The plaintiff claimed that the roots of trees growing on the defendants' land had encroached on his land and had undermined the foundations of his house, and had so withdrawn the moisture underneath the foundations that the clay soil had shrunk and caused considerable damage to his property by settlement. The plaintiff claimed damages and an injunction to restrain the defendants from allowing the continuance of a nuisance and a trespass by the abstraction of water from the plaintiff's land caused by the encroachment of the roots of the trees growing on the defendants' property. (The second defendant, who was a joint holder of the lease with the first defendant, was added at the trial by amendment.)

The defendants did not dispute the fact of the settlement, but contended that this was caused by water in the soil rather than the extraction of water from it; and that the soil, being boulder clay which was on a considerable slope, was particularly prone to bring about settlements, and that many of the houses in the immediate neighbourhood had suffered in this way.

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The plaintiff's and the defendants' houses were built in about 1912 and 1904 respectively. On the defendants' land there was an old black Italian poplar tree, planted before either house was built, and adjoining the boundary between the properties there was a row of Lombardy poplars planted at the time when the plaintiff's house was built. The distance of the trees from the plaintiff's house was from 9 to 25 feet.

In 1949 cracks appeared in the walls and ceilings of the plaintiff's house. A builder who was called in suspected from experience that tree roots were the cause of the trouble, and on making excavations found the ground very dry and poplar roots running under the foundations. Underpinning was carried out at a cost of £678 which was claimed as damages in the action. In 1952 and 1953, after the issue of the writ, further settlements occurred, and the specifications for the further necessary work, which had not been carried out at the date of the trial, amounted to £1,032.

A surveyor and forestry expert called for the plaintiff expressed the opinion that the subsidence was due to the abstraction of water from the clay soil by the poplar roots, which spread very widely and would grow under any barrier which might be put in the soil. Witnesses called for the defence stated that the district, owing to the subsoil of boulder clay, was particularly liable to subsidence, and that a number of neighbouring houses had been so damaged.

S. O. Olson for the plaintiff.
H. G. Garland for the defendants.

The cases referred to in argument are set out in the judgment.

Cur. adv. vult

May 9. Harman J. reading his judgment after stating the facts: In this state of the evidence, does the plaintiff prove his case? In my judgment he does. I have on the one hand evidence of two persons; one an experienced builder and the other a man who has made a special study of the subject, and both of whom made a careful examination of the locus in quo, that the cause of the subsidence of the plaintiff's house is the exhaustion of water from the boulder clay by the roots of the trees growing on the defendant's property. On the other hand, I have testimony from persons with wide local experience who assert that owing to local conditions houses are very prone to subsidence in this immediate area. In addition, one of them advanced the opinion that, though the trees might have contributed, the soil (that is to say, the nature of it, I suppose) was the main cause of the trouble. It is to be observed that neither of these people had examined the plaintiff's property and that the first defendant, though given an opportunity to do

so, did not by himself or any of his advisers take advantage of the opening up of the ground and he has no one but himself to blame that the evidence about the state of things immediately round and under the plaintiff's house is all one side.

In my judgment, I must prefer the evidence for the plaintiff. This house had apparently not proved unstable for thirty-five years and it would, in my judgment, be fanciful to reject as a cause of the trouble the impact of the roots of these poplars. This, after all, is a well-known source of trouble where houses are built on a clay soil. Accordingly, in my judgment, the plaintiff proves his case. To what remedy is he entitled?

It is very old law that if my neighbour's trees encroach on my ground, either by overhanging boughs or by undermining roots, I may cut the boughs or the roots so far as they are on my side of the boundary. In *Lemmon* v. *Webb* [1] it was pointed out in the Court of Appeal that this kind of encroachment is not a trespass which may ripen into a right in the course of time, but is a nuisance which raises a cause of action only on proof of damage. Moreover, the case decides that the nuisance may be abated without notice.

Following on this, a Divisional Court in *Smith* v. *Giddy*,[2] granted a new trial where a county court judge had held that the only remedy of an adjoining landowner was to lop the trees and that an action on the case would not lie. It is clear, therefore. that an action for damages will lie in these circumstances, but there appears to be no English decision where an injunction has been granted.

In a recent case, *Butler* v. *Standard Telephones and Cables Ld.*,[3] the plaintiffs claimed damages for the abstraction of water from under their houses by the roots of poplar trees and were held entitled to them. It is, however, noticeable that in that action the plaintiffs claimed an injunction but apparently abandoned that part of the claim at the trial. Lewis J., however, in his judgment mentioned with approval the Irish case of *Middleton* v. *Humphries*,[4] where the Chancery judge in Ireland apparently had no doubt that an injunction could be granted.

In my opinion this must be right. If an action on the case will lie, then the remedy of injunction must be available if the nuisance be a continuing one, as is clearly the case here. It could not be right to throw upon the plaintiff the burden of watching for further subterranean encroachment. In my judgment, however, the plaintiff is not entitled to an unqualified injunction, for he has no remedy unless a nuisance be caused. The injunction will therefore be to restrain the defendants from allowing the roots from any tree on their property so to encroach on the plaintiff's land as to cause a nuisance.

[1] [1894] 3 Ch. 1; 10 T.L.R. 467.
[2] [1904] 2 K.B. 448; 20 T.L.R. 596.
[3] [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121.
[4] (1913) 47 Ir.L.T. 160.

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There remains the question of damages. The defendants were willing to submit, if wrong in law, to judgment for the amount claimed as special damage, namely, £678 1s. 0d. The plaintiff, however, seeks to recover damage discovered on the 1952 and 1953 inspections and, which has occurred since the issue of the writ. If this be new damage he cannot do that, but if it be continuing damage from the same nuisance then he can recover the damage accruing up to the date of judgment.

On the evidence I am of opinion that the damage is all one. It is true that the builder in 1950 dug a trench round the house five feet deep and cut off the ends of the roots which he found, but the exhaustion of water from the clay soil underlying the house would continue as the evidence shows and the further subsidence would result from that. There is, however, a doubt introduced by the evidence of Mr. Reeves who, with his wide local experience, suggested that the underpinning done in 1950 was the wrong treatment and that this may have caused or at least contributed to the further settlement.

I am, therefore, not in a position to say that the defendants must be liable for the whole aggregate damage and I put the plaintiff to his election either to have judgment now for the sum specified in his claim or to take an inquiry as to damage which in this Division, I suppose, will be referred to the official referee. On that inquiry it will be open to the defendants to suggest that at any rate part of the damage was caused by ill-judged operations in 1950. I do not find that that was so, but am of opinion that it is a consideration still open to the defendants to put forward.

There will be an injunction to restrain the defendants by themselves, their servants or agents from causing or permitting the roots of trees growing on their property to encroach on the property of the plaintiff so as to cause a nuisance to the plaintiff's property.

[After discussion Harman J. ordered an inquiry as against the first defendant only as to the whole of the damage caused by the nuisance, the costs of which were reserved.]

Judgment for the plaintiff; injunction granted against both defendants; inquiry as to damage ordered against the first defendant.

Solicitors: *Goldingham, Wellington & Co. for Granville Jones & Co., Barnet; Vanderpump & Sykes.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

* AUDLEY LAND CO. LD. *v.* KENDALL.

1955
April 4.

His Honour W. K. Carter Q.C. (Official Referee).

[1954 A. No. 1270.]

PRACTICE NOTE.

Practice and Procedure — Court expert — Report — Irrelevant matter expunged—Official referee—Jurisdiction—R.S.C., Ord. 37A, *r.* 1. *Official Referee.*

SUMMONS.

The plaintiffs sued the defendant for money owing under a contract whereby the plaintiffs had agreed to build a house for the defendant. By his defence the defendant pleaded, inter alia, that the house built by the plaintiffs was defective in some 27 particulars. The action was referred to an official referee, and on October 8, 1954, pursuant to R.S.C., Ord. 37A,[1] and with the consent of the parties, the official referee made an order appointing a court expert in the cause, "to inquire and report "upon the questions set out in the schedule hereto . . . and to "report to the court by marking upon the schedule his answers "to the questions set out in the 8th, 9th and 10th columns of "the schedule." The schedule was a "Scott" schedule. It contained the 27 items referred to in the defence, and the defendant's comments thereon, and the 8th, 9th and 10th columns were headed respectively "Defects in the Work," "Cost of "Remedying Defects," and "Observations." The court expert visited the house and wrote remarks in the 8th, 9th and 10th columns of the schedule. He also appended to the end of the schedule two paragraphs which began "I am of opinion that "defendant has generally been given a very inferior job, and "that the mental anxiety and perturbation consequent thereon "are not of his own making."

The paragraphs also contained a reference to a letter written by the court expert to the clerk to the official referee. In that letter the court expert repeated the statement that the defendant had received poor work generally, and further stated certain criticisms concerning the architectural services which the defendant had received under the contract. The completed schedule and the letter were received by the clerk to the official referee on

[1] R.S.C., Ord. 37A, r. 1: "In "any case which is to be tried with- "out a jury involving any question "for an expert witness the court or "a judge may in his discretion at "any time on the application of any "party appoint an independent expert "(to be called 'the court expert') "to inquire and report upon any "question of fact or of opinion not "involving questions of law or con- "struction (hereinafter called 'the "'issue for the expert')."

[Reported by CHRISTOPHER MCOUSTRA, Esq., Barrister-at-Law.]

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January 6, 1955. The plaintiffs applied for an order that the two additional paragraphs and the letter should be struck out.

L. Herrick Collins for the plaintiffs. The court expert has gone outside the terms of his appointment. The additional matter is prejudicial to the plaintiffs.

[HIS HONOUR W. K. CARTER Q.C. I sent the letter back to the expert as soon as I saw what it contained.]

The court should act in its inherent jurisdiction and strike out the additional paragraphs.

J. G. K. Sheldon for the defendant.

HIS HONOUR W. K. CARTER Q.C. I will act under my inherent jurisdiction and order that the two additional paragraphs be expunged from the schedule.

Order accordingly.

Solicitors: *Henry B. Sissmore & Co.; Bower, Cotton & Bower, for William J. Wade, Slough.*

[QUEEN'S BENCH DIVISION.]

1955
April 27.

McNair J.

* MACPHERSON TRAIN & CO. LD. *v.* HOWARD ROSS & CO. LD.

Sale of Goods—F.O.B.—Construction of contract—Goods "afloat per "S.S. Morton Bay due London approximately 8th June"—Whether mere identification of ship and goods or condition of contract.

A contract for the sale of 5,064 cases of Australian peaches provided, inter alia: "Price—1s. 7¾d. per lb. ex Chambers Cold "Store, London; 28 days free rent from date of arrival. . . . Ship- "ment and destination—afloat per S.S. *Morton Bay* due London "approximately 8th June." At the date of the contract the ship was advertised as due to arrive in London on June 19, 1954. She in fact reported in London on June 21, 1954, and the buyers refused to accept delivery:—

Held, that the words "due London approximately 8th June" formed a condition of the contract in that they were part of the description of the goods and not, as contended by the sellers, merely words identifying the ship and the voyage on which the goods were being imported. Accordingly, the buyers were entitled to reject the goods.

SPECIAL CASE by an umpire.

On June 1, 1954, Howard Ross & Co. Ld. agreed to buy from MacPherson Train & Co. Ld. 5,064 cases of Australian quick frozen sliced peaches in syrup. "Price—1s. 7¾d. per lb., ex "Chambers Cold Store, London; 28 days' free rent from day of

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

" arrival . . . Shipment and destination—afloat per S.S. *Morton* " *Bay* due London approximately 8th June . . . Delivery—to be " effected to buyers as follows: 1,250 cases immediately on " arrival. Balance in equal quantities in intervals of seven days."

In a published itinerary the owners of the ship stated on March 3, 1954, that the due date of arrival of the ship in London was June 8, 1954, but by May 31, 1954, the day before the contract, the ship had fallen behind schedule and in the published itinerary of that date the ship was stated due in London on June 19. The ship was reported in London on June 21, 13 days late from her due date as stated in the contract. Subsequent delivery of the goods was refused by the buyers.

The matter was referred to arbitration and the umpire stated a special case.

Miss Dorothy Knight Dix for the sellers.
Frederick Hallis for the buyers.

McNair J. stated the facts, and continued: The matter was referred to arbitration, and the umpire was asked apparently by both parties to state his award in the form of a special case for the decision of the court. It is not very clear what are the precise questions of law which are submitted, but from paragraph 8 and paragraph 10 it is clear that both the buyers and the sellers request that the award should be so stated as to raise the question of law whether on the true construction of the contract the buyers were entitled to reject the goods tendered.

One of the contentions put forward by the buyers in support of their case was: " 9 (*a*): that it was a condition of the contract " that the goods were afloat per S.S. *Morton Bay* due approxi- " mately 8th June." On the other hand, the sellers on that point contended, in paragraph 6 (*a*), " that the goods sold were, under " the express terms of the contract, described as ' afloat per S.S. " ' *Morton Bay* due approximately 8th June ': these words " identified the ship and the voyage on which the goods were " being imported and the 8th June was not, and was not intended " to be, a delivery date."

The first question which arises on this award is whether or not this court takes the view that the words " due London approxi- " mately 8th June " were merely words which, as the sellers contend, identified the ship and the voyage on which the goods were being imported, or whether, as the buyers contend, they formed a condition of the contract in the sense that they were in effect part of the description of the goods. It seems to me that it is plain that they must be taken as part of the description of the goods as soon as it is admitted, as it was properly admitted, that the words " afloat per S.S. *Morton Bay* " are part of the description of the goods. Once it is admitted, as it must be admitted, that if the goods had not been shipped by the *Morton Bay* but by some other ship a fundamental term of the contract

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MACPHERSON TRAIN & CO. LD. v. HOWARD ROSS & CO. LD.

McNair J.

would be thereby broken, it follows necessarily that the whole of that phrase is also part of a description of the goods. There is good commercial sense in that, inasmuch as a description of the goods as being "afloat per S.S. *Morton Bay* due "approximately 8th June" does give the buyers, not an absolute guarantee of arrival on June 8, but at least some indication of the date on which they may be expected to be in London.

Another form of description which has come before the court in other well-known cases is a description of the goods as being shipped or to be shipped on a certain ship "expected ready to "load on" a certain date. There is no doubt at all that in a contract containing such a phrase those words "expected ready "to load" are part of the description and are not merely an identification of the voyage upon which the ship was. I feel no difficulty in holding that the words "due London approximately "8th June" made it a condition of the contract that the goods should be shipped on a ship of which it could truly be said at the date of the contract that she was due to arrive on approximately June 8, 1954; and having regard to the umpire's finding that on the published itinerary dated May 31, 1954, that is the day before the contract, the ship was stated to be due in London on June 19, it is also clear that that condition was broken, with the result that the buyers, when they had tendered to them goods which did not correspond with that description, were entitled to reject.

Award in favour of buyers upheld.

Solicitors: *Holt, Beever & Kinsey for S. Thornhill Tracey, Steyning; Tarlo, Lyons & Co.*

[QUEEN'S BENCH DIVISION.]

1955
May 5.

McNair J.

*J. H. VANTOL LD. v. FAIRCLOUGH DODD & JONES LD.

Sale of Goods—C.I.F.—Cancelling clause—Prevention of shipment by specified clause—Whether seller must prove impossibility of purchasing goods afloat—Prohibition of export—Extension "by two "months."

Commercial Court—Practice—Declaratory judgment—Value of.

The seller under a c.i.f. contract can perform his contract either by shipping himself or by his agents goods in accordance with the contract during the contract period or by purchasing goods afloat which have been shipped during the contract period.

[Reported by JAMES ROCHFORD, Esq., Barrister-at-Law.]

Generally a seller cannot claim the protection of a clause which provides for cancellation of the contract if shipment is prevented by a specific cause unless he proves both that he was himself so prevented from shipping and that it was impossible for him to fulfil the contract by buying appropriate goods afloat which had been shipped during the contract period.

A written contract dated November 27, 1950, for the sale of 100 tons Egyptian washed cottonseed oil to be shipped during the months of December, 1950/January, 1951, from Alexandria, at a price of £146 10s. per ton c.i.f. Rotterdam contained this clause:

"Should the shipment be delayed by . . . prohibition of "export . . . the time of shipment shall be extended by two "months. Should the delay exceed two months, buyers shall have "the option of cancelling the contract forthwith or accepting the "goods for shipment as soon as possible. . . . The option to be declared as soon as shippers announce their inability to ship . . ."

The sellers had previously purchased 200 tons of that commodity from sellers in Egypt who held a valid but withdrawable export licence from the Egyptian Government.

On December 12, 1950, the export of all cottonseed oil was prohibited by the Egyptian Government. On January 3, 1951, the licence granted to the original sellers was renewed. On February 17 the export of cottonseed oil was again prohibited and the prohibition continued until the end of April. On February 22 the sellers notified the buyers of this; the buyers claimed that the sellers were in default:—

Held, that in their contract the parties had in terms and designedly provided protection for the sellers where shipping of the goods by the sellers was delayed, and that the sellers had no need to prove that they were unable to purchase goods afloat which were unaffected by the prohibition; and that, on a true construction of the contract, the sellers were not in default.

Special case stated by the Appeals Committee of the London Oil and Tallow Trades Association.

The contract between the parties was made on Form 5*a* of the London Oil and Tallow Trades Association, which is the appropriate form for contracts for oriental oils c.i.f. terms continental, dated November 27, 1950. By that contract Fairclough Dodd & Jones Ld. (the sellers) sold to J. H. Vantol Ld. (the buyers), according to the rules of the London Oil and Tallow Trades Association, "100 tons Egyptian washed cotton-"seel oil f.f.a. . . . good merchantable quality, packed in sound "drums. To be shipped during the months of December 1950/ "January 1951 from Alexandria," at a price of £146 10s. per ton c.i.f. Rotterdam. The contract contained, inter alia, the following clauses. Clause 2: "Particulars of shipment, with date of "bill or bills of lading, marks and numbers of drums (if any) to "be duly declared by the original seller in writing with due "dispatch, but not later than 42 days from the date of the bill "of lading." Clause 11: "A. In the event of war, hostilities "or blockade preventing shipment this contract or any unfulfilled "part thereof shall be cancelled. If required sellers must pro-"duce proof to justify cancellation. B. Should the shipment be

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" delayed by fire, strikes, lockouts, prohibition of exports, riots, " or revolution, or any other cause comprehended in the term " force majeure other than war, hostilities, blockade, the time of " shipment shall be extended by two months. Should the delay " exceed two months, buyers shall have the option of cancelling " the contract forthwith or accepting the goods for shipment as " soon as possible, but should the shipment not be possible within " eight months from the date of shipment originally stipulated, " contract to be void. The option to be declared as soon as " shippers announce their inability to ship within the extended " period of two months, a reasonable time being allowed for " passing on such announcements. Should buyers fail to " exercise their option in due time, contract to be void. If " required sellers must produce proof to justify their claim for " cancellation or extension."

On September 27, 1950, the Egyptian Salt & Soda Co. Ld. obtained a licence from the Egyptian authorities to export at least 200 tons of cottonseed oil. That licence was valid until December 26, 1950, but was subject to a term that it might be withdrawn at any time. On November 10, the sellers first purchased 200 tons of the commodity in question from the Egyptian Salt and Soda Co. Ld., the contract providing for 100 tons to be shipped during December and 100 tons during December/January. The terms were that the shipment was to be f.o.b. Alexandria and that freight was to be provided by the buyer for shipment to Rotterdam. On the same day they entered into an agreement to sell 100 tons to the Irish Oil & Cake Mills Ld. c.i.f. Rotterdam to be ready for shipment the first half of December and to be shipped by the first available steamer. Seventeen days later on November 27, they agreed to sell 100 tons of cottonseed oil to the buyers to be shipped December/January c.i.f. Rotterdam. On December 12 the Egyptian Government imposed a ban on export of cottonseed oil which applied even in the case of parties who had existing licences, and on December 14 the Egyptian Salt & Soda Co. Ld. notified the sellers that they were unable presently to ship. The Egyptian Salt & Soda Co. Ld. had previously made arrangements to ship these 200 tons which they had sold to the sellers and had booked space on board the *S.S. Mentor*, the booking stating that the *Mentor* was due to load on December 20. On January 3, as a result of persuasion and pressure brought to bear by the Egyptian Salt & Soda Co. upon the Egyptian authorities, their licence was renewed for a period of three months. The award further found that goods of the contract description and quality were available for shipment between January 4 and January 31.

The Egyptian Salt and Soda Co. Ld. were minded to ship the first 100 tons by the end of January and the balance during February, and on January 30 in pursuance of that intention they shipped 100 tons under their contract with the sellers, who appropriated that 100 tons to their first contract with the Irish

Oil & Cake Mills. On February 17, however, the ban was reimposed by the Egyptian authorities and that ban remained in force until the end of April, 1951. Thus from January 3 until February 17 the ban was off but was then reimposed. On February 22 the sellers notified the buyers of this reimposition of the ban and the buyers claimed that the sellers were in default. The award also stated that there was no evidence given by the sellers that goods of the contract quality and description could not have been obtained afloat.

In those circumstances, the buyers' contentions, as expressed in the award, were (inter alia) as follows: "The imposition of "the ban on the export of cottonseed oil on December 12, 1950, "did not of itself bring into operation the provisions of the force "majeure clause entitling the sellers to an extension of two "months. To bring the said clause into operation the ban must "cause such delay as to prevent shipment at any time during the "contract period. The sellers could have shipped the goods "between January 4 and January 31. They did in fact (on their "own admission) ship goods of the contract description and of the "required quantity during that period to Irish Oil & Cake Mills "Ld. The decision of the sellers to allocate the last mentioned "goods to Irish Oil & Cake Mills Ld., and not to the buyers "was an arbitrary one."

The sellers contended, inter alia, as follows: (1) Since the sellers had made all arrangements to ship the goods by *S.S. Mentor* due to load on December 20, shipment was delayed (within the meaning of clause 11B of the contract) by the prohibition on export imposed by the Egyptian Government on December 12, 1950. Consequently the sellers obtained (by virtue of that clause) an extension of two months, that is to say, the shipping period was extended until the end of March. (2) Whether it is held that the sellers' time for shipment was extended for the month of February by agreement on January 4 —that referred to an issue in the arbitration which was decided against the sellers—or was extended until the end of March by virtue of clause 11B, the sellers' time for shipment had not expired when the second ban came into operation, on February 17, 1951. Consequently the sellers were not in default. (3) There was no obligation on the sellers to buy goods afloat as contended by the buyers. The question of whether or not the sellers could have bought goods afloat is immaterial since their time for shipment had been extended.

The appeals committee of the London Oil and Tallow Trades Association affirmed the decision of the original umpire and made an award in favour of the sellers subject to the decision of the court on the question of law whether on the facts found and on the true construction of the contract between the parties the sellers were in default.

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J. H. VANTOL LD. v. FAIRCLOUGH DODD & JONES LD.

A. A. Mocatta Q.C. and *John Donaldson*, for the buyers, cited *Ross T. Smyth & Co. Ld. (Liverpool)* v. *W. N. Lindsay Ld. (Leith)* [1] and *Samuel Sanday & Co.* v. *Cox, McEuen & Co.* [2]

T. G. Roche Q.C. and *A. J. Bateson*, for the sellers, were not called upon.

McNAIR J. stated the facts and continued: The real issue which I have to determine on the argument of this special case is whether the sellers, on the facts found by the appeals committee, are entitled to the protection of paragraph B of clause 11.

It is well settled law that normally in the case of a c.i.f. contract that contract can be performed by the seller in one of two ways: either (1) by shipping himself or by his agents contract goods during the period stipulated for shipment by the contract and tendering the appropriate bills of lading; or (2) he can purchase goods afloat which have been so shipped. Generally, a seller cannot claim the protection of the clause which provides that the contract shall be cancelled if shipment is prevented by certain specific clauses unless he proves both (a) that he was himself so prevented from shipping and (b) that it was impossible for him to fulfil the contract by buying goods afloat which had been shipped during the contract period.

In those circumstances, in the argument before me Mr. Mocatta in substance took the following two points; first, that as a matter of construction the expression "should shipment be "delayed" in paragraph B of clause 11 means "should ship- "ment be delayed during the whole of that part of the contract "period which remains after the cause of delay has come into "force," while conceding that in a case of delay caused by prohibition of export the delay might continue for some time after the prohibition had been removed; secondly, that in any event the seller, in order to obtain the protection of that clause, must prove that there was no possibility of purchasing goods afloat which had been shipped before the prohibition came into effect.

In support of the first contention it was argued that the contrary construction would lead to the result that if, for example, the prohibition of export only operated for the first week of December, that being the period contemplated for shipment by the seller, the seller would be entitled to an extension of two months, i.e., on the conditions of this contract, an extension down to the end of March, which it was said was wholly unreasonable. I am by no means satisfied that such a result would be unreasonable as I can well imagine that the parties familiar with the trade who drew up this contract—which it is to be remembered may provide for a period of shipment extending over many months—may have taken the view that such an

[1] [1953] 1 W.L.R. 1280; [1953] 2 All E.R. 1064.

[2] (1922) 10 Ll.L.Rep. 409.

extension would afford a reasonable time to make alternative arrangements. In any event, even on the buyers' construction, the prohibition only operating for the final week of the contract period would produce very much the same anomaly. Furthermore, it has always to be borne in mind that this clause 11 works both ways. It does not always work in favour of the seller because it imposes on the seller the obligation to effect delivery during the two months which follow the contract period, which may be very onerous upon him if during that time the market has risen substantially.

It was further argued in support of the first contention that the second sentence of the clause, which starts with the words "should the delay exceed two months," points clearly to the conclusion that the clause contemplates a delay which initially continues throughout the remaining part of the contract period. I am unable to accept that submission since it is clear that on either of the suggested constructions the particular phrase "should the delay exceed two months" cannot be given effect to according to its literal and grammatical meaning, but it must be regarded as an expression meaning "if the cause of "delay continues to operate during the two months by which "the period of shipment has been extended." In my judgment, as a matter of construction, there is no justification for reading into the first sentence of this paragraph the words "during that "part of the contract period which remains after the cause of "delay has come into force." So to read it would, in my opinion, be, in effect, to read the word "delayed" as if it were "prevented" and thus to disregard the marked contrast between the use of the phrase "preventing shipment" in the immediately preceding sentence and the phrase "shipment being delayed" in the paragraph in question.

As to the second contention, viz., that the sellers have to show that they could not buy goods afloat, it seems to me that the use of the phrase "the shipment" coupled with the later phrase "as "soon as the shippers announce their inability to ship" in the last sentence of this paragraph points clearly to the conclusion that in this particular contract the parties are in terms and designedly providing protection for the seller in a case where the first method of performing his c.i.f. obligation (namely, shipping by himself or by his agents) is delayed. In my judgment this clause will not work in any business sense if it were held that the seller, in addition to proving that the contemplated shipment was delayed, had further to prove that he was unable to purchase goods afloat which were unaffected by the prohibition.

I have reached the same conclusion about the effect of the clause as was reached by the two trade bodies of arbitration by whom this matter has been considered and the result is that, in my judgment, on the facts found and on the true construction of the contract, the sellers were not in default. Accordingly, the award takes effect with the consequences there stated.

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McNair J.

I cannot, however, part with this case without making one comment. This matter arose out of events which took place in the months of December, 1950, and January/February, 1951, and it has taken until May, 1955, to reach this court. I have little doubt that if the parties had been minded to make use of the machinery of this court in January or February of 1951 the whole matter could have been disposed of in two or three months, and, indeed, it would have been quite possible, and it seems to me businesslike, since there was this dispute between the parties about the effect of that contract, to ask this court for a declaratory judgment, which could have been given with possibly a delay of a week or so even while the contract was still running.

Award in favour of the sellers upheld.

Solicitors: *Stephenson, Harwood & Tatham; Thomas Cooper & Co.*

[COURT OF APPEAL.]

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May 12, 13.

Denning, Birkett and Romer L.JJ.

* HARRIS *v.* RUGBY PORTLAND CEMENT CO. LD.

[1954 H. No. 1068.]

Factory—Staircase—Hand-rails—"Condition of surface of steps"—"Special circumstances . . . specially liable to cause accidents"—Construction—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25 (2).

Section 25 (2) of the Factories Act, 1937, requires that a substantial hand-rail shall be provided on both sides of a staircase which "owing to the . . . condition of the surface of the steps or "other special circumstances, is specially liable to cause accidents."

A staircase in a factory had a hand-rail on one side and on the other a rail so close to the wall that it could not be gripped. The top sill of the staircase had a three-inch metal edge which had worn smooth and shiny. Near the staircase was a hatchway from which grease in containers was issued from time to time. The stairs were kept well cleaned, no grease had ever been seen on them, and no accident had occurred and no complaint been made of the condition of the stairs during fifteen years of use.

On August 12, 1953, a workman slipped on an isolated piece of grease on the top sill and broke his leg. In an action against his employers for negligence and breaches of statutory duties, the trial judge held that the employers were liable only for breach of their duty under subsection (2) of section 25 of the Act of 1937. On appeal by the employers:—

Held, that the employers had not been in breach of their duty under the subsection. The words "specially liable" meant "more "than usually liable," and "special circumstances" implied circumstances continually or frequently arising such as would render the staircase specially liable to cause accidents; and that there was nothing in the history or condition of this staircase to bring it

within the purview of the subsection, and to require the permanent protection afforded by two hand-rails.

Appeal allowed.

Decision of Oliver J. reversed.

APPEAL from Oliver J.

The plaintiff, Frederick Thomas Harris, an electrician's mate, was employed by the defendants at premises to which the Factories Act, 1937, applied. On August 12, 1953, he had occasion to go to the stores which were on the first floor and reached by an iron staircase, each tread of which had indentations; but the very top sill of the stair, which was level with the first floor, had a three-inch smooth metal edge which was in fact part of the supporting girder. Beyond the metal edge was a concrete floor. The staircase had two hand-rails, one on the open side and the other on the side next to a corrugated iron wall, but so close to the wall that it could not be gripped.

As the plaintiff was going down the stairs, he slipped on a piece of grease lying on the top sill of the stair and broke his leg. He brought an action against his employers, claiming damages (a) for negligence at common law; (b) for breach of statutory duty under section 25 (1) [1] of the Factories Act, 1937; (c) for breach of statutory duty under section 25 (2) in that the staircase was specially liable to cause accidents because the top was slippery and oil and grease were carried down the staircase and were liable to fall on the steps and make them slippery, and yet no suitable and substantial hand-rail was provided and maintained on both sides; and (d) for breach of duty under section 26 (1) in failing to provide safe access to the plaintiff's work.

At the hearing before Oliver J. evidence was given that the staircase had been put up in 1938, and that there had never before been an accident of any kind on the staircase; that it was kept well cleaned by a special rota of men; that apart from the one piece of grease on the evening of the accident no grease had ever been seen on the stairs at any time, either before or after the accident; that, although there was an active safety and welfare committee operating in the factory, no complaint had ever been made about the condition of this staircase, and that while grease and oil were from time to time issued to workmen from the stores hatchway near the staircase, these were normally issued in 7 lb. or 14 lb. containers.

Oliver J. on March 15, 1955, giving judgment, said that he was satisfied that this was an extremely well run factory, and

[1] Factories Act, 1937, s. 25: "(1) "All floors, steps, stairs, passages "and gangways shall be of sound con- "struction and properly maintained."

"(2) For every staircase in a "building or affording a means of "exit from a building, a substantial "handrail shall be provided and "maintained which, if the staircase "has an open side shall be on that "side, and, in the case of a staircase "having two open sides, or in the "case of a staircase which, owing to "the nature of the construction there- "of or the condition of the surface "of the steps or other special circum- "stances, is specially liable to cause "accidents, such a hand-rail shall be "provided and maintained on both "sides. . . ."

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held that the employers had not been guilty of any negligence at common law. He held, too, that there had been no breach of section 25 (1) of the Act of 1937, since the staircase was of sound construction and properly maintained; and similarly, that there was no breach of section 26 (1); but taking into account the condition of extreme shinyness and polish of the top of the stair, in proximity to the hatchway from which grease was issued from time to time, the judge held that the staircase was one specially liable to cause accidents, and that, as a hand-rail tight against the wall was not a properly constructed hand-rail, the employers must be held liable for breach of the duty under subsection (2) of section 25. He awarded the plaintiff £520 4s. 7d., including £170 4s. 7d. special damages.

The employers appealed.

T. Michael Eastham for the employers.

E. Martin Jukes Q.C. and *Malcolm Morris* for the workman.

The following cases were referred to in the argument: *Latimer* v. *A. E. C. Ld.*[2]; *Protheroe* v. *Railway Executive.*[3]

DENNING L.J. stated the facts and continued: Section 25 (2) of the Factories Act, 1937, provides: "For every staircase in a "building or affording a means of exit from a building, a "substantial hand-rail shall be provided and maintained, which, "if the staircase has an open side shall be on that side, and, in "the case of a staircase having two open sides,"—that is not this case—"or in the case of a staircase which, owing to the "nature of the construction thereof or the condition of the "surface of the steps or other special circumstances, is specially "liable to cause accidents, such a hand-rail shall be provided and "maintained on both sides."

The judge said that the "condition of the surface" of the steps was faulty in that the top sill was shiny and highly polished owing to user; and that there were "special circumstances" in that there was a hatchway a couple of feet away from which grease was periodically issued. He held, therefore, that there ought to have been two hand-rails.

On reviewing the evidence, I find myself unable to agree with the judge's view. I do not think that he has given sufficient effect to the words of the subsection "specially liable." It is only when the condition of the surface of the steps or other special circumstances render it *specially liable to cause accidents* that two hand-rails must be provided.

I will take the two points in order. 1. The "condition of the "surface" of the stairs. I can well see that if the steps had become so slippery as to be a real danger, there ought to be two hand-rails; but the evidence falls far short of that. The cogent

[2] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[3] [1951] 1 K.B. 376; 66 T.L.R. (Pt. 2) 980; [1950] 2 All E.R. 1093.

factor to my mind is that ever since 1938 until this accident in 1953, that is, 15 years, there has never been a single accident on these stairs at all, nor indeed on the 14 similar stairs in this factory; and, although there are safety committees of the men, there has never been any suggestion by anyone that there was anything in these steps making them specially liable to cause accidents. I take it that "specially liable" means more than usually liable, and I do not see how one can say that the condition of the steps is specially liable to cause accidents when no accident has happened for all these years.

2. "Special circumstances." The mere fact that there was a hatchway was not likely to cause danger. The grease was always issued in tins from which it was not likely to escape. This one piece of grease was the only piece of grease that had ever been known to be on the steps all the time that the staircase had been there. I cannot see that that is a special circumstance requiring a double hand-rail. "Special circumstances" must be something which is being continually repeated or so often repeated as to be specially liable to cause accidents, so that a permanent protection is necessary. That is not the case here.

On all the evidence in this case I come to a different conclusion from the judge. I cannot see any evidence that there was anything specially liable to cause accidents in this case, and therefore there was no statutory obligation to have a double hand-rail. I would allow the appeal.

BIRKETT L.J. The obligation on the employers, which the judge held had not been fulfilled by the employers, is that imposed by section 25 (2) to provide a hand-rail and maintain it on both sides in certain circumstances.

According to the section, the hand-rail may be necessary because of the construction of the staircase. Upon that the judge made a finding with regard to section 25 (1) (the exact wording of which is "All floors, steps, stairs, passages and gangways shall "be of sound construction and properly maintained") that the plaintiff had no cause of action, that is to say, that there was no fault to be found with the construction or with the maintenance.

The second matter under subsection (2) is "or the condition "of the surface of the steps." It was not argued before the judge that this particular strip of three inches, a very small thing indeed, which is actually on the floor leading down to the first step of the staircase, was not to be considered as part of the steps. It might possibly have been argued that the strip was part of the concrete floor and not the surface of the steps; but the point was not taken. For my own part, I think that section 25 (2), when it specifies "the condition of the surface "of the steps," is dealing with the staircase as a whole where there are highly polished wood treads or metal treads, or a surface which is in some way rather treacherous. But that particular matter was not argued, and it was taken that this was

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to be regarded as a step, and this three inches of metal which the judge found was polished and shiny was a part of one of the steps.

The third matter under subsection (2) is "or other special "circumstances" making it "specially liable to cause accidents." It is on this third matter that the judge came to his conclusion.

Mr. Martin Jukes said that we were to consider three questions. First, did the judge direct himself properly when considering section 25 (2)? We do not really know how he directed himself, because he merely recited the section and then said: "Now, the question I have to decide is whether this is a "staircase which, while having only one open side, nevertheless, "owing to the condition of the surface of the steps or other "special circumstances, is specially liable to cause accidents." That, of course, is merely paraphrasing the wording of the section.

Then, Mr. Martin Jukes said, the second question is: are the answers which the judge gave justified by the evidence? and, thirdly, on those answers, was there a breach by the defendants? As I understand it, all that the judge has done is to say that this little three-inch strip made this staircase a staircase "specially "liable to cause accidents," because of the highly polished bar or threshold at the top; and all the controversy that went on about the presence or absence of grease, the proximity of the hatchway from which the grease was issued and so on, does not really seem to have very much bearing, except as a sort of supplementary factor in the "special circumstances."

I have felt in this case that when there is a staircase of this kind, one must have regard to its history. The plaintiff had been using it himself for four years, and others had been using it for very much longer—since 1938. [His Lordship referred to the evidence as to the plaintiff's use of the staircase over four years, and the fact that there had been no other accident and no complaint about the condition of the staircase, and continued:] In my view, it is tremendously difficult to say that a staircase is "specially liable to cause accidents" when one has testimony of that kind about this very staircase, used by the plaintiff himself for four years, and used by other people between forty and fifty times a day since 1938. If those facts are proved, it really strains language to say in the same breath: "Yes; never- "theless this staircase was 'specially liable to cause accidents.'"

Mr. Martin Jukes very bravely tried to meet that situation by citing a case in which he was concerned yesterday. No doubt cases come to the mind in which a state of affairs has gone on for a very long time without any accident at all, and then there is an accident; but, with great respect to Mr. Jukes, that is not the point which we have to determine. It is the construction of these words "special circumstances"—"specially liable to cause "accidents"; and if it is "specially liable to cause accidents," one would have thought that in 15 years or 4 years or 12 months, one would at least have had a complaint or something of that

kind; but the history, uncontradicted, is that there was no complaint, despite the elaborate machinery provided in this very well-run factory for voicing complaints. There was no complaint to the chargehand, no suggestion that the staircase was in any way faulty. It was used continuously by the plaintiff and there was no accident in his four years. There was none to anybody in those four years, and, so far as the evidence went, none at any time since 1938.

The judge first of all found that there was no common law negligence here. The employers are under no liability at common law: they have performed their duty, that is to say, they have taken reasonable care for the safety of their employees.

So far as section 25 (1) is concerned, he said that the staircase was properly constructed and properly maintained, and concluded, " I find no fault there "; but on section 25 (2), where the wording is so remarkable—" special circumstances " making it " specially " liable to cause accidents "—in the face of the evidence I have recited, the judge found the defendants liable. I think he was wrong, and this appeal ought to be allowed.

ROMER L.J. I agree. After the very full discussion we have had about the evidence in this case, and the construction of section 25 (2) of the Factories Act, 1937, it really does not seem possible to say that this metal three-inch strip at the top of the stairs was " specially liable to cause accidents," and for my part I doubt whether it was liable to cause accidents at all. It certainly never has caused one since the stairs were built in 1938, and, indeed, it did not cause this accident. The plaintiff's accident came about by a conjunction of circumstances—slipping on the grease, as the judge found he had done, plus the presence of the strip; but it cannot be said that the strip alone caused this accident. Therefore, I am not myself satisfied that it could be said that it was liable to cause accidents; but a fortiori it seems to me it cannot be said that it was " specially liable to " cause accidents." Therefore, so far as the strip itself is concerned, in my opinion the plaintiff cannot bring the case within the subsection.

As to the alleged " special circumstances " with regard to the presence of grease, there is nothing I desire to add to what has already been said. It was merely a temporary incident which had never happened before and has never happened since, and I cannot believe that this mere lone instance of grease being found once can amount to a " special circumstance " within the purview of the subsection. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Hugh Jones & Co.; Rowley Ashworth & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

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Ormerod J.

*DAVIDSON *v.* RODWELL.

PRACTICE NOTE.

Practice and Procedure—Jury, civil action—Disagreement of jury—Procedure for re-entry.

APPLICATION.

At the conclusion of the hearing of a slander action before a jury on May 13, 1955, the jury disagreed. There being some doubt as to the correct procedure for re-entry of the case for trial, Ormerod J. gave liberty to apply.

Percy Bloomfield for the plaintiff. In the Annual Practice (1955), at page 2862, there is a note halfway down the page dealing with court fees and stamps. The note reads: "It was "decided by the Treasury on question submitted by the Master "of the Crown Office, July, 1904, with regard to Fee 52 (Setting "down) in the annulled Fees Order, 1884, that a second fee was "not payable on re-entry of actions made remanet, adjourned, or "postponed from one assize to another, or sent down for trial on "circuit after entry in London, or vice versa, or on change of "venue from one town to another on the same circuit. But a "second fee was payable on re-entry of a case for new trial after "order for new trial, or after disagreement of jury." In those circumstances, it is submitted that the proper course here would be for the case to be set down again for re-hearing.

John Wilmers, for the defendant. I agree, but I think the court would have to give a direction under R.S.C., Ord. 36, r. 11, as to the time within which the setting down was to take place. Unless that is done the defendant cannot exercise the rights given to him under both Order 36, r. 11A and r. 12, namely, if the plaintiff makes default in setting down within the time stated in the order, to set down himself.

ORMEROD J. This is a case where an action was tried by a jury and the jury failed to agree. At the end of the hearing some doubt was raised by counsel on both sides as to the proper procedure to be adopted, as a disagreement by a jury in a civil action is a comparatively rare matter in these days.

The Rules of the Supreme Court appear to offer no assistance on the matter, but there has been some research in the Associates Office and it appears to be beyond doubt that the old practice was that the parties should be given leave to set down the case again, and, of course, the fee on setting down would have to be paid by the party setting down the action. That is borne out to some extent at least, by a note on page 2862 of the Annual

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Practice (1955), which is the part dealing with court fees and stamps. The note refers to a decision of the Treasury in July, 1904, when certain matters of this kind were submitted. It was established then that a second fee was payable on re-entry of a case for new trial after an order for new trial or after disagreement of a jury. That, of course, is not a statement of the practice, but it does reflect what the practice was at that time, and, in my view, that is the practice which should be followed.

Under the circumstances, I think it is essential, if the parties wish this action to be tried again, that the action should again be set down and a further fee paid. I therefore propose to order that the plaintiff be at liberty to set down the action within twenty-one days. Failing that, the defendant will have the right to do so.

Order accordingly.

Solicitors: *Paisner & Co.; Canter, Hellyar & Co.*

J. D. P.

[CHANCERY DIVISION.]

*J. H. TUCKER & CO. LD. *v.* BOARD OF TRADE.

1955
May 19.

Vaisey J.

[1954 J. 5531.]

War Damage—Business insurance scheme—"Goods"—Working drawings used in manufacture—Excluded as "documents owned for the "purposes of a business"—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 84 (1), 104.

Ejusdem Generis Rule—Statute.

The proviso to section 104 of the War Damage Act, 1943, excludes from the definition of "goods" in the Act "documents "owned for the purposes of a business."

Working drawings used in the process of manufacture are "documents" within the meaning of that proviso, and they are not, therefore, "goods" insurable against war damage under the business scheme within the meaning of section 84 (1) of the Act, and a claim for their loss is rightly excluded.

Hill v. *Regem* [1945] K.B. 329; 61 T.L.R. 294; [1945] 1 All E.R. 414 applied.

ADJOURNED SUMMONS.

The plaintiffs, J. H. Tucker & Co. Ld., manufacturers of electrical accessories and components, asked for a declaration that the Board of Trade were not entitled to exclude from payments made to them under the War Damage Acts, 1943,[1] under

[1] War Damage Act, 1943, s. 84: "(1) Subject to the provisions of "subsection (4) of this section, the "goods insurable under the business "scheme in relation to any person "carrying on business are all goods "situated in the United Kingdom— "(*a*) which are in his possession "(whether he owns them or not) and "are held or used by him wholly or

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the business scheme for the insurance of goods, the sum of £14,600, agreed value of some 15,000 working drawings owned by the plaintiffs, whose business premises were destroyed by enemy action on the night of November 21–22, 1940. Among the contents of the destroyed premises were some 50,000 drawings including the 15,000 working drawings which were the subject of the present claim.

The assessment of the plaintiffs' loss had been fixed at £133,687, which included a sum of £14,600 in respect of these working drawings. The plaintiffs' claim to that sum was resisted by the Board of Trade.

These working drawings included (a) tool design drawings required for the making or repairing of tools, (b) manufacturing drawings required for the process of manufacture of components, (c) inspection limit drawings required for gauging and viewing components. (d) assembly drawings required for assembling components and (e) outside suppliers' drawings. The evidence was that such drawings were essential parts of the process of manufacture, and that the manufacturing processes could not be initiated or carried through without them; and if the plaintiffs had wanted to sell their business undertaking a purchaser could only have been dealt with on the footing that these working drawings would be handed over with the rest of the apparatus connected with the making of the products supplied by the plaintiff company.

Neville Gray Q.C. and *Eric Blain* for the plaintiffs.
Denys Buckley for the Board of Trade.

VAISEY J. This summons raises a question of construction arising under the War Damage Act, 1943, which is not easy to answer, but it lies within a small compass, and depends on the combined effect of sections 84 (1) and 104 of the Act. It involves consideration of the problem of what are "documents" within the meaning of the last-mentioned section.

It is unnecessary for me to dwell at length on the width of the significance of the word "document"; etymologically, it means something which shows something or teaches something and is evidential or informative in its character. Having said that much, the context in which the word appears is naturally of the first and most cogent importance in determining what it means for the purposes under consideration.

"mainly for the purposes of that "business . . ."

S. 104: "In this Act, unless the "context otherwise requires, the ex- "pression 'goods' includes all cor- "poreal property neither falling "(whether generally or in relation to "any particular land) within the "meaning assigned to the expression "'land' by the last preceding sec- "tion, nor deemed for the purposes "of section 71 of this Act to form "part of a highway: Provided that "the said expression does not include "money, negotiable instruments, "securities for money, evidences of "title to any property or right or of "the discharge of any obligation, or "any documents owned for the pur- "poses of a business."

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[His Lordship stated the facts and continued:] I do not doubt that the working drawings I am particularizing are "documents." The question is how, on the facts, section 104 of the Act has to be applied. I need not go into the machinery by which this loss was brought within the ambit of the War Damage Act, 1943, although it happened nearly three years before the Act came into existence; there is no dispute that the plaintiffs' loss comes within the War Damage Act, 1943. The question is whether these working drawings are property in respect of which a claim can validly be made under the Act.

[His Lordship read sections 84 (1) and 104 of the War Damage Act, 1943, and continued:] If the Act had stopped with the words "goods situated in the United Kingdom—(*a*) which "are in his possession (whether he owns them or not) and are "held or used by him wholly or mainly for the purposes of that "business" the answer would have been simple enough. These working drawings were undoubtedly goods "situated in the "United Kingdom" in the possession of the plaintiffs, and were held by them "for the purposes of their business."

But it is necessary to look at section 104, which is a definition section, the marginal heading of which is "definition of "'goods.'" It will be observed at once that the words in the proviso to section 104 are different from the words in section 84 ("goods . . . held or used . . . for the purposes of that business"), but whether they are different in meaning is another question.

The argument put forward on behalf of the plaintiffs is this: that these documents are not owned for business purposes in the same sense as account books or ledgers or anything of that kind, but that they form an integral part of the process of manufacturing, without the possession of which the company could not carry out its manufacturing business.

I must refer to the only judicial decision on this particular point, namely, *Hill* v. *Regem*,[1] a decision of Humphreys J. The headnote reads: "Account books, such as journals and "ledgers, used by an insurance broker in his business, are "'documents owned for the purposes of a business,' within the "meaning of the proviso to section 104 of the War Damage Act, "1943, and so excluded from insurance under the 'business "'scheme' operated by the Board of Trade by virtue of "section 83 of the Act." The report in the All England Reports is in a slightly different form from the Law Reports and has a final paragraph which does not appear in the report in the Law Reports.

I am attracted by the argument advanced on behalf of the plaintiffs that "documents owned for the purposes of a business," although they clearly include account books, ought not to include any which form a substantial and necessary part of the manufacturing activities of the company and are not merely what might

[1] [1945] K.B. 329; 61 T.L.R. 294; [1945] 1 All E.R. 414.

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be called business documents. All the other items in the proviso seem to me to be very far removed from anything like a manufacturing process or the activities of a manufacturing business; and the argument from that is that "documents owned for the "purposes of a business" would primarily mean something of the same character as those other items, and that that is the justification for the decision in *Hill* v. *Regem* [2] as explained by Humphreys J.

The War Damage Act, 1943, which came into existence at the time of great disturbance was a remarkable piece of draftsmanship and, on the whole, has produced very few problems. I am inclined to think that to limit the meaning of the word "documents" on any of the considerations which I have mentioned is really not admissible according to any proper principle of construction. The words are "any documents "owned for the purposes of a business." These working drawings are clearly "documents": they were "owned" by the plaintiffs, and I think that they were "owned for the pur- "poses of their business," not in the same sense that account books and ledgers may be owned, but nevertheless for the purpose of carrying on their business.

Although there is much to be said for the contentions put forward for the plaintiffs, I think that the safer course is to say that "documents" means, according to its ordinary significance, written documents. It is easy to say that "documents" includes tombstones and other kinds of documentary objects, but in the ordinary sense in which the ordinary business man uses the word "documents" it means written documents: that is to say, documents which either record something or contain directions for the making of something, or are used for reference in the course of business.

It is pointed out on behalf of the Board of Trade that there are a good many reasons why documents should be excluded from the purview of the Act. They could without any great difficulty be re-duplicated, and indeed I am told that in this case the plaintiffs were in process of duplicating their documents when this catastrophe befell them in the early days of the war. The argument as to the extreme difficulty of valuing documents of this nature rather loses its weight when I know that the value attached to these particular documents has been agreed at £14,600. Although a value has been put on these particular documents for this particular purpose which somewhat limits the force of that point, one sees nevertheless some reason why documents are not the proper subject for compensation in the ordinary way. It would, in many cases, be difficult to value a chemist's book of prescriptions, an advertising agent's mail list, or an architect's drawings. So in this or in any comparable case, to value these documents for the purposes of this Act would be a

[2] [1945] K.B. 329.

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difficult problem which could hardly have been envisaged by those who drafted the Act.

The words are, after all, perfectly general. The proviso says (disregarding for one moment the ejusdem generis argument to which I have already referred) that there are to be excluded from the category of goods "any documents owned "for the purposes of a business." I think that "any documents "owned for the purposes of a business" mean, on the whole, written documents of any kind used or held or owned for any of the purposes of a business—it may, for instance, be for the purposes of keeping the accounts of a business, or for making up bills for estimating quantities. Such documents are, in my judgment, clearly within the proviso to section 104 and excluded from the operation of the Act under the decision of Humphreys J. It seems to me that "any documents owned for the purposes "of a business" must include, according to the ordinary use of language, working drawings. I cannot see where a line can be drawn between documents owned for the purposes of a business, and documents owned for the purpose of carrying on a business, or documents which are owned and used for both of such purposes. I find myself on safer ground in holding, as I feel bound to do, that "any documents owned for the purposes of a "business" include these particular working drawings which, in my judgment, were held by the plaintiffs for the purposes of their business. I shall declare that on the true construction of sections 84 and 104 of the Act the expression "goods" does not include the working drawings in respect of which a claim for £14,600 has been made by the applicants and not accepted by the Board of Trade.

Declaration accordingly.

Solicitors: *Gregory, Rowcliffe & Co. for Shakespeare & Vernon, Birmingham; The Solicitor, The Board of Trade.*

I. G. R. M.

[LANCASTER ASSIZES.]

* CROOKALL *v.* VICKERS-ARMSTRONG LD.

1955
Jan. 26, 27;
Feb. 17.

Glyn-Jones J.

[1953 C. No. 851.]

Negligence—Safe system of work—Injurious dust—Steel foundry—Risk of silicosis—Duty to take steps to induce employee to wear mask provided.

Factory—Dust—Elimination—Provision of masks—"All practicable "measures . . . to protect the persons employed against inhalation "of the dust"—Failure to induce employee to wear mask provided —Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1).

Damages—Negligence—Continuing negligence—Injury to health arising partly before and partly after breach of duty.

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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The plaintiff, a moulding machinist employed by the defendant company at its steel foundry, was in the course of his employment from 1930 to 1951 engaged in work upon the foundry floor which involved the use of siliceous sand. The work carried out upon the foundry floor included, inter alia, processes known as "easing," "knocking-out" and the preliminary stages of "dressing," which processes involved a silicosis risk. This risk was not appreciated during the earlier part of the plaintiff's employment; but by about the year 1942 or 1943 the risk was beginning to be recognized. From about the year 1941 or 1942 the defendant company provided a sufficient number of masks for use by their workmen, but although the foundry manager spoke to the workmen from time to time about the wearing of masks very few of them did so. In March, 1951, the plaintiff was certified to be suffering from silicosis, which condition had commenced to develop in about 1939 and was the result of his having inhaled, throughout the period of his employment, fine particles of freshly fractured silica:—

Held, (1) that once an employer knows, or ought to know, that his workmen are exposed to a material risk of contracting a serious disease, and that the risk can be markedly diminished, if not eliminated, by the wearing of masks, he must take all reasonable steps, by clearly warning the workmen that they refrain at their own risk from wearing the masks and by encouragement and exhortation, to seek to persuade them to do so; and accordingly, from about the year 1942 or 1943, the defendant company, having failed to take such steps, was guilty of negligence at common law in failing to take due care for the safety of the plaintiff.

(2) That the words "all practicable measures . . . to protect "the persons employed against inhalation of the dust" in section 47 (1) of the Factories Act, 1937, included the provision of masks and the taking of steps to induce the workmen to wear them; and, accordingly, the defendant company was also in breach of its duty under the subsection.

(3) That, the plaintiff's present condition having been brought about by his inhalation of silica particles over a period of time both preceding and running concurrently with that during which the defendant company was in breach of duty, the damages recoverable by the plaintiff should be measured by reference to the extent to which his condition had been aggravated during the period of the defendant company's breach of duty.

ACTION.

The plaintiff, who was employed as a moulding machinist by the defendant company at its steel foundry, contracted silicosis in the course of his employment and brought this action claiming damages therefor on the grounds of breach by the defendant company of its duty at common law to take reasonable precautions for his health and safety, and its duty under section 47 (1) of the Factories Act, 1937.[1] The allegations

[1] Factories Act, 1937, s. 47: "(1) In every factory in which, in "connection with any process carried "on, there is given off any dust or "fume or other impurity of such a "character and to such extent as to "be likely to be injurious or offensive "to the persons employed, or any "substantial quantity of dust of any "kind, all practicable measures shall "be taken to protect the persons "employed against inhalation of the "dust or fume or other impurity and "to prevent its accumulating in any "workroom, and in particular, where "the nature of the process makes it "practicable, exhaust appliances shall "be provided and maintained, as

relied upon by the plaintiff as constituting a breach of duty by the defendant company were that the defendant company failed to provide and/or to take reasonable steps to induce the plaintiff to wear a suitable mask. The facts sufficiently appear from the judgment.

Fenton Atkinson Q.C. and *Godfrey Heilpern* for the plaintiff.
Daniel Brabin Q.C. and *C. M. W. Elliott* for the defendant.

The following cases, in addition to that referred to in the judgment, were cited in argument: *Ebbs* v. *Whitson (James) & Co.*[2]; *Roberts* v. *Dorman Long & Co. Ld.*[3]

Cur. adv. vult.

February 17. GLYN-JONES J. read the following judgment (delivered at Liverpool Assizes): For rather more than 20 years, ending in March, 1951, the plaintiff was employed as a moulding machinist at the defendant company's steel foundry at Barrow-in-Furness. On March 1, 1951, he was certified by the Pneumoconiosis Board to be suffering from silicosis; and it is common ground that he contracted that disease in the course of, and as a result of his employment. He claims by his statement of claim in this action that he contracted this disease because the defendant company was guilty of various breaches of its statutory duty under sections 4 and 47 of the Factories Act, 1937, and of its duty at common law as his employers, to take reasonable care for his health and safety. In the course of the trial Mr. Fenton Atkinson, for the plaintiff, abandoned all allegations that his client's condition had been caused by any negligence or breach of statutory duty, save such as might be based upon the defendant company's alleged failure to provide a suitable mask or respirator, and to take reasonable steps to induce him to wear it. Mr. Atkinson submitted that such failure, if established, constitutes a breach, as well of section 47 of the Act, as of the defendant company's duty at common law.

In the defendant company's foundry steel castings are made by the usual process of pouring molten steel into moulds of sand contained in steel moulding boxes or casting boxes. The processes involved, so far as they are relevant, are as follows. The moulding boxes, or casting boxes, are built up in segments, square or circular, clamped together, and having a top and bottom to complete the box. The moulding machine, at which the plaintiff worked, is a metal "table" which may be vibrated rapidly. The bottom of a moulding box and as many segments as are needed, depending upon the size and shape of the casting to be made,

"near as possible to the point of "origin of the dust or fume or other "impurity, so as to prevent it enter- "ing the air of any workroom."

[2] [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.
[3] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

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are assembled and built up on the table; and within the box so made is placed a pattern of the casting. Fresh sand, called facing sand, is applied moist to the surface of the pattern. A layer of damp sand is placed behind the facing sand, and the remainder of the space left between the sand-covered pattern and the side or sides of the box is packed with dry sand which has already been used before. When the mould is full, the table is set in motion and vibrates rapidly for a short time so as to shake the sand firmly down. Finally, the mould is covered by a layer of wet sand and the box closed. So far the process is carried out by the moulding machinists, of whom the plaintiff was one. The casting box containing sand and pattern is then taken to the moulders, who break out and remove the pattern and repair any damage done to the inner surface of the mould. Then the casting box with the mould within it, is taken to an oven and heated to dryness. When the box is removed from the oven the sand is baked hard, but within the mould and upon the box there is a quantity of coke breeze dust. The mould must be cleaned of this dust before the molten metal is poured into it. The dust was formerly blown out by the blast from a compressed-air pipe, but for some time now a suction pipe has been used in its place. After the cleaning of the mould and the placing therein of the core by the moulders, the box is closed and the metal poured.

Next comes a process known as "easing." When the metal has solidified but is still red hot the mould is opened, one or more segments of the box taken off, and some of the sand surrounding the casting is removed. The object of this process is to enable the casting to set and contract freely, thus avoiding the risk of cracking. At this stage the sand is hard and dry. It is hard work to move it, and hot work too, because of the heat of the casting. The segments are replaced and the metal left further to cool. From time to time the plaintiff took part in this process also. Next comes the "knocking-out" process in which the casting is lifted from the box, and at that stage there is still much hard dry sand sticking to it. As much as possible of this sand is removed in the knocking-out, but there still remains a quantity of sand as hard as stone, and burnt on to the casting so firmly that it can be removed only by the use of special tools or appliances such as pneumatic chisels. The removal of this burnt-on sand, and of any other removable matter, is the first step in the process of cleaning the casting. Finally, the rough surface of the metal is smoothed and finished to the dimensions required. The process of removing the very hard burnt-on sand and the metallic excrescences, with pneumatic chisels, and the final smoothing of the casting is known as "dressing" or "fettling."

By 1931 it was generally known that workmen engaged in dressing or fettling steel castings were exposed to the risk of contracting silicosis; and by the Various Industries (Silicosis)

Scheme, 1931,[1] it is provided that a workman in a foundry or metal works, engaged in the process of "freeing . . . steel "castings from adherent sand or other siliceous substances, "*excepting work done upon the foundry floor*,"[2] should be entitled to workmen's compensation if he contracted silicosis due to his employment. It was not then thought, apparently, that the processes described above—other than fettling or dressing—all of which are carried out upon the foundry floor, involved a risk of silicosis; but as methods of diagnosis improved after further study and research, it came in due course to be realized, and is now well known and has been for some time, that workmen engaged in work upon the foundry floor in such other processes may also contract silicosis, as the plaintiff has done.

[His Lordship referred to the fact that some of the processes caused considerable quantities of visible dust to rise into the air, stating that, so far as ventilation could dispose of that dust, it was no longer alleged that the defendant company was in breach of its duty so as to cause the plaintiff's silicosis; that visible particles of dust do not cause silicosis, which is caused by tiny particles of freshly fractured silica visible, if at all, only as motes in a beam of light, and continued:] The moulding sand used by the defendant company was siliceous sand. It came straight from a sand-pit without being subjected to any crushing or other process which could fracture the particles, and, as supplied to the foundry, contained no particles which could cause silicosis. But in the process of "easing," of "knocking-out," and of removing the burnt-on sand from the casting with pneumatic chisels, freshly fractured particles, small enough to cause silicosis if inhaled in sufficient quantity and over a long enough period of time, were and are produced; and these freshly fractured particles retain their noxious property for some time—a month or more.

All these processes were carried on within the foundry. At some time before the enactment of the Scheme of 1931, the whole of the process of fettling or dressing was also carried on within the foundry. By the time the plaintiff began to work in the foundry most of the fettling or dressing was being done in a separate room; but the preliminary work of removing some at least of the burnt-on sand with pneumatic chisels continued to be done within the foundry until about 1951 or 1952.

It is of some significance that by the Various Industries (Silicosis) Amendment Scheme, 1946, the Scheme of 1931 was amended by, inter alia, the deletion of the words "excepting "work done upon the foundry floor." Thus, as it seems to me, a workman in a steel foundry who, after 1946, could prove that he had contracted silicosis as a result of his employment in the process of easing, or knocking-out, as well as in the removal of burnt-on sand in the first stage of the dressing process, could

[1] S.R. & O., 1931, No. 342. [2] Ibid. para. 2 (viii) (*b*).

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recover workmen's compensation, notwithstanding that his work was done upon the factory floor; and it is obvious that, from that time at least, a reasonable employer ought to have known that these last-named processes involved the workmen in the foundry in the risk of contracting silicosis, and placed him therefore under a duty to take all proper steps to protect the workmen from that risk.

I am satisfied that the plaintiff's silicosis has been caused gradually by his having inhaled, throughout the period of his employment, fine particles of freshly fractured silica arising from all these processes. These particles are so light that they do not fall to the floor with the visible dust which settles. They remain floating in the air as it circulates within the foundry. It appears from the report of *Adsett* v. *K. & L. Steelfounders & Engineers Ld.*,[3] that the device of fitting a perforated grid in the floor of the foundry, with a down draught intended to suck the dust through the floor, was thought at one time to be a method of eliminating dust which might cause silicosis; but I doubt whether this method would dispose of the tiny noxious particles. I accept the evidence of Mr. Rogers, an engineer and former factory inspector, that, so far, at least, as the process of easing is concerned, the great heat of the casting would cause swift upward convection currents of air, which would render ineffective any attempt to suck these light particles through the floor.

Since the plaintiff did contract silicosis as the result of the cumulative effect upon his lungs of the silica particles he had inhaled over many years, it follows that any efforts which were made by the defendant company to improve the atmosphere had not succeeded in eliminating the risk.

As I see them, the questions which I must answer are: Ought the defendant company to have appreciated this risk? If so, when? And, once the risk had been appreciated, ought not greater efforts to have been made by the company to provide masks, and to see that the workmen, including the plaintiff, used them?

On the subject of masks my attention has been invited to the second report of the Committee on Dust in Steel Foundries, dated March 31, 1951, in which appears, in paragraph 50, the following sentence: "While we cannot say that we consider personal "protection to be the ideal method, we do think it has a vital "purpose, and we consider all parties should wear masks in an "attempt to make them more comfortable and more efficient." But workmen find it very uncomfortable to do heavy work wearing masks and are reluctant to wear them. The difficulty created by this reluctance was discussed in the judgment of Parker J. in *Adsett's* case,[4] and I approach the subject with full sympathy for the employers' difficulty. Mr. Williams, who was the defendant

[3] [1953] 1 W.L.R. 137; [1953] 1 All E.R. 97n.

[4] [1953] 1 W.L.R. 137.

company's foundry manager from 1943 to 1953, and Mr. Marsh, who succeeded him, both said that, short of dismissing a man who did not wear his mask when told to do so, there was no way in which they could compel a man to wear one; and dismissal would "cause a riot" in the foundry. Nevertheless, there is a half-way house between, on the one hand, merely providing masks and leaving it to the men to decide whether or not they will wear them, and, on the other hand, proceeding to the length of dismissing a man caught working without a mask. Once the employer knows, or ought to know, that his work-people are exposed to a material risk of contracting a serious disease, and that the risk can be markedly diminished, if not eliminated, by the wearing of masks, he must take all reasonable steps, by clearly warning the men that they refrain at their own risk from wearing the masks and by encouragement and exhortation, to seek to persuade them to do so.

I have come to the conclusion that by about the years 1942/1943, the defendant company in the particular circumstances of this foundry should have appreciated that their workers on the foundry floor were exposed to a risk of silicosis. I base this conclusion largely on the fact that the first stages of the dressing process were carried on upon the foundry floor. From that time onward more effort should have been made than was made to make the masks freely available, and to induce the men to wear them. It follows that, in my opinion, the company was guilty in this respect of a breach of its duty at common law to take due care for the safety of its workmen.

Mr. Brabin, for the defendant company, desires to keep open the point that section 47 of the Act of 1937 is concerned only with measures such as the provision of adequate ventilation, etc., for eliminating harmful dust from the atmosphere in the foundry, and does not extend to the provision of masks, or other protection, for men working in an atmosphere from which the dust has not been eliminated. I am of opinion that the "practical "measures to protect persons employed against inhalation of "dust" include the provision of masks, and the taking of steps to induce the workmen to wear them. In my opinion, therefore, the defendant company has been guilty of a breach of section 47 of the Factories Act, 1937.

The facts on which I base this conclusion are as follows: Mr. Rogers, the defendant company's witness, to whose evidence I have already referred, told me that, by 1942, the risk that the processes carried out on the foundry floor, particularly easing and knocking-out, might cause silicosis was beginning to be recognized, and that he knew of no satisfactory method of protecting the men against that risk, other than the provision of masks. He said that if an employer knew of that risk he should attach the highest importance to seeing that the men wore masks, and he thought masks should have been made available from 1942 onwards. In view of Mr. Rogers's evidence that the risk arising

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from the processes of easing and knocking-out was only beginning to be recognized in 1942, I do not think I should have found the employer negligent in not then appreciating that the risk existed in the foundry; but when I add the fact that part of the dressing process was carried on there too, I think the combined risk should have been appreciated.

Mr. Williams, the foundry manager, said that masks were introduced to reduce the incidence of silicosis and other respiratory diseases, and that by the time the masks were introduced he appreciated that there was some risk of silicosis, not only to fettlers and dressers, but also to other workers. I think the time to which he refers was about 1941 or 1942; although, in fact, masks were introduced earlier. The original purpose was, I think, to protect the men from the clouds of visible dust, rather than against the specific risk of silicosis.

From October, 1940, there was a works committee of representatives of the workers and management which met frequently, and at these meetings the men's representatives often complained of conditions in the foundry, as appears from the extracts from the minutes of the committee which were tendered in evidence, and, at a meeting of December 4, 1942, specific reference was made by the men's representative to the risk of silicosis. It is true that the men were asking for protection against the visible dust clouds which they thought, mistakenly, caused silicosis; but their complaint clearly called the company's attention to the possibility of the risk.

Masks were first provided in small numbers shortly before the war. The plaintiff says that the men could draw them for use on dusty jobs, and would then return them to store where they might be reissued to other men. He says that he thought this undesirable and never asked for one. When Mr. Williams heard of men wearing one another's masks he stopped the practice, and thereafter there were plenty of masks; and certainly, I think, by 1941 or 1942 a sufficient number of masks was provided and kept in store, so that any man who asked for one could have had one.

This brings me to the question of what steps were taken to persuade and encourage the men to wear them, and it is on this question that I find that the plaintiff succeeds. I think that the attitude of the defendant company is in the observations of Sir Robert Beeman recorded in the minutes of December 4, 1942, and amounts to this: "We have provided the best masks we have "been able to obtain: what a pity the men don't use them!" There was a failure to press upon the men's representatives with earnestness and ardour the need for these masks, so as to try, at least, to secure their strong help in persuading the men to wear them, and to wear them, not merely for a few minutes in dusty conditions, but as much as possible. I draw the inference that after a somewhat half-hearted attempt to persuade the men to wear the masks, the attempt was given up as hopeless, with the result that, as Mr. Williams said, by the time he ceased to be

foundry manager in 1953, and although he had from time to time spoken to men about wearing masks, very few men wore them.

I now come to the question of damages. I accept the medical evidence that the plaintiff is suffering from a moderate degree of pneumoconiosis which produces some shortness of breath on exertion, and renders him, if he should suffer from diseases like bronchitis or pneumonia, less able to resist them. I accept the evidence that the plaintiff was beginning to suffer from silicosis before the war, and that the progress of the disease was somewhat accelerated during the war—no doubt by black-out conditions. The progress of the disease is slow and insidious, and, no doubt, every particle of silica which the plaintiff has inhaled has played its part in bringing about his present state. If a man is once diagnosed, as a result of an X-ray examination, to be suffering from industrial silicosis, whether or not he feels any symptoms of disease, he ought not to continue to work on the process to which the silicosis is due; and it may be that an X-ray examination made much earlier than 1951 would have discovered that the plaintiff had begun to suffer from the complaint.

Mr. Atkinson puts his case simply. Since the plaintiff was prohibited in March, 1951, from working as a moulding machinist, he has had to take lower paid work. Up to the date of the trial his loss of wages amounts to £389 19s., and is continuing at the rate of £3 4s. 8d. a week. Mr. Atkinson says that, at the date when first the defendant company was in breach, the plaintiff was capable of doing the full work of a moulding machinist, and that it is the further progress of the disease since then which has caused him to suffer loss of earning capacity; and, therefore, that the defendant company must compensate him to the full, without taking into account the fact that he was already suffering (if he was so suffering) from incipient silicosis at the time of the first breach.

Mr. Brabin, on the other hand, argues that the breach, if any, by the defendant company, has not caused the whole of the plaintiff's damage but only a part; and that I must take into consideration the fact that, to the extent to which the plaintiff was already suffering from silicosis when the defendant company's breach began, the defendant company is not to blame for the whole of his present condition.

I test these contentions by a hypothetical case. The reason why the plaintiff ceased to be employed as a moulding machinist was not that his symptoms prevented him from working; it was that a routine examination was made (as in these days is often done) of all the men who consented to be examined. Assume that the defendants' breach took place a very short time before the X-ray examination revealed silicosis—say six months. The progress of the disease during those six months might have been almost imperceptible, and, had the examination taken place six months earlier, the same diagnosis would have been made; yet Mr. Atkinson's argument would presumably have been the same,

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Glyn-Jones J.

and would bring about, in such a case, I think, a manifest injustice. So, also, if the plaintiff's employment had been shared between two employers, each of whom had been in breach. It would be unjust, I think, to make the first employer pay for damage done after the plaintiff left his employment, and equally unjust to make the second employer liable for damage done by the first. Under the Workmen's Compensation Act, 1925, the liability to pay compensation was placed upon the second employer, with a right, in certain circumstances, to recover contribution from the first.

There are also other considerations. The wearing of a mask by the plaintiff—assuming that the defendant company had succeeded in persuading him to wear one—would have checked the progress of the disease, though probably would not have prevented some slight worsening. It could not have repaired the damage already done; and the extent to which his lungs were already affected would have tended, as he grew older, to shortness of breath, so as to make it more difficult for him to wear his mask. What I have to assess, I think, is the extent to which the defendants' breach has aggravated the plaintiff's condition, and to award damages for that. No arithmetical calculation of loss of earnings can help; I think that all I can do is to assess, as a lump sum, what I think is fair compensation for the part played by the defendants' breach in bringing about the plaintiff's present condition. This I assess at £750, to include special damage.

Solicitors: *W. H. Thompson; Hart Jackson & Sons, Barrow-in-Furness.*

[PROBATE, ETC., DIVISION.]

1955
May 16.

* PRACTICE DIRECTION (FOREIGN MARRIAGES).

Husband and Wife—Divorce—Evidence—Foreign marriage—Proof of certificate in Divorce Division—Avoiding expert evidence—Evidence (Foreign, Dominion and Colonial Documents) Act, 1933 (23 *Geo.* 5, *c.* 4).

With the object of avoiding unnecessary costs, the attention of practitioners is directed to the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, and the Orders in Council made under it [in particular the Evidence (Belgium) Order, 1933 (S.R. & O., 1933, No. 383), and the Evidence (France) Order in Council, 1937 (S.R. & O., 1937, No. 515)] and to *North* v. *North and Ogden.*[1]

[1] (1936) 52 T.L.R. 380.

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PRACTICE DIRECTION (FOREIGN MARRIAGES).

The effect of these orders is, inter alia, that expert evidence is not normally required to establish the validity of Belgian or French marriages in matrimonial proceedings.

B. LONG,
Senior Registrar.

Principal Probate Registry.
May 16, 1955.

[PROBATE, ETC., DIVISION.]

*CARPENTER *v.* CARPENTER.
HOLDEN INTERVENING.

1955
May 4, 5, 6.

Sachs J.

Husband and Wife—Divorce—Cruelty—Deception before marriage—Association with another woman—Shock of subsequent discovery—Aggravation by husband's deliberate conduct and desertion.

If a man so deceives his wife before marriage that he must know that the revelation of the truth would be a serious shock to her, he is under a duty not to aggravate that shock; and if such aggravation is a natural and probable consequence of an act of his own volition, and injury to health results, he is guilty of cruelty.

A husband, who had represented to his wife before marriage that he was an orphan and a bachelor, and had treated her well during the three years they lived together, disappeared, leaving no clue as to his whereabouts. In the course of inquiries which the husband must have known the wife would make, she learned that he had been twice previously married and twice divorced, had had children by both marriages, and a child by another woman; and had been associating since the marriage with yet another woman of whom he was accepted as the fiancé:—

Held, that although deception before marriage, association with another woman, and desertion were not of themselves cruelty, the husband had in the circumstances of his disappearance been guilty of cruelty by reason of his deliberate acts, which had inevitably aggravated the shock to the wife of the discovery of the deception, and caused injury to her health.

WIFE'S PETITION for dissolution of marriage.

The following statement of facts is taken from the judgment. The parties met in 1949 when the wife was about twenty and the husband just over thirty. At the first lunch they had together he told her that all his family had been killed during the war, that he was an orphan, and that because he was in the Army he had not found time to get married. During the period after that first lunch the husband did not volunteer any further information as to his family background, but, when questions were asked, maintained in fact the story which he had previously told. They became engaged towards the end of 1949 and were married in July, 1950. The wedding was a white wedding and the best man was one John Dickson, a partner of the husband in his business as a theatrical photographer.

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The husband and wife then settled down to live very happily for nearly three years. There was no evidence that during that period the question of the husband's status before marriage and his family was the subject of conversation, but it was equally clear that during that period the husband in no way went back on what he had originally told his wife.

It had been arranged between husband and wife that on June 11, 1953, they should set off on a holiday to Lucerne. On June 9, 1953, two days previously, he left the matrimonial home, apparently in the ordinary course of business, saying that he was going on business affairs to Bradford and would be back in good time for the two of them to start their holiday. Nothing more was seen or heard of him by the wife until October 8, 1953, and therefore during those months of June, July, August and September, 1953, he had simply disappeared leaving no message and no clue to his whereabouts.

As soon as the wife found he had not returned at the time promised she became extremely anxious. She set about making inquiries, and those inquiries included attempts to seek information from his business associate, John Dickson. In addition, she sought information from the police, with whom she registered her husband as missing. As a result of these and other inquiries the wife learned a number of facts which inevitably caused her great distress. She found out that the husband, who had declared himself never previously to have been married and who had caused himself to be entered upon the marriage certificate as a bachelor, had in fact been married twice before. The first marriage had taken place in Middlesex on September 6, 1939. By that marriage he had had two children, one born in February, 1941, and the other in June, 1942. That marriage had been dissolved on the ground of the husband's cruelty by a decree dated May 12, 1944. The second marriage took place on April 13, 1946, at Christ Church, Rawalpindi, India. By that marriage he had had one child, born in February, 1947. On April 21, 1950, that marriage had been dissolved on the ground of the husband's adultery in 1949 with one Elizabeth Clark. Another fact which came to light in the course of the investigations was that on August 21, 1950, just a month after the present marriage, one Elizabeth Clark obtained against a man, who, by inference from the facts as a whole, was this husband, an affiliation order at the magistrates' court at Greenwich in respect of a child born to her on October 8, 1949. Those facts also had not been disclosed to the wife.

In addition it was found that the husband had been associating with the intervener from November, 1952. He had proposed marriage to the intervener and become engaged to her in December, 1952, and had in May, 1953, induced her to go to St. Helier, Jersey, to arrange with the vicar of a church there for their wedding to take place. He had taken a lease of a flat, where they had associated as an engaged couple, and had been introduced into

her home as her fiancé. In June, 1953, he had vanished from her life in the same way as he had vanished from that of the wife. All this time, from December, 1952, to June, 1953, he had at the same time been living very happily with his wife, who had not the slightest suspicion of what was going on as between the husband and the intervener.

It was also discovered that the husband's story as to being an orphan and as to the way in which his family had perished was untrue. The husband's father had been alive until a few years before the marriage and had not been killed during any form of war activities. The husband's mother was still alive and he also had alive a sister and a brother.

Of these discoveries relative to the husband, the first was made about a week after the husband's departure. As the other matters became known to the wife, the cumulative effect increased; her health deteriorated and she became listless, irritable, jumpy, developed a twitch in her hands, and other symptoms. She could not work at her own job and was given some five weeks' leave of absence; since then she had had to be put on to less responsible work. So great was the change wrought in her that on one occasion, not long after these series of discoveries, her sister barely recognized her in the street. Of the various discoveries the husband's deception as to his previous marriages had had the deepest effect.

On October 8, 1953, the husband came back to the extent of slipping a note under the door of the matrimonial home. By that and by some telephone communications and a subsequent note he made an ostensible approach to the wife to be received back, but she would have nothing to do with him, and on August 24, 1954, filed her petition for divorce.

Anthony Harmsworth for the wife.
The husband did not appear and was not represented.
Richard Ellis for the intervener.

The following cases were referred to in argument: *Russell* v. *Russell* [1]; *Cox* v. *Cox* [2]; *Barker* v. *Barker* [3]; *Simpson* v. *Simpson*.[4]

SACHS J. stated the facts substantially as set out above, found the injury to health clearly established, and continued: From the facts which I have mentioned certain matters become abundantly clear. First, of course, this man is shown to be a congenitally amoral philanderer and an accomplished and plausible liar. Secondly, he is shown to be a menace to the happiness of any young woman with whom he associates and has, indeed,

[1] [1895] P. 315; 11 T.L.R. 579.
[2] [1952] 2 T.L.R. 141.
[3] [1949] P. 219; 65 T.L.R. 49; [1949] 1 All E.R. 247.
[4] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

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ruined the happiness of five women so far. The third thing that is clear is that what he did to this wife in the present proceedings is something that caused her to suffer grievously and that everyone must have sympathy with her sufferings.

But those facts do not necessarily solve of themselves the question as to whether the husband has, to use the precise words of the Matrimonial Causes Act, 1950, s. 1 (1) (*c*), "since the "celebration of the marriage treated the petitioner with cruelty." I have had to bear in mind the passage in Lord Stowell's judgment in *Evans* v. *Evans*,[1] quoted by Karminski J. in *Eastland* v. *Eastland*,[2] that "'the Courts of Justice do not pretend to furnish "'cures for all the miseries of human life.'" Further, the courts must, of course, be careful not to substitute a different ground for divorce for those provided by the legislature. The Court of Appeal in recent cases—*Westall* v. *Westall*,[3] *Cox* v. *Cox*,[4] and *Warburton* v. *Warburton*[5]—has underlined the fact that the mere incidence of severe results to the wife, resulting from acts of the husband, does not of itself necessarily constitute cruelty.

In those circumstances, it seems right to examine the components of what in the aggregate is charged as cruelty. The first is the deception of the wife by the husband's fraudulent statements before the marriage. The second, the subsequent association with the intervener of the nature described but kept secret from the wife till June 14, 1953. The third, his desertion in June, 1953, by his complete disappearance. These must be regarded in conjunction with the fact that until June, 1953, he had, undoubtedly, treated his wife unexceptionably well.

Now pausing for a moment to consider each component on its own, it is obvious that pre-marriage fraud, whether it relates to sexual or to criminal or to other matters, will often, when revealed, inevitably result in pain and may thus impair the health of the spouse deceived. Assuming that the revelations be accidental or arranged in the way which a spouse hopes will be least hurtful to the wife, the realities of the case must be that the injury then flows from the pre-marriage deception. Thus the matter does not come within section 1 (1) (*c*) as being treatment "since the celebration of the marriage." So one finds that fraud before marriage cannot of itself (and I underline the words "of itself") be cruelty within the above section. Further, as regards the continuation of the deception after the marriage, one is faced with the fact that the more successful the continuance of the deception the less the chance of injury to the wife.

Next there is the association with the intervener. Since *Cox* v. *Cox*[6] it appears that the philanderer who associates with other women for his own gratification, but to an extent that does not include adultery, comes in one respect within the same class

[1] (1790) 1 Hog.Con. 35, 38.
[2] [1954] P. 403, 415; [1954] 2 W.L.R. 851; [1954] 3 All E.R. 159.
[3] (1949) 65 T.L.R. 337.
[4] [1952] 2 T.L.R. 141.
[5] The Times, July 10, 1953.
[6] [1952] 2 T.L.R. 141.

as the drunkard and the burglar. In each case, the association, the drunkenness and the crime, is not of itself, without other acts, cruelty unless the association, the drunkenness or the crime, is done with intention to injure the wife—and that is so although each of these things may cause grave distress and resultant ill-health to the wife. Here the clear inference to be drawn from the facts is that the association of the husband with the intervener was carried on by him for his own gratification and not with intent to injure his wife.

There is then the matter of desertion. The remedy for desertion is laid down by section 1 (1) (*b*) of the Matrimonial Causes Act, 1950. Desertion, of course, often creates great distress and always does so if the wife was and remained in love with her husband. Here, again, Mr. Harmsworth conceded very properly that desertion was not of itself cruelty. Indeed, otherwise it would be only too easy to stultify the intention of the legislature that there must be three years' desertion in order that a petition for divorce may be properly grounded. I emphasize desertion " of " itself " lest I be construed as saying that the act which constitutes desertion could never become an ingredient in a charge of cruelty, as, for instance, where the desertion took place just when the deserted spouse was critically ill.

It is because no one of these three components of itself constitutes cruelty that the case caused me considerable concern. At one time I was much inclined to the view that this was a case in which the court could not be asked, by taking three components, each in effect equalling nought, and adding them one to another, to find that taken together they constituted cruelty. But Mr. Harmsworth, very properly, invited me to examine certain particular aspects of this particular case and especially he asked me to examine the matter on the footing that here was a case of deception followed by a suspicious association, followed by complete disappearance of the husband, followed by a shock that was gravely aggravated on the particular facts by the way in which the husband had conducted himself. I have already said deception before marriage cannot of itself be cruelty nor, if accident reveals it or if the husband makes a careful revelation in what he considers to be the best interests of the marriage, would one normally, at any rate, expect that to constitute cruelty. But if a man so deceives his wife before the marriage that he, as here, must know that the revelation of the truth would be a great and perhaps disastrous shock to her, then he must at least be under a duty, having himself created the situation, not to aggravate that shock. If his revelation, for instance, were by some unfeeling remark or some coarse jest that would be bound to create an aggravated shock, I do not think anyone would doubt that such conduct would constitute cruelty in the sense that it would be a cruel thing to do—using that word " cruel " in the way

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approved of by Lord Merriman P. in *Simpson* v. *Simpson*,[7] and by Hodson J. in *Cackett* (*orse. Trice*) v. *Cackett*,[8] that is to say, in its ordinary connotation and ordinary acceptation in the English language.

Here the husband did create by his deception a position in which he had at least a duty to use every effort to see that the ill consequences of that deception being discovered were not aggravated. By his deliberate acts he associated with and engaged himself to the intervener and then disappeared without a word of explanation with the inevitable result that both the wife and the intervener would make inquiries at his business address—where the latter had first got to know the husband. Both would, in the natural course of events, come into contact with John Dickson—who knew the second wife, knew the present wife, and would come to know the intervener and of her purported engagement. It was thus clear that his disappearance (and I think, in the circumstances, one could properly say his cruel disappearance) from his wife's life would assuredly result in the shock of the discovery of his previous deception being grievously aggravated to the maximum extent by the manner in which they would come to light. That inevitable result duly happened with the disastrous effects already mentioned, and to my mind that aggravation was clearly a natural and probable consequence of an act of the husband's own volition.

To paraphrase words which Karminski J. quoted in *Cooper* v. *Cooper* [9] with approval, it is not a question in such a case whether the husband had an intention of being cruel but whether his intentional acts amounted to cruelty. Thus to aggravate the shock was to my mind something which I think any right-minded jury could, and would, call cruel, and I so find it, and accordingly find cruelty proved.

[His Lordship then considered the evidence relating to adultery, held the charge not to have been proved, and dismissed the intervener from the suit.]

Decree nisi.

Solicitors: *Gordon Dodds & Co.; Pettiver & Pearkes.*

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[7] [1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955.

[8] [1950] P. 253; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677.

[9] [1955] P. 99, 119; [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415.

[COURT OF APPEAL.]

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1955
May 16, 18.

[1953 D. No. 41.]

Evershed M.R., Hodson and Parker L.JJ.

Husband and Wife—Divorce—Insanity—Care and treatment—"With-"out any interval"—Detention under temporary order—Discharge —Re-admission 12 days later as voluntary patient—Whether receiving treatment "without any interval"—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*a*), (*d*).
De minimis non curat lex. "*Interval.*"

In 1953 a husband petitioned for divorce on the ground that his wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The wife had been admitted to an institution in February, 1947, and had been detained in pursuance of an order within section 1 (2) (*a*) of the Matrimonial Causes Act, 1950, for six months. The order had then lapsed and she had been discharged and re-admitted 12 days later as a voluntary patient. She had thereafter remained under continuous care and treatment. The commissioner dismissed the petition and the husband appealed:—

Held, that the period between the discharge and re-admission on a voluntary basis could not, for the purposes of section 1 (2) (*d*) be regarded as negligible. The subsequent period of care and treatment on a voluntary basis did not, therefore, follow "without "any interval" the period during which the wife was detained pursuant to the order, and the appeal failed.

Frank v. *Frank* [1951] P. 430; [1951] 2 T.L.R. 404; [1951] 2 All E.R. 503 distinguished.

Quaere. Whether the priciple of de minimis non curat lex ought to be applied in construing the expression "any interval" in section 1 (2) (*d*).

APPEAL from Judge Rewcastle Q.C., sitting as a special commissioner at Leeds.

On September 18, 1937, Joseph Ulric Charlton was married to Annie Isabel Redston. On February 15, 1947, the wife was admitted as a private temporary patient to Holloway Sanatorium, Virginia Water, Surrey, on the application of the husband supported by a recommendation made under section 5 of the Mental Treatment Act, 1930, by two medical practitioners that she should be received into the sanatorium for a period not exceeding six months. A certificate by the visitors of licensed houses appointed by quarter sessions for the county of Surrey was given on February 28, 1947, stating that it was proper that she should continue to be detained as a private temporary patient. On August 14, 1947, at the expiry of the six months' period, the wife was discharged from the sanatorium as "recovered." She returned to her husband, but on August 26 she was re-admitted to the same sanatorium as a private voluntary patient and remained there continuously under care and treatment. On April

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15, 1953, the husband presented a petition for divorce on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The commissioner held that the temporary order followed by the visitors' certificate constituted a detention within section 1 (2) (*a*) of the Matrimonial Causes Act, 1950,[1] but that when the wife left the sanatorium on August 14, 1947, the order had expired by effluxion of time. Consequently, he held that the treatment after re-admission on August 26, did not, for the purpose of section 1 (2) (*d*) of that Act, follow without any interval the period during which she was detained pursuant to the order. He dismissed the petition and the husband appealed. It was conceded for the purposes of the appeal that the original detention was pursuant to an order within section 1 (2) (*a*) of the Act of 1950.

No case other than those referred to in the judgments was cited in argument.

Laurence Pratt for the petitioning husband.
H. G. Bennett for the respondent wife.

EVERSHED M.R. This appeal raises a question of the proper construction of section 1 of the Matrimonial Causes Act, 1950, so far as it relates to what may be broadly called insanity as a ground of dissolution of marriage.

[His Lordship referred to the facts as to the original admission to the sanatorium as a temporary patient and continued:] The period of detention was limited, in accordance with the ordinary practice in such cases, to six months; and it is conceded that there were no circumstances which would have justified any extension of that period. At any rate, no such extension occurred; and on August 14, 1947, the wife was discharged from the sanatorium. She returned to her husband, the petitioner in the suit, but on August 26 she was re-admitted to the same sanatorium as a voluntary patient; and she has since been there continuously, and is there now, under care and treatment.

[His Lordship, having stated further facts and read the

[1] Matrimonial Causes Act, 1950, s. 1: "(1) Subject to the provisions "of the next following section, a "petition for divorce may be pre- "sented to the court either by the "husband or the wife on the ground "that the respondent . . . (*d*) is "incurably of unsound mind and has "been continuously under care and "treatment for a period of at least five "years immediately preceding the "presentation of the petition; . . . "(2) For the purposes of this section "a person of unsound mind shall be "deemed to be under care and treat- "ment—(*a*) while he is detained in "pursuance of any order or inquisi- "tion under the Lunacy and Mental "Treatment Acts, 1890 to 1930 [or "under one of a number of other Acts "specified] . . . (*d*) while he is "receiving treatment as a voluntary "patient under the Mental Treatment "Act, 1930, . . . being treatment "which follows without any interval "a period during which he was "detained as mentioned in paragraph "(*a*) . . ."

relevant provisions of section 1 of the Matrimonial Causes Act, 1950, continued:]

During the period from February 15, 1947, until the expiration of six months (namely, August 14, 1947), the detention in the Holloway Sanatorium was a detention within paragraph (*a*) of section 1 (2), being a detention in pursuance of an order under one or other of the Acts mentioned. From August 26, 1947, the wife has been receiving treatment as a voluntary patient continuously up to the present time; but there is the gap from August 14 to August 26, during which the wife was at home living with her husband. The question upon this appeal is whether that interval of time, in all the circumstances of this case, constitutes an "interval" within the meaning of section 1 (2) (*d*).

At the hearing before the commissioner a point was made on the husband's behalf that the wife's sojourn with her husband should be regarded as being a sojourn with someone who was taking care of her and treating her, in the same way as she would have been cared for had she been in the institution. That suggestion was based, among other things, on the fact that the husband was given certain sedatives with which to quieten her impulses during the time when she was with him; but Mr. Pratt has not felt able in this court (and, if I may say so, he is plainly right) to suggest that, during the 12 days when the wife was with her husband, she could sensibly be regarded as being under care and treatment as a voluntary patient within the meaning of the Act. In those circumstances, Mr. Pratt has been constrained, in effect, to contend that the interval (having regard to the facts which I will mention in a moment) is or should be regarded as being negligible, to the extent that the court may properly disregard it and may say that the wife was under treatment as a voluntary patient "without any interval," to use the language of paragraph (*d*), from the moment when the order ceased to have effect on August 14.

The doctor who had attended the wife at the institution, Dr. Parfitt, gave evidence. He said, in answer to a question put to him in examination in chief, that she was capable of expressing herself as willing or unwilling at the time that she first left the institution. I will read one or two more questions which follow that answer: "(Q) What did you do? (A) The temporary order "was running out, and we decided to make her a voluntary "patient. (Q) How do you make a person a voluntary patient? "(A) The only way is if the person himself or herself is perfectly "willing to become a voluntary patient. (Q) Was she? (A) Mrs. "Charlton was perfectly willing to be a voluntary patient, "although at the same time she was certain we were detaining "her against her will. She was perfectly willing, and was on "parole most of the time, except for the occasional interludes. . . "(Q) Was that," that is, her leaving the hospital on August 14, "pursuant to any arrangement that she should go on trial? "(A) Yes, it was a kind of trial. It was for a fortnight." He

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said that the electrical treatment which she received just before leaving was, in fact, not the sort of treatment that would be given to a person who was being discharged unconditionally and without any arrangement for a return. In cross-examination by Mr. Bennett on behalf of the wife, the following questions and answers appear: "(Q) The fact is that for the period from August "15 to the date of her re-admission on August 26, this woman "was the subject of no order at all? (A) That is so, other than "the fact that we knew she was returning. (The commissioner): "There was nothing legal? (A) No. (Q) Had she not desired "to return on August 26, she need not have done so? (A) She "would have had to have been certified; that would have been "inevitable. (Q) You will know from your experience that there "can be trial periods given to patients who remain the subject of "an order? (A) That is so, yes. (Q) That was not so in this "case, was it, because there was no order in force against her? "(A) There was no order in force against her." In re-examination: "(Q) If the patient had not returned at the end of the "period, what action would you have taken? (A) Mr. Charlton "would have had to have taken the action and called in doctors "to certify Mrs. Charlton. (The commissioner): Supposing he "had not taken any action? (A) Mrs. Charlton's conduct was "such that, if Mr. Charlton had not, someone would have had "to have done, because when she became impulsive she really "was dangerous and suicidal. It would have been quite "inevitable."

Those are the facts; and they disclose a tragic state of affairs in which one cannot help feeling great sympathy not only for the unfortunate wife herself but also for her husband. But I have found it impossible to conclude that, within the fair interpretation of the relevant parts of this section, it can be said that the wife underwent treatment after the termination of the order "without "any interval."

Mr. Pratt has very properly referred the court to cases in which the Court of Appeal has said that, in construing this Act, one must depart from so strict an interpretation of its language as would deprive it of sense and obvious intention. Thus, in *Frank* v. *Frank*,[1] the court came to the conclusion that where a patient who was being detained in an institution in Scotland was moved to an institution in England, the inevitable gap that occurred from the termination of the effectiveness of the Scottish order and the beginning of the effectiveness of the English order, a gap which was occupied in the patient being transported from one institution to the other, could not have been intended to constitute a break in continuity. It was demonstrated in that case that unless such inevitable gaps as were occupied with necessary transit were to be excluded from consideration, one would get from the language of the Act a result which could not

[1] [1951] P. 430; [1951] 2 T.L.R. 404; [1951] 2 All E.R. 503.

possibly have been within the intention of its terms. But, although such a very strict construction of the language must be rejected if it is necessary to do so to make the terms of the section effective, it seems to me that that cannot justify giving to the section a construction not only so liberal but, as I think, so loose as to amount to the substitution for the language Parliament has used of some different language. Parliament has said "without "any interval"; and the argument of Mr. Pratt would, I think, compel us to interpret the section as though Parliament had said "without any substantial interval." But we are concerned with the language Parliament has used, and not with some other language which one might think, if it had been used, would have enabled us in the present case to avoid a possible hardship.

Mr. Pratt put his case also on the basis that, in all the circumstances, this interval of 12 days might be disregarded by application of the principle de minimis non curat lex. But I doubt whether it is legitimate to apply that principle in the construction of this section. In expressing that doubt I am indeed doing no more than echoing the language which Lord Greene M.R. used in this court in 1944 in *Safford* v. *Safford*.[2] In that case, Lord Greene M.R. said, in terms, that he doubted whether the principle could properly be applied. He said[3]: "I am very doubtful whether the principle of de minimis ought to "be applied. If detention means detention in a physical sense "it is interrupted by four days' absence just as much (though "not for so long) as by forty." In that case, the question was whether the detention had been "continuous." There had been, in fact, during certain periods actual physical absences from the place where the detention had occurred, although the orders for detention had still remained in operation; and it was pointed out by the Court of Appeal that detention was to be regarded rather as a status than by reference to the physical fact of being kept under lock and key at a particular place. No question of that kind arises in the present case. The facts are, as I have stated them by reference to the evidence, that during a period, which cannot be regarded as wholly negligible, the wife was living with her husband. The order for her previous detention had ceased to operate, and she had not taken the steps necessary to become a voluntary patient and she did not become a voluntary patient until 12 days had elapsed.

In my judgment, it is not possible, without doing violence to the plain words of this statute, to say in those circumstances that the treatment which followed the termination of the order's operation followed "without any interval"; and, though I repeat my sympathy for both the parties, I fear that no other conclusion is possible than that at which the commissioner arrived. I think, therefore, that the appeal must be dismissed.

[2] [1944] P. 61; 60 T.L.R. 439; [1944] 1 All E.R. 704.

[3] [1944] P. 61, 68.

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HODSON L.J.: I agree. The commissioner, I think, was bound to arrive at the conclusion at which he did arrive. The order lapsed on August 15, 1947, and from that date until the wife was re-admitted on August 26, there was no order in existence at all. On the latter date the wife became a voluntary patient, which she has remained ever since. It is not possible, therefore, for the reasons given by the Master of the Rolls, to say that her treatment as a voluntary patient followed " without any interval " a period during which she was detained under an order. I agree, therefore, that the appeal must fail.

PARKER L.J.: I have come to the same conclusion. From August 26, 1947, up to the date of the petition more than five years had elapsed during which the wife was incurably of unsound mind and was continuously under care and treatment. So far, therefore, the provisions of section 1 (1) (*d*) of the Act apply; but, in the case of a person receiving voluntary treatment under the Mental Treatment Act, 1930, as this wife was, the petitioning husband must show that the treatment as a voluntary patient followed " without any interval " a period during which she was detained. There appears to be no authority as to the meaning of those words " without any interval," but we were referred to a number of cases dealing with the meaning of the word " continuously " in connexion with the phrase " continuously " under care and treatment." Those cases appear to show that, once a person has acquired a status or quasi-status of a person detained or a person undergoing treatment as a voluntary patient, a break in the actual treatment may not prevent a continuation of that status: compare *Safford* v. *Safford*,[4] and a more recent case *Swymer* v. *Swymer*,[5] in particular the judgment of Lord Goddard C.J.[6] They also show that treatment may be said to be continuous even if there is a slight break in it, provided that that break is necessary (for example, in order to transfer the patient from one institution to another institution) and, for this reason, that to hold otherwise would defeat the whole intention of the Act: consider *Frank* v. *Frank*.[7] Further than this the cases do not go.

So far as the present case is concerned, clearly no question of status can arise, because the original order of detention had lapsed and the wife did not become a voluntary patient until 12 days later. Further, it seems to me quite impossible to say that the 12 days' interval in question here was an interval which was necessary for the purpose of her becoming a voluntary patient.

Mr. Pratt finally suggested that the principle of de minimis should be applied. Like the Master of the Rolls in the present case and Lord Greene M.R. in *Safford* v. *Safford*,[8] I share the

[4] [1944] P. 61.
[5] [1955] P. 11; [1954] 3 W.L.R. 803; [1954] 3 All E.R. 502.
[6] [1955] P. 11, 16.
[7] [1951] P. 430.
[8] [1944] P. 61.

doubts as to whether this principle can be applied in such a case as this; but, even if it could, I am quite satisfied that the interval of 12 days could not be brought within that principle. Sympathising, as I do, with the husband, I feel nevertheless that this appeal should be dismissed.

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Appeal dismissed.

Solicitors: *Ridsdale & Son for Heninghem, Armstrong and Ambler, York; Official Solicitor.*

E. D.

[COURT OF APPEAL.]

*LAW SOCIETY *v.* RUSHMAN.

C. A.
1955
May 20.
Singleton, Jenkins and Morris L.JJ.

Legal Aid—Costs—Charge on property recovered—Plaintiff legally aided—Infant plaintiff suing through next friend—Small contribution—£125 paid into court for plaintiff by defendants—Tender accepted by plaintiff after commencement of trial—Settlement approved by judge—Plaintiff ordered to pay £20 towards defendants' costs—Balance of £105 ordered to be paid into county court for benefit of plaintiff—Whether subject to first charge for benefit of legal aid fund—Legal Aid and Advice Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *s.* 3 (4).

An infant plaintiff, suing by her father, brought an action against her employers for damages for personal injuries. She had been granted a legal aid certificate in her own name, her contribution being fixed at £4 10s. The defendants paid into court a sum of £125, which, at the commencement of the trial, with the approval of the judge, was accepted by the plaintiff. The attention of the judge was not directed to the provisions of the Legal Aid & Advice Act, 1949, in respect of the legal aid fund's costs, and he ordered that the money paid in, after the deduction of £20 in respect of the defendants' costs, should be transferred to the county court for the benefit of the infant plaintiff. Subsequently an application to the county court for the payment out to them of the money was made by the Law Society, who claimed that the legal aid fund had a first charge on the sum recovered in the action for the balance of the fund's costs not covered by the plaintiff's contribution. On appeal from the county court judge, who ordered payment out to the plaintiff on her application:—

Held, that the appeal must be allowed, since section 3 (4) of the Legal Aid and Advice Act, 1949, gave to the legal aid fund a first charge on any property (including money) recovered or preserved in any proceedings in respect of the fund's legal costs not covered by the contribution of the person legally aided; and regulation 19 (1) (2) of the Legal Aid (General) Regulations, 1950, vested in the Law Society the right to enforce that first charge. Moreover, in the circumstances, the Law Society was "a person interested" under Ord. 16, r. 13 (2), of the County Court Rules.

Reg. v. *Judge Fraser Harrison, Ex parte The Law Society* [1955] 1 Q.B. 287; [1955] 2 W.L.R. 220; [1955] 1 All E.R. 270 applied.

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Per Singleton L.J. It is most important in the administration of the service given by this Act that the plaintiff should be advised what the position is in a case such as this before a settlement is arrived at.

APPEAL from Judge Dutton Briant, sitting at Brighton County Court.

The following facts were stated by Singleton L.J. in delivering his judgment. The plaintiff, Miss Eileen Joyce Rushman, an infant, was injured when working for the defendants, and on January 25, 1952, suing through her father as her next friend, she issued a writ against them, claiming damages. On May 21, 1952, the defendants paid the sum of £120 into court. Subsequently an application for legal aid was made by the plaintiff's father as her next friend, and on October 29, 1952, a civil aid certificate was granted to the plaintiff "to continue proceedings "by her next friend," and her contribution was assessed at the sum of £4 10s. The acceptance of those terms was given both by the father as next friend and by the plaintiff herself, though the grant of legal aid was to the plaintiff.

On July 16, 1953, the action was in the list at Lewes Assizes to be heard and determined by Havers J., and it was decided at that stage that the plaintiff would accept the sum of £125 paid into court. Havers J. approved the settlement, and after consideration assessed at £20 the amount payable by the plaintiff to the defendants in respect of their costs after the date of the payment in. His order included the following passage: "And it "is further ordered that the sum of £125 aforementioned do "remain in court to abide the taxation of costs, the sum of £20 "or such smaller sum as shall be certified by the district registrar "as payable hereunder by the plaintiff to the defendants shall "be paid out to the defendants . . . and that the balance of the "said sum thereafter remaining in court be transferred to the "Brighton County Court there to be invested applied or otherwise "dealt with for the benefit of the plaintiff Eileen Joyce Rushman "in such manner as the county court in its discretion shall "think fit."

Accordingly, the sum of £105, plus interest, was transferred in due course to the Brighton County Court for the plaintiff's benefit. Subsequently, applications for payment out were made both by the plaintiff and by the Law Society. The latter claimed to be entitled to the money in part satisfaction of their costs under section 3 (4) of the Legal Aid and Advice Act, 1949.[1] On March 2, 1955, the county court judge gave a reserved judgment

[1] Legal Aid and Advice Act, 1949, s. 3 (4): "Except so far as regula- "tions otherwise provide, any sums "remaining unpaid on account of a "person's contribution to the legal aid "fund in respect of any proceedings "and, if the total contribution is less "than the net liability of that fund "on his account, a sum equal to the "deficiency shall be a first charge for "the benefit of the legal aid fund on "any property (wherever situate) "which is recovered or preserved for "him in the proceedings."

ordering the money to be paid out to the plaintiff. The Law Society appealed.

John Macgregor for the Law Society.
J. K. Wood for the plaintiff.

No case was cited in argument other than that referred to in the judgment.

SINGLETON L.J. stated the facts set out above, and continued: There having been an order made for the taxation of the plaintiff's costs under the Legal Aid and Advice Act, 1949, those costs were taxed as between solicitor and client at the sum of £213. That amount was reduced by 15 per cent. under the terms of the Act, and the amount paid out of the legal aid fund was in fact £172 odd. The plaintiff had contributed the sum of £4 10s. in accordance with the terms on which legal aid had been granted, and thus the sum of £167 10s. was due to the legal aid fund.

The order of Havers J. was made on July 16, 1953. Some time afterwards two applications were made, the one being directly opposed to the other, to Judge Archer, who was then the county court judge for the area which includes Brighton. One application was made by the Law Society that the £105 should be paid out to them; the other was an application by the plaintiff that it should be paid out to her. Judge Archer thought that there were difficulties because of the framing and the wording of the order of Havers J., and he adjourned the matter so that it might be mentioned to the judge. Meantime, there came a decision of the Divisional Court in *Reg.* v. *Judge Fraser Harrison, Ex parte The Law Society.*[1] When the Law Society's advisers saw that decision they thought their proper course was to go back to the county court and to ask again for the money to be paid out to them. They returned, and their application was heard by Judge Dutton Briant, who had been appointed as county court judge for that area a short time earlier. The judge also heard the application of the plaintiff, who appeared in person. On March 2, 1955, he delivered a reserved judgment in favour of Miss Rushman, ordering that the money should be paid out to her. Against that decision the Law Society appeals to this court.

[His Lordship read section 3 (4) of the Legal Aid and Advice Act, 1949, and continued:] Property for this purpose includes money; the contrary has not been argued in this court. Thus the effect of section 3 (4) is that if the legal aid fund is out of pocket, any money recovered on behalf of a plaintiff is subject to a first charge for the benefit of the fund if there is a deficiency. Again I emphasize the words "a first charge." It ought to be understood that the legal aid fund is not wholly charitable. It has

[1] [1955] 1 Q.B. 287; [1955] 2 W.L.R. 220; [1955] 1 All E.R. 270.

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served for some years now a good purpose for persons whose financial position is such that they are unable to undertake litigation on the one side or the other unless they have help. Help is provided, and provided out of public funds, and the framers of the Act of Parliament thought it right to say that, if there was a deficiency arising from a person's contribution to the fund, the property recovered in an action should be subject to a first charge for the benefit of the fund.

If a person, with the help of the legal aid fund, obtains £5,000 damages, it is surely only right and proper that some part of those damages should be made available, if there be a deficiency, rather than that the public should bear the cost. There are many cases, no doubt, in which there are no funds available, and the cost to the public of the administration of the Legal Aid and Advice Act must be considerable. In a case such as the present, if the damages recovered amount only to a sum of £105, while the deficiency is £167 10s., it appears to me to be open to the Law Society, who administer the legal aid fund, to claim their first charge on the £105. It is unfortunate for the plaintiff that she did not recover more damages than the deficiency which arose in costs, but that is not the fault of the Law Society or of those who administer the legal aid fund. The £125 might have been taken out of court before there was an application for legal aid, or at a later stage before the case went to trial. Why it was not I do not know; nor do I know anything about the circumstances of the action or the injury, but at the trial the plaintiff was advised to take the £125 out of court. It is most important in the administration of the service given by this Act that the plaintiff should be advised what the position is in a case such as this before a settlement is arrived at. It is disappointing for a plaintiff if she is advised to take £125 out of court, and is not told she will not get a penny by reason of the fact that someone else has a charge over the whole amount, and it may lead some people to think that there is not so much good in the Act of 1949 as there is.

Section 3 (4) of the Act is clear in that it gives a first charge to the legal aid fund in respect of any deficiency there may be, and I should say that the later subsections of section 3 of the Act make it clear that this case is covered. In particular, subsection (5) covers the case of a compromise, as this may be described, although it was a compromise arrived at with the approval of the court.

Regulation 19 of the Legal Aid (General) Regulations, 1950, provides: "(1) Any charge on property recovered or preserved "for an assisted person arising under section 3 (4) of the Act "shall vest in The Law Society. (2) The Law Society may "enforce any such charge in any manner which would be avail- "able if the charge had been given inter partes. (3) Any such "charge affecting land shall be a land charge of class B within "the meaning of section 10 of the Land Charges Act, 1925.

" (4) Subject to the provisions of the Land Charges Act, 1925, all " conveyances and acts done to defeat, or operating to defeat, " such charge shall, except in the case of a conveyance to a " bona fide purchaser for value without notice, be void as against " The Law Society."

In the regulations, as in the Act, care is taken to provide for the protection of public moneys in that way, and to provide a means of enforcing the first charge which is given under section 3 (4). Furthermore, there is no doubt that when circumstances such as these arise the Law Society is a " person " interested " under Ord. 16, r. 13 (2) of the County Court Rules, 1936.

When this matter was before the county court judge he had the help of counsel on one side, but the plaintiff appeared in person. The judge pointed out that he would be very glad if the case was considered elsewhere, but that he hoped, in such an event, the plaintiff would have some help to put her case before the court, as he had been without assistance on her side. Accordingly, it was arranged that she should have legal aid for the purposes of this appeal, and I am very glad that that was done. There were several reasons which led the judge to make an order that the money in court be paid out to the plaintiff. First, I think he was in something of a difficulty in view of the order made by Havers J. The difficulty was created by the fact that section 3 (4) of the Act of 1949 was not drawn to the attention of Havers J. If it was present to the mind of counsel in the case, I think it ought to have been mentioned; it would have saved a lot of trouble. Havers J. having made the order in the terms in which he did, I am inclined to think that thereafter there might have been an application made to him to reconsider the terms of his order under the slip rule, but it may be that no one thought of it until the money was lodged in the Brighton County Court.

Judge Dutton Briant, in the course of his judgment, referred to *Reg.* v. *Judge Fraser Harrison, Ex parte The Law Society*,[2] which was before the Divisional Court, consisting of Lord Goddard C.J., Cassels and Sellers JJ., on January 13, 1955. There the point raised was almost precisely the same as in the present case. Damages had been awarded by Glyn-Jones J., who approved a settlement; the money had been paid into the Liverpool County Court, and an application similar to the present was made. Glyn-Jones J. had said: " I gather that the defendants " have not offered to pay you any costs. We must leave the legal " aid fund to deal with the next friend." Judge Fraser Harrison thought it right not to order that the Law Society's application be granted, because of what Glyn-Jones J. had said. In the Divisional Court, on an application for an order of mandamus, the Lord Chief Justice, in the course of his judgment, made it

[2] [1955] 1 Q.B. 287.

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clear that section 3 (4) gives a first charge to the Law Society, and that the county court judge had no option but to make the order which the Law Society sought.

To my mind, that case is on the same footing as the present case. It is true that there was no representation on behalf of the other party in that case, and some of the questions which have been mentioned before us were not argued there, but I see no distinction between the two cases.

Judge Dutton Briant, giving his reasons for making the order which he made, said: "This case can be distinguished from *Reg.* "v. *Judge Fraser Harrison*[3] in that Havers J. dealt with the "question of defendants' costs and ordered the plaintiff to pay a "sum not exceeding £20 towards the defendants' costs, clearly "with the intention that the plaintiff should receive the balance "of the money. If he had been informed that the effect of his "order was that the defendants would be deprived of the balance "of their costs over £20, and that the rest of the money would "go to the legal aid fund and not the plaintiff, I do not think he "would have limited the plaintiff's liability to £20. Unfor-"tunately, the defendants have had no opportunity of arguing this "point."

It may be that if the judge had realized the result of this, he would have thought it right to let the defendants in the action have more than £20; he might have done; why he should I do not know. That would not have had any effect on the plaintiff, nor would it have benefited her, and I do not think that upon that ground a distinction can be drawn between the present case and *Reg.* v. *Judge Fraser Harrison.*[3]

The next reason given by the county court judge is: "Although the legal aid certificate was granted nominally to the "plaintiff, as she was an infant she was under no personal liability "for costs, and the next friend was joined for the purpose of "meeting any liability for costs, and it is he, if anyone, who is "liable for the deficiency." In the ordinary way, where an action by an infant suing through his or her next friend fails, the order for costs will often be "costs against the next friend." That has no bearing upon this case. Legal aid was granted to the infant; the infant recovered in the action a sum of damages; those damages are subject to a first charge as a sum recovered in the proceedings. It matters not for this purpose whether the plaintiff is an infant or not, in view of the fact that the certificate was granted to the infant, and the first charge is given in respect of the deficiency in those proceedings, which were the proceedings in which the infant had been granted legal aid.

The third reason is: "Section 3 (4) of the Act provides for a "first charge on property recovered 'except in so far as regula-"'tions otherwise provide,' and regulation 19 (2) provides that "the Law Society 'may' enforce such charge. In my opinion

[3] [1955] 1 Q.B. 287.

" this gives the Law Society a discretion as to whether or to " what extent they should seek to enforce the charge." That is a matter for them. I suppose they have a discretion as to how far they will go in these matters, but it is right to say that when they are administering the legal aid fund they are dealing with public funds, and they owe a duty to the public which is at least as high as their duty to anyone else; it is sufficient to say they seek to enforce the first charge which they are given by the Act of Parliament.

Fourthly, the judge said: " That I am bound by the order of " Havers J., and by Ord. 16, r. 13 (4) of the County Court " Rules to administer the fund for the benefit of the plaintiff " within my discretion." It is the form of the order of Havers J. which caused some difficulty; none the less, if the county court judge was satisfied that the order was made without the attention of Havers J. having been called to the section in question, and if the section is clear, I think he ought to have followed it.

Fifthly, Judge Dutton Briant said: " There being conflicting " claims to the fund, I must exercise my discretion, having regard " to the benefit of the plaintiff, and in spite of the contention of " the Law Society that the charge would still attach to the money " in the hands of the plaintiff. I reject the argument that this is " a good reason for refusing payment out to the plaintiff. For these " reasons I order payment out of the whole sum in court to the " plaintiff."

I am not quite sure what that means. If the judge has a discretion, he must exercise the discretion according to law. His duty was to regard the terms of the statute. He must have realized that the order of Havers J. would not have been in that form if his attention had been drawn to the words of section 3 (4) of the Act of 1949. I should think that if the money is still in the county court it would be open to the Law Society to apply now for an injunction to prevent the plaintiff in the action from dealing with it pending the determination of the question; but if this court is satisfied that the Law Society's claim to a first charge is right, it would be idle that there should be further proceedings.

It appears to me for these reasons that the proper course is for this court to allow the appeal, and to say that the order which the Law Society seeks should be made. I wish to add one further observation. Consideration should be given to the framing of an order which will meet the position when a situation of this kind arises; it would save trouble if associates, both on circuit and in London, had this kind of question always present to their minds, for they are able to remind a judge if the position is not brought to his attention by counsel. There are provisions as regards moneys recovered by infants in R.S.C., Ord. 22, r. 14, and other provisions under regulation 16 of the Legal Aid Regulations, which overlap to some extent. There is no difficulty in the working of them provided that some form of order is devised which will cover both sets of circumstances.

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JENKINS L.J. I agree, and find nothing I could usefully add to the reasons my Lord has given for holding that this appeal should be allowed, and that the sum in court should be paid out to the Law Society.

MORRIS L.J. I also fully agree with the judgment which has been delivered by my Lord, and I do not think I could add anything usefully to what has been said.

Appeal allowed.

Solicitors: *Hempsons for Gates & Co., Brighton; Charles Webb & Sons, Brighton.*

A. W. G.

[CHANCERY DIVISION.]

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May 24.
Vaisey J.

* WOODLANDS *v.* HINDS.

[1955 W. No. 307.]

Practice and Procedure—Summary procedure under Order 14A*—Action for specific performance—Alternative claim for damages—Agreement to purchase or to find a purchaser for shares in limited company—"Property" including shares—"Purchase"—R.S.C., Ord. XIVA (S.I.* 1954, *No.* 1728/*L.*25).

An agreement made between the plaintiff and the defendant was evidenced by the following letter dated January 14, 1952, signed by the defendant: "In consideration of your taking up 1,580 . . . "redeemable preference shares . . . in the . . . company, I under-"take either myself to purchase or to find a purchaser . . . for "such of the . . . shares in the company as you may hold on "December 25, 1954, and which by that date have not been "redeemed."

The defendant failed to fulfil the agreement and the plaintiff took out a summons for summary judgment under Order XIVA asking for specific performance or for damages in lieu thereof:—

Held, that, since (1) the order in its revised form applied to cases in which there were alternative claims for damages; (2) "property" included shares in a limited company; and (3) an agreement to purchase or find a purchaser for property was an agreement for the purchase of property within the meaning of the order, the agreement of January 14, 1952, was enforceable under Order XIVA.

SUMMONS under R.S.C., Ord. XIVA.

An agreement was made between the plaintiff and the defendant relating to certain shares in a private company, of which the defendant was a director. The agreement was in the first place oral; but later the defendant furnished a written statement of the terms of the agreement in the following letter, dated January 14, 1952: "*Re Hind & Co.* (*Surrey*) *Ld.*: In considera-"tion of your taking up 1,580 £1 6 per cent. redeemable

" preference shares and 3,160 1s. 0d. ordinary shares in the above " company, I undertake either myself to purchase or to find a " purchaser at par for such of the redeemable preference shares " in the company as you may hold on December 25, 1954, and " which by that date have not been redeemed." The letter was signed by the defendant over a sixpenny stamp.

The plaintiff fulfilled his part of the agreement, and received share certificates for the shares. None of the preference shares was redeemed by December 25, 1954, but the defendant did not perform his part of the agreement, although he recognized the existence of the letter dated January 14, 1952, by various letters written during the year 1954. He paid a sum of £80 to the plaintiff's accountants, who acknowledged it as part payment for the plaintiff's shares in the company.

By the indorsement on the writ the plaintiff claimed for: (1) specific performance of the agreement evidenced by the letter of January 14, 1952; (2) alternatively, damages in lieu of specific performance; (3) damages in any event for delay in performing the agreement or alternatively for failure to perform the agreement; (4) an inquiry as to damages as aforesaid.

The plaintiff took out a summons for summary judgment under R.S.C., Ord. XIVA,[1] on March 29, 1955.

The minutes of order provided that the court, being of opinion that the agreement made on or about January 14, 1952, between the plaintiff and the defendant ought to be specifically performed, and the plaintiff having elected to treat the agreement as repudiated by the defendant, there should be an inquiry as to damages; and that in calculating the damages the defendant should be treated as having paid £80 in part payment under the agreement and the plaintiff as having transferred 80 of the shares comprised therein, and that within 14 days from the date of the master's certificate in answer to the inquiry the defendant should pay to the plaintiff the amount certified to be due in respect of such damages.

The master adjourned the summons into court to determine whether the contract came within Order XIVA.

A. C. Sparrow for the plaintiff.
David Sullivan for the defendant.

[1] The Rules of the Supreme Court (Chancery Provisions), 1954: " 2. For " Order XIVA there shall be substi- " tuted the following Order:— " ' Order XIVA. *Summary Judgment* " ' *in Actions for Specific Performance.* " ' 1.—(1) In any action in the Chan- " ' cery Division commenced by a " ' writ of summons indorsed with a " ' claim for specific performance of " ' an agreement, whether in writing " ' or not, for the sale or purchase of " ' property, with or without alterna- " ' tive claims for damages, for res- " ' cission or for the forfeiture or " ' return of the deposit, the plaintiff " ' may (whether the defendant has " ' appeared or not), on affidavit . . . " ' stating that in his belief there is " ' no defence to the action, apply to " ' the court or a judge for judgment " ' and the court or judge may there- " ' upon give judgment in the action " ' unless the defendant . . . satisfies " ' the court or judge that he has a " ' good defence to the action . . .' "

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Woodlands v. Hinds.

Vaisey J. This summons raises a somewhat curious point arising first, on the proper construction of an agreement which was originally oral, but which has either been reduced into writing or evidenced by a letter dated January 14, 1952, and secondly, on the true construction of the new Order XIVa, which came into operation on January 11, 1955.

The chief difference between the new Order XIVa and the old Order XIVa is that the latter only applied to agreements in writing, whereas the former applies to agreements whether in writing or not. There are also other differences between the two orders, some of which are material for the purposes of the present case. The first is this: the old Order XIVa was headed by the words "Summary Judgment for Specific Performance," but the new Order XIVa is headed with the words "Summary Judgment "in Actions for Specific Performance." Arising from that difference, it is to be observed that the kind of action to which both forms of the order apply is a claim for specific performance of an agreement for the sale or purchase of property, but the new order has put in these words: "with or without alternative claims "for damages, for rescission or for the forfeiture or return of "the deposit. . . ." I think that the difference is reflected or anticipated in the heading of the present order which provides not for summary judgment for specific performance, but for summary judgment in an action for specific performance which, as the rule indicates, may or may not include a number of alternative claims.

The new rule follows closely the words of the old rule, and provides: "the court or judge may thereupon give judgment in "the action unless the defendant . . . satisfies the court or "judge that he" is entitled to defend. I think that the new Order XIVa must, in order to make sense, be held to cover a case in which there are alternative claims to the main claim for specific performance. That is the position here. The plaintiff has elected to treat the agreement in question as repudiated and is asserting a claim for damages, which is one of the claims set out in the indorsement to the writ.

Another point taken, and rightly abandoned, was that property here means only real property, or, at any rate, chattels real or real property. "Property" is obviously a word of the widest possible import and includes personal property and real property and certainly includes the shares in a limited company.

The agreement in question, either as expressed in or evidenced by the letter of January 14, 1952, consists, so far as material, of an undertaking by the defendant either himself to purchase or to find a purchaser at par for certain preference shares.

It was alleged that a contract either to purchase or to find a purchaser at a fixed price for property is not an agreement for the sale or purchase of property, and that the alternative claims which are mentioned in the new order do not include an alternative claim to find a purchaser as an alternative to an agreement

to purchase. There are several answers to that. The first is that the agreement is an agreement for sale or purchase of property, even though it contemplates that the purchase will be effected either by the contracting party himself, or by somebody whom he can produce before the appropriate date to take it over on the same terms in place of himself. I think that it is none the less an agreement for the sale or purchase of property because the purchaser may be either the contracting party or somebody else. Besides coming within the words of the new order as I have indicated, I doubt whether in such a case as the present the agreement to find a purchaser, as an alternative to becoming a purchaser, really adds anything to the sense of the arrangement. Every contract for the purchase of property may be carried out by the person who agrees to carry it out in his own person or by the substituted action of somebody found by that purchaser to do it.

Nor do I think that on the question of damages—and I assume and hold that this claim for damages comes within the new order—there is any difference; the damages may be, or would be, precisely the same. It can be tested in this way: suppose the purchaser, the signatory of this letter, became bankrupt so that he was wholly unable to perform the contract, or died, I think that if his trustee in bankruptcy or his legal personal representative found somebody else to take over the contract there would be no answer on the part of the vendor to say that he was only contracting with the immediate contractor and would not enter into an agreement with anybody else. The purchaser who is found, that is to say, the purchaser who is ready to purchase these shares at par, must have certain qualifications. In the first place, he must have the money; he must not be a man of straw. Secondly, he must be of full age, and as these are shares in a private company he must possess the necessary qualification to be accepted as a shareholder by the directors of the company.

On all these grounds, in spite of the objections which have been very ably put forward by the counsel for the defendant, I hold that this contract comes within the new Order XIVA.

I must make the order asked for and the costs must be the plaintiff's costs in any event.

Order accordingly.

Solicitors: *Whitelock & Storr; Abbott, Baldwin & Co.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

1955
May 18, 19.

Donovan J.

* GODFREY AND ANOTHER *v.* SMITH AND ANOTHER.

Legal Aid—Costs—Order for costs against aided person—Relevant circumstances—Aided person uninsured driver—Supported by Motor Insurers Bureau—Whether to be taken into account in making order against unsuccessful aided person—Legal Aid and Advice Act, 1949 (12 *& 13 Geo.* 6, *c.* 51), *s.* 2 (2) (*e*).

Road Traffic—Third party insurance—Motor Insurers Bureau.

The fact that an unsuccessful legally aided defendant, to an action for personal injuries incurred in a road accident, is supported by the Motor Insurers Bureau in the proceedings, as he was uninsured at the time of the accident, is a circumstance which is relevant to the question whether an order for costs against the aided person should be a full order or not, and the matter lies within the discretion of the trial judge.

ACTION.

Judgment was entered for the plaintiffs, Arthur Ralph Godfrey and Frederick Charles Humphrey Fowle, in an action in which they claimed damages for personal injuries incurred as a result of a collision between a motor-cycle, on which they were riding, and another motor-cycle ridden by the first defendant, Leslie Edward Smith. The second defendant, the first defendant's father, was dismissed from the suit. At the time of the accident the first defendant was uninsured and he was supported in the action by the Motor Insurers Bureau.[1] It was submitted by the plaintiffs that this was a matter which the judge could take into account in considering whether or not to make an order for the full amount of costs against the first defendant, but the first defendant contended to the contrary.

John D. Stocker for the plaintiffs.
Stephen Chapman Q.C. for the defendants.

DONOVAN J. In the ordinary way I should have made an order here for the sum of £50 by way of costs to be paid by the unsuccessful defendant by instalments of £1 a month, if he so wished, because, apart from one circumstance, there is nothing which would justify a full order. But it appeared that, at the time of this accident, the defendant was driving his motor-cycle uninsured, with the result that these proceedings, so far as he is concerned, are, to use a neutral term, supported by the Motor Insurers Bureau.

It is wrong to say that the bureau indemnifies the defendant against damages and costs. The position is, as I have been told,

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

[1] Pursuant to an agreement dated June 17, 1946, between the Minister of Transport and the Motor Insurers Bureau.

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Donovan J.

that there is an agreement between the bureau, which was set up by the leading insurance companies, and the Minister of Transport, under which the bureau undertook to pay such damages and costs as were awarded in an action against an unsuccessful defendant. I am also told, and I accept it, that the judgment which is obtained by the plaintiff in such a case has to be assigned to the Motor Insurers Bureau, and that they, thereafter, are in a position to execute it against the defendant. Whether they do or not, I do not know, but I should imagine that if the defendant's means increased they would. It is said that that is a circumstance which I ought to take into account in determining what order as to costs ought to be made. Whether one calls it indemnity or by some other name, in fact the unsuccessful defendant will not, in the first instance at least, pay. It will be paid by the Motor Insurers Bureau, pursuant to their agreement with the Minister of Transport.

Whether I take that into account or not seems to me to be largely a matter of discretion, and I look at it in this way: Here is an individual plaintiff who is not legally aided, who has suffered a wrong, and who has been awarded damages in consequence. I think it would be wholly unjust if he had to be out of pocket of a considerable sum because the defendant was legally aided and could not, in the ordinary way, pay the full costs, which I should imagine amount to more than £50. I think justice requires that I should take into account the circumstance of the Motor Insurers Bureau being behind the defendant in the sense I have indicated, as something which is relevant when it comes to the question of making a full order or not. Therefore, I order that the first defendant shall pay the two plaintiffs' costs, as taxed in the ordinary way.

Solicitors: *G. Howard & Co.; Ponsford & Devenish.*

[QUEEN'S BENCH DIVISION.]

*RIALTO CINEMAS LD. *v.* WOLFE.

1955
May 19.

Ashworth J.

Landlord and Tenant—Act of 1927—*Goodwill—New lease—Rent and term—Method of assessment—Cinema—Tribunal without powers to impose condition in terms of section* 5 (5)—*Landlord and Tenant Act*, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 (5).

Premises which for many years had been used as a cinema were let for a term of 21 years from November 21, 1932, at a weekly rent of £50. In August, 1952, the tenants served on the landlord a notice under the Landlord and Tenant Act, 1927, claiming a new lease under section 5 or, alternatively, compensation for goodwill under section 4. The landlord offered to grant a new lease at such rent and for such a term as the tribunal might consider reasonable and that offer was accepted by the tenants. On an originating

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summons for the determination of what was a reasonable rent and term for the new lease:—

Held, (1) that, although the maximum period of 14 years might be appropriate for a new term where the goodwill attached to the premises by reason of the tenant's trade and business was substantial, the length of the new term should bear some relation to the nature and value of such goodwill and a lessor offering a new tenancy in lieu of compensation under section 4 did not commit himself to the grant of a tenancy for the maximum period, nor was such an offer in itself an admission that there was a "goodwill" as distinct from a "normal" rent. During the 21 year term goodwill had attached to the premises and, considering all the circumstances of the case, a reasonable term for the new tenancy was 10 years.

(2) That trading results, especially those for periods reasonably close to the end of the tenancy, might afford assistance in considering future rent, and that, in the circumstances, a reasonable method to adopt was to assess the "goodwill" as distinct from the "normal" rent, on figures estimated from such trading results, subtracting from the total amount of annual estimated takings amounts in respect of (*a*) expenditure, (*b*) interest on capital and in respect of profit (25 per cent. on estimated capital of £12,000) and (*c*) repairs, and to deduct from the sum so obtained such figure as would reduce it to the normal rent. A reasonable method of making that deduction was by way of a percentage which, on the facts, should be 10 per cent.

Whiteman Smith Motor Co. Ld. v. *Chaplin* [1934] 2 K.B. 35, 50; 50 T.L.R. 301 applied.

Per curiam. There is no power conferred on the tribunal under section 4 to deal with the terms of the new tenancy other than those relating to period and rent, and it is not open to the tribunal to introduce into the tenancy in a case arising under section 4 a condition in the terms of section 5 (5).

ORIGINATING SUMMONS adjourned into court for judgment.

By a lease dated November 21, 1932, premises known as the Cameo Cinema, Charing Cross Road, together with the fixtures, fittings, furniture, plant and equipment in and about or belonging to the premises were let from November 21, 1932, for 21 years at a weekly rent of £50 for the premises and £10 for the fixtures, etc. exclusive of rates.

On August 12, 1952, the tenants, the present applicants, served on the landlord, the respondent, a notice under the Landlord and Tenant Act, 1927,[1] claiming a new lease under section 5,

[1] Landlord and Tenant Act, 1927, s. 4: "(1) The tenant of a holding to "which this Part of this Act applies "shall . . . be entitled, at the ter- "mination of the tenancy on quitting "the holding, to be paid by his land- "lord compensation for goodwill if he "proves to the satisfaction of the "tribunal that by reason of the carry- "ing on by him or his predecessors in "title at the premises of a trade "or business for a period of not less "than five years goodwill has become "attached to the premises by reason "whereof the premises could be let at "a higher rent than they would have "realised had no such goodwill "attached thereto: Provided that . . . "(*b*) the tenant shall not be entitled "to compensation in respect of such "goodwill if within two months after "the making of the claim the land- "lord serves on the tenant notice "that he is willing and able to grant "to the tenant, or obtain the grant "to him of a renewal of, the "tenancy of the premises at which "the trade or business is carried on

or, alternatively, £20,000 compensation for goodwill under section 4. On October 10, 1952, the landlord offered to grant a new lease at such rent and for such a term as, failing agreement, the tribunal might consider reasonable and on October 24, 1952, the tenants accepted that offer. On July 16, 1953, the tenants took out an originating summons for the determination of what was a reasonable rent and term for the renewal of their tenancy under the provisions of section 4 of the Act, and the proceedings were referred to a referee for inquiry and report. The referee considered that the landlord, in offering to grant a new lease, impliedly admitted that there was some adherent goodwill and, basing his assessment on the trading figures of the last three years, assessed the rent at £5,000 a year and was of the opinion that a new lease should be granted for 14 years subject to the condition (for determination by the landlord after seven years if the premises were required for re-development) contained in section 5 (5) of the Act.

Further facts and the findings of the referee are more fully stated in the judgment of Ashworth J.

George Avgherinos for the applicants.
Neville Faulks for the respondent.

Cur. adv. vult.

May 19. ASHWORTH J. read the following judgment: The proceedings herein, which arise under the Landlord and Tenant Act, 1927, were begun by originating summons taken out on behalf of the applicants on July 16, 1953. The applicants are a company known as Rialto Cinemas Ld., and in December, 1932, they became assignees of a lease dated November 21, 1932,

" at such rent and for such term " not exceeding fourteen years as, " failing agreement, the tribunal may " consider reasonable . . . (*d*) the " tribunal shall, in determining the " amount of compensation for good- " will— . . . (ii) disregard any value " which is attributable exclusively to " the situation of the premises. (3) " Where an offer of the renewal of a " tenancy by the landlord under this " section is accepted by the tenant, " the rent fixed by the tribunal shall " be the rent which in the opinion of " the tribunal a willing lessee other " than the tenant would agree to give " and a willing lessor would agree to " accept for the premises having " regard to the terms of the lease, but " irrespective of the value of any good- " will which may have become " attached to the premises by reason " of the tenant or his predecessors in " title having carried on thereat a " particular trade or business.

S. 5. " (1) Where the tenant " alleges that, though he would be " entitled to compensation under the " last foregoing section, the sum which " could be awarded to him under that " section would not compensate him " for the loss of goodwill he will " suffer if he removes to and carries " on his trade or business in other " premises, he may in lieu of claiming " such compensation, . . . serve on " the landlord notice requiring a new " lease of the premises at which the " trade or business is carried on to be " granted to him. (5) Every lease " granted under this section shall, if " the landlord so requires, be subject " to a condition that if at any time " after the expiration of seven years " from the commencement of the term " thereof the premises are required " for the purpose of carrying out a " scheme of re-development, the land- " lord . . . may determine the lease " and resume possession . . . upon " payment of . . . compensation."

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whereby premises situate in Charing Cross Road and known as the Cameo Cinema were demised for a term of 21 years from November 21, 1932, at the weekly rents of £50 for the premises and £10 for the furniture and equipment. The respondent, Henry Lucien Wolfe, was not the original lessor, but acquired the freehold subject to the lease. By an order dated July 30, 1953, the matter was referred to a referee for consideration and report, and in pursuance of that order came before Mr. B. Mark Goodman in the month of June, 1954. His report is dated September 16, 1954, and the case was then restored to the list and came before me on May 10 and 12, 1955. Both parties criticised the report. As appears from paragraph (*h*) of the originating summons, which was admitted in the answer, the applicants in August, 1952, served on the respondent a notice claiming a new lease or compensation for goodwill, and in October, 1952, the respondent served a counter-notice offering a renewal of the tenancy under the provisions of section 4 of the Act of 1927, which offer was accepted by the applicants. It was common ground between the parties that the issues which I have to decide are (*a*) for what term not exceeding 14 years the new lease should be granted, and (*b*) what rent should be fixed.

An outline of the history of the cinema is to be found in the report, from which I extract the following passages: "The "premises have been a cinema for many years prior to 1932, "one witness said prior to 1910, and are situated in a central "position with frontages to Charing Cross Road (Nos. 35 & 37), "Bear Street, which leads into Leicester Square and Hunt's "Court. Prior to the applicants' tenancy, the Cinema showed "feature films and was conducted on the lines of an ordinary "suburban cinema by the respondent's father. The applicants "leased the premises with the intention of converting it into a "News Theatre, as soon as the existing advance bookings of "films, which bookings they had to take over, ceased. Originally "there were 489 seats with licensed standing room for 80 persons. "Shortly after the applicants' tenancy begun, the seating was "slightly rearranged and the number of seats reduced to 464. "The main entrance was in Charing Cross Road, but there was "another entrance in Bear Street. On April 17, 1941, the "premises sustained bomb damage and ceased to be open as a "cinema. Various notices under the War Damage Acts were "served by the parties and from October, 1942, to some date "in 1944 the premises were used as a fun fair. In 1944 a licence "was obtained by the applicants to carry out temporary repairs, "and on August 6, 1945, the premises were reopened by the "applicants as a News Theatre. As the furniture, etc. had been "damaged or removed, the applicants had to repair, refurnish "and re-equip the premises, and by agreement the £10 a week "rent for furniture, etc. ceased and the applicants paid £50 a "week only. As a result of the bomb damage, the seating on "reopening was reduced to 414 and the licensed standing room

" from 80 to 35. Subsequently the seating was reduced to 403 " seats through the applicants installing a big screen. The audi- " torium had to be shortened because the projection room which " had been in a gallery had to be rebuilt on the ground floor, and " the Bear Street entrance was demolished and no longer exists."

It is convenient to mention here three matters which were the subject of agreement before the referee and are referred to in his report: " After some discussion the parties agreed further (1) that " the rent was to be assessed for an unfurnished and unequipped " cinema with its present seating capacity of 403 seats. (2) that " if at any time during the currency of the lease to be granted " the landlord obtains a licence to restore the cinema to its former " condition with a seating capacity of 464 or thereabouts, the rent " was to be reassessed. Mr. Faulks for the landlord stated the " latter was willing and anxious to restore the cinema when the " necessary licences can be obtained. (3) that in the absence of " agreement between the parties on the rent after restoration, " the matter was to be referred to me again." I should point out that in the course of the hearing before me it was stated without dissent on the part of the landlord that not only was he willing and anxious to restore the cinema, but that the new lease would contain a positive obligation on his part to do so when the licences were obtained.

Although the two issues now before me, namely, the issues as to the term of the new lease and as to the rent payable under it, are distinct, they cannot in my view be treated in isolation. The question what is a reasonable rent for the applicants to pay must be considered in relation to the period during which they are to be tenants, and I think it preferable to deal with the question of the term first.

Proviso (*b*) to section 4 (1) of the Act of 1927 enacts, in effect, that the tenancy is to be " for such term not exceeding 14 years " as, failing agreement, the tribunal may consider reasonable." In the present case agreement as to the term was not reached, the applicants seeking the full period of 14 years and the respondent contending that a 7 years' term is enough. The referee did not adopt either view, but recommended a term of 14 years subject to a condition in the terms provided by section 5 (5) of the Act, which reads as follows: " Every lease granted under this section " shall, if the landlord so requires, be subject to a condition that " if at any time after the expiration of seven years from the " commencement of the term thereof the premises are required " for the purpose of carrying out a scheme of re-development, the " landlord, on satisfying the tribunal that the premises are so " required, and on giving not less than twelve months' notice in " writing to the tenant, may determine the lease and resume " possession of the premises upon payment of such compensation " as the tribunal may determine to be the value of the unexpired " residue of the term of the lease."

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It was argued for the applicants that in the present case, which arises under section 4, there was no justification for introducing a condition applicable to a case arising under section 5. In support of this argument reference was made to subsection (2) of section 5, by which the tribunal is expressly empowered to order the grant of a new tenancy for such period not exceeding 14 years and on such terms as the tribunal may determine to be proper. No power is conferred upon the tribunal by section 4 to deal with the terms of the new tenancy other than those relating to period and rent, and for my part I do not think that it is open to the court to adopt the course recommended by the referee. Mr. Neville Faulks, who appeared for the respondent, did not seriously challenge the argument put forward on behalf of the applicants on this point, but did not in any way concede that a term of 14 years was reasonable.

It is to be noted that a term of 14 years is the maximum which in default of agreement can be imposed upon a lessor, and in my view it is reasonable to suppose that a term of that length was considered by Parliament to be appropriate for a case in which the goodwill attached to the premises by reason of the tenant's trade or business was substantial, or at least not open to doubt. In other words, the length of the new term should have some relation to the nature and value of such goodwill, and if a lessor offers a new tenancy in lieu of compensation under section 4, he does not commit himself to the grant of a tenancy for the maximum period of 14 years. In the present case the original lease was for a term of 21 years. As hereinafter appears, I have come to the conclusion that during that period goodwill did become attached to the premises which, but for the offer of a new tenancy, would have entitled the applicants to compensation, but I do not consider that such goodwill was of sufficient value to entitle them to the full term of 14 years by way of renewal. In deciding what term is reasonable I have considered all the circumstances of the case, and I shall deal with some of them in more detail in relation to the question of rent. My conclusion is that a reasonable term is one of 10 years.

So far as rent is concerned, it is convenient to start with a citation from subsection (3) of section 4 of the Act: "the rent "fixed by the tribunal shall be the rent which in the opinion of "the tribunal a willing lessee other than the tenant would agree "to give and a willing lessor would agree to accept for the "premises having regard to the terms of the lease, but irrespec- "tive of the value of any goodwill which may have become "attached to the premises by reason of the tenant or his pre- "decessors in title having carried on thereat a particular trade or "business." Although that subsection was not considered by the Court of Appeal in the leading case of *Whiteman Smith Motor Co. Ld.* v. *Chaplin*,[1] the judgments, in particular that of Maugham

[1] [1934] 2 K.B. 35; 50 T.L.R. 301.

L.J., contain statements of principle which are clearly applicable. As appears from the report,[2] certain matters which may favourably affect a business are none-the-less to be excluded from the valuation of the goodwill contemplated in section 4. For example, any value attributable exclusively to the situation of the premises must be excluded, subject however to the observations of Scrutton L.J. in *Simpson* v. *Charrington & Co. Ld.*[3] Further, an addition to the value due to an increase in the population, or a change in trading conditions, or a shortage of suitable premises, or other like conditions, must also be excluded. Further, profits due to the reputation of the proprietor, or to the personal skill or ability of the persons or the assistants employed in the business, must be excluded. Lastly, value which is largely or wholly due to the custom of persons who come to the premises simply because of their proximity, or because they lie on a line of route which the customers frequent, must be excluded.

Maugham L.J.[4] defined net adherent goodwill as meaning the goodwill, if any, which will remain attached to the premises, not including the site goodwill, that is, irrespective of customers who would come to a new tenant starting a new business, simply because of their convenient situation. Maugham L.J.[5] stated the problem in the following terms: "It follows that the real "question to be answered is: What is the addition to the value "of the premises in the hands of the landlord by reason of the "'net adherent goodwill'? This is in effect the same thing as "saying that the compensation to which the tenant would be "entitled is the difference, if any, between: (*a*) the value of the "reversion if the landlord were to let the premises at the goodwill "rent, i.e., for the purpose of the same business as that which "the tenant has carried on, and (*b*) the value of the reversion "if he let the premises at the normal rent."

In my judgment the problem in the present case is to fix what Maugham L.J. termed the normal rent, and the answer can best be ascertained by deciding first what is the goodwill rent, and then by deducting from it such figure as will reduce it to the normal rent. This appears to have been the method adopted by the referee and I agree with it, although I am unable to agree with the result as found by him.

Part of the argument before me centred upon the question of the material which the court is to take into consideration in fixing the rent. The respective expert witnesses adopted widely differing approaches. On the one hand, Mr. Levy on behalf of the applicants relied on his own experience and put forward estimates of his own which were in no way based upon the past trading results. On the other hand, Mr. Daly based his evidence on the past results, subject to their being adjusted in the light

[2] [1934] 2 K.B. 35, 48.
[3] [1934] 1 K.B. 64, 79; 50 T.L.R. 46 (affirmed in part [1935] A.C. 325; 51 T.L.R. 270).
[4] [1934] 2 K.B. 35, 48.
[5] Ibid. 49.

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of his criticisms. Originally he relied on the relevant accounts for the three years ended respectively on March 25, 1951, March 30, 1952, and March 29, 1953, but in the course of the hearing before the referee, his attention was called to the draft accounts which had been prepared for the year ended March 28, 1954, and which were subject to audit. As the original lease terminated in November, 1953, these last-mentioned draft accounts covered a period during a considerable part of which the lease was still in being.

Warnings as to the risk of drawing wrong conclusions from figures of profit have been given on more than one occasion: see the judgments of Maugham L.J. in the case already cited,[6] and see also *British & Argentine Meat Co. Ld.* v. *Randall.*[7] So long as those warnings are kept well in mind, I am of opinion that trading results, especially trading results for periods reasonably close to the end of the tenancy, do afford assistance in considering the problem of rent for the future. I agree with counsel for the respondent that a witness, however experienced, who has not taken into account any of the trading figures, carries less weight than one who has at least considered them, and I am not surprised to find that the referee preferred Mr. Daly to Mr. Levy.

It is hardly necessary to state that, apart from the trading figures, there are other relevant factors. In the present case one of the most obvious is the site of the premises. The Cameo Cinema is in Charing Cross Road, close to Leicester Square, and is therefore in a position to attract a considerable volume of casual trade. Another factor (on which the evidence was conflicting) relates to the nature of the entertainment and its capacity to create goodwill. The Cameo Cinema has, since the year 1935 and subject to war-time interruption, been run as a News Theatre, with programmes made up of short films, the whole performance lasting approximately one hour. It is therefore an entertainment which is well adapted to suit the requirements of persons who have time on their hands and are prepared to spend it in a cinema without minding much which particular cinema it is. As against this there was evidence to show that persons do tend to go to a particular cinema, even a News Theatre, for its own sake and the substantial sums spent annually in advertisement must, I think, have had some effect in fostering and maintaining goodwill.

It was contended for the applicants that the respondent's counter-offer of a renewed tenancy in reply to the claim for compensation under section 4 constituted an implied admission that net adherent goodwill had been created by the applicants. In my view this contention, which appears to have been accepted by the referee, goes too far. Just as a counter-offer does not commit a lessor to an admission that the maximum term of 14 years is reasonable, so also it does not commit him to an admission that there is a "goodwill" rent as distinct from a "normal"

[6] [1934] 2 K.B. 35, 50, 51.

[7] [1939] 4 All E.R. 293.

rent. The most that can be said of a counter-offer is the comment that a lessor, who has premises to let for which there are would-be tenants in competition, is hardly likely to make a counter-offer if he is confident that no net adherent goodwill has been created.

Proof of the creation of net adherent goodwill must frequently be a matter of difficulty for a lessee and the difficulty no doubt varies in degree according to the nature of the trade or business. In the case of a cinema carried on as a news theatre in the heart of London the difficulty is pronounced. On behalf of the respondent Mr. Daly expressed the view that no such goodwill had been created, but the referee did not accept this view. Nor do I. Having considered all the available evidence, I have reached the conclusion that the applicants have established that by their efforts, especially in the post-war period, some goodwill was created of which the respondent would receive the benefit, but (as will appear) I do not think that such goodwill calls for any substantial reduction in what Maugham L.J. described as the normal rent.

On the assumption that the past trading results are relevant to the question of future rent, the problem arises of how such figures are to be applied. Various suggestions were canvassed, namely, that one should look only to the figures of the financial year in the course of which the lease terminated; alternatively, that one should take an average of the results of recent years. The last completed accounts seen by Mr. Daly were those for the year ended March 29, 1953 (some eight months before the termination of the lease), and his evidence regarding future rent was therefore open to the criticism that he had not taken into account the change in circumstances revealed by the draft accounts for the year ended March 28, 1954. It appears from the shorthand note that a good deal of somewhat hasty arithmetic was carried out in the course of his evidence, and it is by no means easy to follow all the calculations recorded in the note as having been made by Mr. Daly and by counsel and by the referee.

The referee was favourably impressed by Mr. Daly as a witness, and I see no reason to take a different view. I have therefore thought it right to adopt in principle his method of arriving at a figure for future rent, but I have adopted somewhat different figures in the process and, as already stated, I have also decided that some allowance ought to be made for net adherent goodwill. I accept the referee's finding that the year 1954 was exceptional throughout the cinema trade and that the decline in takings then experienced generally might fairly be regarded as over. I have not overlooked the fact that the seating accommodation is now 403 instead of 464, but it was agreed on behalf of the respondent that the new lease should incorporate an obligation on him to restore the original seating capacity as soon as the necessary licences can be obtained.

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I have considered the trading figures contained in the accounts for the years ended March, 1951, 1952 and 1953, and also the figures in the draft accounts for the year ended March, 1954. From the comprehensive picture presented by all those figures, the following conclusions may, in my judgment, reasonably be drawn: (*a*) that annual takings would amount to £38,000 or thereabouts; (*b*) that annual expenditure, excluding rent and also excluding a sum of £2,000 in respect of management expenses, would amount to £27,900. This figure is arrived at by deducting from a sum of £32,500 the aforementioned sum of £2,000 and a sum of £2,600 in respect of rent which was payable under the original lease and was included in the sum of £32,500. The question whether any and, if so, what deduction should be made in respect of management expenses was the subject of much evidence and argument, to the details of which I do not propose to refer. I consider that the management expenses actually included in the accounts were higher than a potential lessee would reasonably expect to incur, and the deduction of £2,000 is based upon Mr. Daly's evidence. On the other hand, in estimating expenditure at £32,500, I have kept in mind a point made on behalf of the applicants that any increase in rent would entail an increase in rates; (*c*) that a reasonable sum to attribute to the lessee in respect of interest on capital and in respect of profit would be £3,000 per annum, namely, 25 per cent. on an estimated capital of £12,000; (*d*) that a sum of £770 per annum would be a reasonable allowance in respect of repairs, being £500 in excess of the allowance laid down by statute, so as to take account of increased building costs.

These conclusions result in a balance of £6,330, made up as follows:

	Takings (para. (*a*))		£38,000
LESS	Expenditure (para. (*b*))	27,900	
	Interest & Profit (para. (*c*))	3,000	
	Repairs (para. (*d*))	770	31,670
			6,330

This sum of £6,330 represents my view of what Maugham L.J. described as the goodwill rent and there remains for consideration the deduction necessary for the purpose of assessing what he defined as the normal rent. I am conscious that the result must on any view appear arbitrary, and that (as Maugham L.J. said [8]) it cannot be more than an intelligent guess, although I hope that at least it qualifies for that description. In my judgment a

[8] [1934] 2 K.B. 35, 51.

reasonable method of making the deduction is by way of a percentage, and I hold that 10 per cent., namely £630, should be deducted. The result is that I fix the rent at £5,700 per annum.

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Order accordingly.

Solicitors: *Joynson-Hicks & Co.; Eland, Hore, Pattisson, Nettleship & Butt.*

J. F. L.

[PROBATE, ETC., DIVISION.]

*PRACTICE DIRECTION (ANCILLARY RELIEF).

1955 *May* 17.

Husband and Wife—Maintenance—High Court—Ancillary relief—Application out of time—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 44 (1).

In future, applications under Matrimonial Causes Rules, 1950, r. 44 (1), for leave to apply for ancillary relief out of time should be made to a registrar on affidavit.[1]

B. LONG,
Senior Registrar.

Principal Probate Registry.
May 17, 1955.

[1] This direction replaces the Practice Direction of May 21, 1954 ([1954] 1 W.L.R. 898; [1954] 2 All E.R. 349), and is the result of the judgment of Lord Merriman P. in *Simmonds* v. *Simmonds* [1955] 3 W.L.R. 129.

[CHANCERY DIVISION.]

**In re* BONE, DECD.
BONE *v.* MIDLAND BANK LD. AND OTHERS.

1955 *May* 18, 19.

Danckwerts J

[1953 B. 5282.]

Family Provision—Limitation—Extension of time—Question of whether a person had an interest in the estate, not having been determined at the time when representation first taken out—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *as amended by Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64), *s.* 2 (1) (1A).

The plaintiff, the widow of a deceased testator, probate of whose will was granted on May 8, 1953, was dissatisfied with the provision made for her under the will. The plaintiff's solicitors were well aware of the six months' time limit prescribed for the making of an application under the Inheritance (Family Provision) Act, 1938, but refrained from taking immediate steps to issue a summons because they understood that an originating summons was to be taken out by the executors raising a question of the construction

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of the testator's will the answer to which might materially affect the widow's interest under it. On November 10, 1953, just outside the time limit, the plaintiff's solicitors took out a summons under the Act of 1938. A construction summons was never taken out, although until January, 1955, it was understood that such would be the case.

The plaintiff now asked for an extension of time within which the summons could lawfully be taken out for the purposes of the Act:—

Held, granting the application, that the circumstances of the case fell directly within section 2 (1A) (*b*), and that accordingly, the court had jurisdiction to and would extend the time for lawfully taking out the summons until the expiration of November 11, 1953.

In re Greaves, decd. [1954] 1 W.L.R. 760; [1954] 2 All E.R. 109 distinguished.

ADJOURNED SUMMONS.

The plaintiff widow of a testator, who died on February 11, 1953, being dissatisfied with the provision made for her under her husband's will was minded to take out a summons under the Inheritance (Family Provision) Act, 1938,[1] asking for increased provision to be made for her out of his estate. Probate of the testator's will was granted on May 8, 1953, and, accordingly, the time prescribed by the Act within which such an application could be made expired on November 7 or 9, 1953 (November 8 being a Sunday). Shortly after the testator's death the plaintiff's solicitors were informed by solicitors acting on behalf of the executors that, on the advice of counsel, an originating summons would be taken out for the determination of the question whether the plaintiff took a life interest in the part of the testator's estate representing the assets of his business. Accordingly, the plaintiff's solicitors took no immediate steps to take out a summons under the Act of 1938, for the need for such action would depend on the outcome of the construction summons to be taken out by the executors.

The plaintiff's solicitors were well aware of the six months' time limit prescribed by the Act of 1938 and became anxious when no construction summons was taken out before the long vacation of 1953. It was still anticipated, however, that a summons would be taken out by the executors and this view continued to be held until January, 1955, when counsel advised the executors contrary to the opinion which had originally been given by other counsel, that there was no doubt about the effect

[1] Inheritance (Family Provision) Act, 1938, s. 2, as amended by Sch. III to the Intestates' Estates Act, 1952: "(1) Except as provided by "the following provisions of this sec- "tion or section four of this Act, an "order under this Act shall not be "made save on an application made "within six months from the date on "which representation in regard to "the deceased's estate is first taken "out. (1A) If it is shown to the "satisfaction of the court that the "limitation to the said period of six "months would operate unfairly,— ". . . (*b*) in consequence of a question "whether a person had an interest "in the estate, or as to the nature of "an interest in the estate, not having "been determined at the time when "representation was first taken out ". . . the court may extend that "period."

of the will and that the plaintiff was not entitled to a life interest in the assets of the testator's business. Accordingly no summons was taken out by the executors.

In the meantime, on November 10, 1953, the plaintiff's solicitors had taken out a summons under the Act of 1938.

The plaintiff now asked for an extension of time within which the summons could lawfully be taken out for the purposes of the Act.

Geoffrey Cross Q.C. and *Raymond Walton* for the plaintiff.

Nigel Warren for the first and second defendants, the executors.

B. S. Tatham for the third defendant, a beneficiary.

The case cited in argument is referred to in the judgment.

DANCKWERTS J. [having stated the facts:] In these circumstances, the plaintiff asks for an extension of time within which the summons can lawfully be taken out for the purposes of the Act. This application is not opposed by the executors, but it is opposed by the last defendant, who is joined as a beneficiary because she appears in a representative capacity on behalf of a class and feels it her duty therefore to put forward such arguments as shall be made against the granting of the application.

I have been referred to the decision of Roxburgh J. in *In re Greaves*.[1] In that case, apparently, there was a mistake by the solicitors for the plaintiff in the sense that it appeared that they were ignorant of the time limit. There had been negotiations in that case which might have avoided the necessity for starting any proceedings at all, but they apparently fell through and when the application was made it was two months out of time. Roxburgh J. held that the error was due to the mistake of the solicitors and as that was not a circumstance affecting the administration or distribution of the estate, he felt bound to refuse the application.

In the present case, it is true there has also been a mistake by the solicitors. There is that common feature between the two cases. But the mistake in the present case was of a different nature for the solicitors were apparently well aware of the date by which the summons ought to have been taken out, as well as the provisions of the amendment in the Act of 1952. It arose because the solicitors for the plaintiff were kept waiting by the executors' solicitors, who had led them to suppose that some proceedings would be started by the executors for the construction of the will. In one sense that is not a complete answer because it does not prevent the plaintiff starting her proceedings and having them adjourned pending a decision on the originating summons taken out by the executors.

[1] [1954] 1 W.L.R. 760; [1954] 2 All E.R. 109.

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Danckwerts J.

On the whole, it seems to me that this is a case in which it would be a hardship if the time were not extended. I think that applications of this nature must be considered upon the particular facts in each case, and it is difficult to see that there is any general principle governing them except in so far as it is laid down in the provisions of the Intestates' Estates Act, 1952. In my judgment the present case falls directly within the words of sub-paragraph (*b*): "in consequence of a question whether a person "had an interest in the estate, or as to the nature of an interest "in the estate, not having been determined at the time when "representation was first taken out." It seems to me that there was a "question" in this case, and that it had "not been "determined." Therefore, I have power to extend the time and in my view it is a case in which I should extend the time. Accordingly, I will extend the time until the expiration of November 11, 1953.

Order accordingly.

[His Lordship directed that the plaintiff should pay the costs of all the defendants as between party and party, and that the first and second defendants should receive their costs as trustees according to the new form. Any difference between party and party costs and solicitor and client costs in the case of the third defendant to be paid out of the estate.]

Solicitors: *Bell, Brodrick & Gray; Waterhouse & Co. for Coleman & Co., Hove; Trotter, Leaf & Pitcairn.*

J. A. G.

[COURT OF APPEAL.]

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May 25.

* OTTWAY *v.* JONES.

[Plaint No. K. 4384.]

Evershed M.R., Hodson and Parker L.JJ.

Costs—Costs follow event—Discretionary remedy sought—Jurisdiction to order successful defendant to pay plaintiff's costs—Rent restriction—Possession application—Tenant causing nuisance—Landlord's application for possession dismissed—Tenant ordered to pay landlord's costs—Jurisdiction to make order—County Court Rules, 1936, *Ord.* 47, *r.* 1—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1), *Sch. I* (*b*).

Landlord and Tenant—Rent restriction. Court of Appeal—County court—Appeal from.

The plaintiff sought to recover possession from the defendant of a dwelling-house within the Rent Restriction Acts on the ground that the defendant had been guilty of conduct which was "a "nuisance or annoyance to adjoining occupiers" within paragraph (*b*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The plaintiff's particulars

of claim were dated October 23, 1954, and the case was not heard until March, 1955. The county court judge held that the plaintiff had established that on three occasions, the last of which was in June, 1954, the defendant's conduct had amounted to a serious "nuisance or annoyance." The judge refused to make an order for possession but he ordered the defendant to pay the plaintiff's costs:—

Held, (1) that, although the terms of Order 47, r. 1, of the County Court Rules, 1936,[1] appeared to put no limit upon the way in which a county court judge could exercise his discretion as to costs, in the ordinary case, where a defendant had been wholly successful, it was not a proper exercise of the judicial discretion to order such a defendant to pay the plaintiff's costs; and that such an order would be one upon which an appeal would be entertained by the Court of Appeal.

(2) But that, in a possession application under the Rent Acts, the plaintiff having established facts giving the court jurisdiction to make an order, it might then withhold relief by reason of matters of which the plaintiff had had no knowledge, and, accordingly, there was no reason for limiting the judge's discretion as to costs; and that the order as to costs in this case should not be interfered with.

Foster v. *Great Western Railway Co.* (1882) 8 Q.B.D. 515 and *Andrew* v. *Grove* [1902] 1 K.B. 625; 18 T.L.R. 455 distinguished.

APPEAL from Judge Elder Jones, sitting at Wandsworth County Court.

The plaintiff, Harry Frederick Ottway, had let the top floor of No. 84 Mount Ararat Road, Richmond, being premises within the protection of the Rent Restriction Acts, to the defendant, William Jones. The plaintiff had served a notice to quit dated July 16, 1954, on the defendant, and on October 23, 1954, started these proceedings to recover possession. The particulars of claim alleged that the defendant had been guilty of conduct which was "a nuisance or annoyance to adjoining occupiers" within the First Schedule, paragraph (*b*), to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Particulars were given of a number of acts on the part of the defendant of which the plaintiff complained.

The case did not come on for hearing until March, 1955. The judge then found that the plaintiff had proved three incidents which amounted to a nuisance and annoyance, but he held that as the last of those incidents had occurred in June, 1954, it would be harsh to make an order for possession. He directed the defendant to pay the plaintiff's costs. The county court judge's judgment is fully stated in the judgment of Evershed M.R.

The defendant appealed against the order as to costs.

Desmond Vowden for the defendant.
Harry Lester for the plaintiff.

[1] County Court Rules, 1936, Ord. 47, r. 1: "Subject to the provision "of any Act or Rule, the costs of "proceedings in a county court shall "be in the discretion of the court;".

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The following decisions were referred to in argument in addition to those referred to in the judgment: *Hong* v. *A. & R. Brown Ld.**; *Westgate* v. *Crowe*†; *Lloyd Del Pacifico* v. *Board of Trade*.‡

EVERSHED M.R. This is an appeal, solely upon the question of costs, from a decision of a county court judge. Whereas under the rules applicable to the Supreme Court it would require leave, prima facie, to appeal to the Court of Appeal on a question of costs only, that provision does not find a place in the County Court Rules. The relevant rule now is Order 47, r. 1: "Subject "to the provisions of any Act or rule, the costs of proceedings "in a county court shall be in the discretion of the court"; and then follows a proviso relating to executors, and the like, which has no application to the present case. There appears to be no provision in the present County Courts Act, 1934, directed to this matter. It may, however, be relevant to observe that the provisions of the Judicature Act of 1925 as to costs—which relate in terms to the Supreme Court—are found, inter alia, in section 50 of that Act: "Subject to the provisions of this Act "and to rules of court and to the express provisions of any other "Act, the costs of and incidental to all proceedings in the "Supreme Court, including the administration of estates and "trusts, shall be in the discretion of the court or judge, and the "court or judge shall have full power to determine by whom and "to what extent the costs are to be paid."

I have read that section as lending (as I think) some support to the view that, if regard is had only to the terms of Order 47, r. 1, it would appear to rest entirely in the discretion of the county court judge by whom the costs of any proceedings should be paid, even though the person ordered to pay the costs had in substance or in fact been wholly successful—a view which again, I think, is supported by the reasoning in the speeches in the House of Lords in *Donald Campbell & Co. Ld.* v. *Pollak*[1] (see particularly the language of Cave L.C.).

But although the terms of the rule on the face of them appear to put no limit upon the way in which a judge exercises his discretion as to costs, there is, I think, no doubt that, in what I will call (and I will later define what I mean by the phrase) the ordinary case, where there is a decision to the effect that a defendant has been wholly successful, it is not a proper judicial exercise of the discretion to order such a defendant to pay the plaintiff's costs. That the judge may deprive the successful defendant of the costs which prima facie he would expect to recover is another matter. But decisions to which our attention has been drawn by Mr. Vowden for the defendant (of which the

* [1948] 1 K.B. 515; [1948] 1 All E.R. 185; sub nom. *Hong* v. *Brown and Runcimans*, 64 T.L.R. 132.

† [1908] 1 K.B. 24; 24 T.L.R. 14.

‡ (1930) 46 T.L.R. 476.

[1] [1927] A.C. 732, 811, 812.

last one cited, *Foster* v. *Great Western Railway Co.*,[2] in this court, is an example) do, I think, undoubtedly establish as a general proposition, in what I have called the "ordinary" case, that it is not a good exercise of judicial discretion to order a successful defendant to pay the plaintiff's costs; so that such an order would be one upon which an appeal in this court would be entertained. Nevertheless, since the matter of costs is so much a matter of discretion it is equally true to say that the Court of Appeal will entertain appeals on matters of costs with great caution.

When Mr. Vowden first opened this case it looked to me, I must confess, very much as though there had been here an error on the part of the county court judge in what I have called the judicial exercise of the powers vested in him; for this was a case in which the plaintiff sought an order for possession of his premises which were in the occupation of the defendant, who admittedly had the protection of the Rent Acts; and the plaintiff failed to get the order which he sought or, indeed, to get any relief such as he prayed against the defendant. Nevertheless the judge, quite deliberately (because his attention was particularly drawn to the matter), ordered the defendant to pay the costs of the unsuccessful plaintiff.

I propose to read the whole of the note of the county court judge's judgment with which we have been supplied, because it states the facts of the case and also includes an expression of the judge's grounds for making the order as to costs which he did. The judgment is as follows: "I find that the plaintiff has become "psychopathic about the activities of the defendant not perhaps "without reason—and he sees an enemy under every bush. "Almost anything annoys him and is a nuisance, so I have to "take his evidence with great caution. But I am satisfied that "there were serious incidents on 2nd, 3rd May, 1953, and in "June of 1954, i.e., drunkenness, bullying behaviour frighten-"ing the plaintiff, and urinating, and unpardonable bullying "behaviour over the shed. Also malicious teasing plaintiff by "turning off water. I think other incidents of water are quite "unproved and are imaginary, and the objection to the fires and "the dog are similar. Only those three incidents are proved to "my satisfaction and are nuisance and annoyance. Defendant "is a liar, and is not to be trusted at all. I find him a bully and "that he did try (and successfully) to dominate the tenants but "plaintiff certainly provoked. As all three incidents long ago, "not reasonable to order possession. Can't make suspended "order for possession usefully. No order for possession, but as "nuisance and annoyance established defendant pay plaintiff's "costs Scale 2. Note. Mr. Vowden asked me if my order as "to costs was per incuriam, or did I mean it. I told him that "I did mean it; that I had decided it was unreasonable to make

[2] (1882) 8 Q.B.D. 515.

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" an order because the three incidents which I considered serious " were long ago. But that I found his client had been a ' nuisance " ' and annoyance,' and that, had this been a claim analogous to " an action for trespass and an injunction where damages could " be given in lieu of an injunction," and then there appears " (sic, in lieu of order for possession)," which I am not quite sure that I follow, but it may be " secus, in lieu of an order for " possession "—" then I would have awarded damages. I was " satisfied that the case was made out sufficiently to carry costs, " but in the circumstances it seemed to me the extreme penalty " of eviction of the defendant would be harsh."

To that narrative in the judgment I only desire to add very little, but that little must, I think, be added. It will be apparent that the nature of the case which the plaintiff set out to prove was that the defendant had acted in such a way as to cause a nuisance and an annoyance. That is a reference to the First Schedule to the Act of 1933, para. (*b*), " the tenant . . . has " been guilty of conduct which is a nuisance or annoyance to " adjoining occupiers, or has been convicted of using the premises " or allowing the premises to be used for an immoral or illegal " purpose . . ."

The other matter which I must add is this. The case was eventually heard and the judgment pronounced in March of the present year. The proceedings had been begun a great deal earlier, the date on the particulars of claim being October 23, 1954. It will be appreciated that the last of the three episodes which the judge mentioned, and which he said constituted acts of nuisance or annoyance within paragraph (*b*) of the schedule, occurred in June, 1954. We were informed that the hearing of the case was, for one reason or another, postponed—not for a reason for which the plaintiff was in any way at fault, but it was postponed; so that, when the judge heard the case in March, there was nothing proved as having constituted an act within paragraph (*b*) since the previous June. And that is the explanation of the emphasis, which twice occurs in the judgment, on the fact that the incidents had taken place some time ago.

In those circumstances it appeared to me, when we heard the case opened, that what the judge had really decided was this, that, having regard to the distance of time which had elapsed since the last incident of which there had been a valid complaint, it would be unreasonable to make an order for possession: in other words that, in considering the question whether he should make an order for possession, the judge was not influenced by the order for costs which he later made and which he then anticipated. But I am left in a little doubt as to that in view of the last three lines of the notes—" I was satisfied that the case " was made out sufficiently to carry costs, but in the circum- " stances it seemed to me the extreme penalty of eviction of the " defendant would be harsh." And so there was raised and discussed during the course of the argument this question:

whether a judge, in making up his mind whether it was reasonable to make an order for possession, could consider what order for costs he could or would make and allow his decision on reasonableness to be influenced by a forecast in his own mind of the order he would be later likely to make as to costs; or, to put the matter in another way, whether a judge, in considering the reasonableness of an order for possession, could or should consider what order as to costs he would (or, if the appellant is right, could) make, if no order for possession were made. I do not find it necessary to express any final view on the question, for, in all the circumstances of the case, I have come to the conclusion, upon another ground, that we ought not to interfere with the order which the judge made.

I should like to say (what is indeed obvious) that, where a plaintiff in the end fails, it must be a very unusual thing to order the successful defendant to pay the costs; and it would only be in exceptional cases that a judge would think it right to make such an order. Still, this is a matter of discretion; and, unless it is shown here that the judge erred upon some matter of principle, we should not, according to the well-established rules applicable to such matters, vary the discretion of the judge or seek to substitute a discretion of our own.

The basis upon which, in my judgment, this case ought to be decided lies in the peculiar jurisdiction of the court under the Rent Restrictions Acts. It will be convenient to read the opening words of section 3 of the Rent Act of 1933: "No order "or judgment for the recovery of possession of any dwelling-house "to which the principal Acts apply or for the ejectment of a "tenant therefrom shall be made or given unless the court "considers it reasonable to make such an order or give such a "judgment, and either—(*a*)" (which is the relevant paragraph for present purposes) "the court has power so to do under the "provisions set out in the First Schedule to this Act." It will be seen, therefore, that Parliament has erected, so to speak, two fences, both of which a plaintiff must surmount, if an order is to be made in his favour for possession. But the two fences (if I may adhere to the metaphor) are of dissimilar character and structure; for the plaintiff must first of all establish, as a matter of fact or of right, that the court has power to make such an order. In order to do that, where the case falls within paragraph (*a*) of subsection (1) of section 3, the plaintiff has to establish that his case is within one or other of the paragraphs of the First Schedule. In that respect the plaintiff is in the same position as the plaintiff in what I have called (and I will now proceed to define) an ordinary action. In an ordinary action the plaintiff seeks to establish some matter of right, the existence of which depends upon his proving the necessary facts, and then invoking whatever is the appropriate provision of the law. But

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it is a matter of right: if the facts are proved, the right is established. That is the first stage in a rent case where a plaintiff seeks possession.

Having surmounted that fence, however, there is still the second obstacle; but in that case the plaintiff no longer is in the position of one seeking to establish a matter of right: there is no matter of right. When the plaintiff has established his right, that is, he has shown that he is in a position to invoke the jurisdiction, the court has to decide, as a matter of its own discretion, whether the remedy suggested, or indeed any remedy or relief, ought to be given. In determining that matter the court has to exercise a discretion, the character of which has been laid down in language often cited from the judgment of Lord Greene M.R. in *Cumming* v. *Danson*.[3] "the duty of the "judge" he said, "is to take into account all relevant circum-"stances as they exist at the date of the hearing. That he must "do in what I venture to call a broad, common-sense way as a "man of the world, and come to his conclusion, giving such "weight as he thinks right to the various factors in the situation. "Some factors may have little or no weight, others may be "decisive."

It is plain from the nature of that discretion that its exercise may depend upon matters of which a plaintiff might have no knowledge at all before the matter is tried out—circumstances affecting the personal or domestic considerations of the defendant, and the like. It seems, therefore, to me that in a Rent Act case, unlike an ordinary action, the question is not one of the plaintiff seeking to establish some matter of private right which, if he does suceed in establishing it, gives him the palm of victory; and so that, if he fails, as a matter again of right, prima facie at any rate he would expect to have to pay the costs which would be the fruit for the defendant of his victory.

Looked at in that way, I return again to the facts of the present case. From the judgment that I have read, it is quite plain that, though the incidents proved were in number but three, they were incidents of a very startling character; and the reference to the notes of the evidence emphasizes what the judge says, that the defendant, in addition to being a liar and not to be trusted at all, was a bully; he behaved beyond a doubt outrageously on each one of these three occasions. The plaintiff, I understand, is by trade or profession a musician, and plays in the Symphony Orchestra of the British Broadcasting Corporation. He may therefore well be a man of somewhat sensitive nature; and, as the judge says, and as Mr. Lester emphasized, the bullying and extremely vulgar behaviour of the defendant would be likely enough to have a serious effect upon not only the plaintiff's peace of mind but also upon his imaginative faculties; and one may indeed ask, in such circumstances, what could the plaintiff do to

[3] (1942) 112 L.J.K.B. 145, 147; 59 T.L.R. 70; [1942] 2 All E.R. 653.

protect himself? He brought his action. So far as the matter rested on private right and upon his establishing such a case as empowered the court to give him relief, he succeeded. But then the judge, basing himself (and I assume basing himself substantially, if not exclusively) upon the fact that when he tried the matter in March, 1955, no incident had been proved since June of 1954, and after considering no doubt the other circumstances—for example, the circumstances of the defendant's household and family—came to the conclusion, to use his own words, that "the "extreme penalty of eviction would be harsh." But in those circumstances can it be said that this county court judge departed from a due exercise of his judicial duty in dealing with costs, having regard to the circumstance that, the plaintiff having done all he could as plaintiff to establish his cause of action, he nevertheless did not get the relief which it was within the discretion of the judge to give?

I said earlier that to make the defendant (who in the end succeeds in the sense that no relief is ordered against him) pay the costs of the plaintiff (who fails in the sense that no relief is obtained at his suit) requires a strong and exceptional case. But I cannot think that in a rent case such an award of costs must necessarily be in excess either of the powers of the county court judge or of a proper exercise of his judicial discretion.

Reverting to the cases which were cited, it is here, I think, that the contrast appears with such a case as that of *Andrew* v. *Grove*,[4] to which Mr. Vowden also referred. In that case Lord Alverstone C.J., who delivered the leading judgment of the Divisional Court upon an appeal from a county court judge, said[5]: "In my opinion this is a section" (he had referred to section 113 of the County Courts Act, 1888, since repealed) "which enables the county court judge to award costs in the "exercise of a judicial discretion, but to give him that discretion "there must be some right established by the plaintiff." In that case the plaintiff had failed to establish a right, because the defendant set up (as he was entitled to do) the Gaming Acts as an answer to the plaintiff's case. In the present case, however, applying strictly Lord Alverstone C.J.'s dictum, the question of right was successfully litigated by the plaintiff, because he established what he had to set out to prove, namely, power in the county court, by virtue of conduct by the tenant falling within paragraph (*b*) of the schedule, to grant relief, if in all the circumstances the court thought fit to grant it. Beyond that, the plaintiff could not, as a matter of right, establish anything: he could only submit himself to the discretion of the judge. And so again, I think that the case is to be distinguished from the sort of case this court had in mind in the language cited from Brett L.J.'s judgment in *Foster* v. *Great Western Railway Co.*,[6]

[4] [1902] 1 K.B. 625; 18 T.L.R. 455.

[5] [1902] 1 K.B. 625, 627.

[6] 8 Q.B.D. 515, 521.

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to which I have already referred, for the Lord Justice said, in reference to the old Chancery cases of *Witt* v. *Corcoran* [7] and *Dicks* v. *Yates*,[8] "[they] seem to me to show that in the "opinion of the judges in the Court of Appeal, which if it is the "ground of their judgments is binding upon us even although "we did not agree with it, the meaning of Order 55 is that "there should be an absolute discretion over all costs within the "jurisdiction of the High Court, and that the jurisdiction of the "High Court should be precisely what the jurisdiction of the "Court of Chancery was before, and therefore, that where the "defendant has absolutely succeeded no order can be made "against the defendant in favour of the plaintiff for any part of "the costs of the litigation."

In the present case that observation seems to me inapplicable. It cannot, I think, be true to say of the defendant here that he absolutely succeeded. Upon the matter of private right (as I have many times said) he failed: the plaintiff succeeded. And so this case, being within the ambit of the Rent Acts, must be considered, as I think, in the light of the very special provisions of those Acts, and the peculiar nature of the limitations put upon a plaintiff's right to a remedy by virtue of the wide discretion reposed in a judge on the matter of reasonableness. I think it is indeed important, if justice is to be done, that these discretions should be of the widest possible character, and I should be very sorry to limit them. In the present case justice undoubtedly was to my mind done, because I do not see what else the unfortunate plaintiff could do but bring the case to the attention of the court, in an attempt to get a relief from the tempestuous conduct of the defendant. The judge, having regard to the length of time, felt that "the extreme penalty would be harsh"; but I should find it very difficult for my part to say that, in the result, it would be just that the plaintiff should have to pay any costs or, indeed, that there should be any other result than that this plaintiff should have the costs to which he had been put paid by the defendant, who was responsible for all that had occurred.

For these reasons I think we ought not to interfere with the judge's discretion; and I would dismiss the appeal.

HODSON L.J. I entirely agree with the judgment of the Master of the Rolls, and cannot usefully add anything.

PARKER L.J. I have come to the same conclusion. It is, I think, clear, that the discretion of the county court judge under Order 47, rule 1 of the County Court Rules, just as that of a High Court judge under section 50 of the Judicature Act, 1925, is, on the face of it, completely unfettered. I say "on the face "of it" because, of course, the discretion cannot be exercised arbitrarily; it must be exercised judicially and on fixed principles

[7] (1876) 2 Ch.D. 69. [8] (1880) 18 Ch.D. 76.

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dictated by reason and justice. One starts with this, that as a general principle costs follow the event, and the successful party is entitled to be paid his costs, unless there are special grounds to order otherwise; and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt also where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right. But it seems to me that those cases and that principle do not apply and cannot apply where the case, as under the Rent Acts, is a case calling for discretionary relief. Under the Rent Acts a plaintiff has to prove certain facts before the jurisdiction of the court arises to grant any relief at all. Once those facts are proved and the plaintiff has succeeded in establishing jurisdiction, then it may be that he will nevertheless fail to get his relief because of something which may be completely unknown to him, such as the extent and the needs of the defendant's family. In such a case, I can see no reason for limiting the wide discretion which exists to order the defendant to pay the plaintiff's costs. No doubt cases when that will be done will be rare: in general, it will be sufficient to deprive the successful defendant of his costs and not to order him to pay the plaintiff's costs. But, so far as this case is concerned, it is quite clear that the defendant's conduct was such as not merely to provoke the plaintiff but to make it inevitable and necessary that he should bring the proceedings—proceedings in which he ultimately failed, although, so far as lay in his power, he proved and satisfied the judge of the jurisdiction to grant the relief.

I would, in these circumstances, dismiss this appeal.

Appeal dismissed.

Solicitors: *H. C. L. Hanne & Co.; Thomas V. Edwards & Co.*

B. A. B.

[COURTS-MARTIAL APPEAL COURT.]

* REGINA *v.* BRYANT.

C.-M. A. C.
1955
May 9.
Lord Goddard C.J., Hallett and Byrne JJ.

Military Law—Court-Martial—Civil offence—Larceny—Offence within section 18 *of the Army Act—Whether charge to be laid under that Act or under the common law—Army Act,* 1881 (*as re-enacted*), *ss.* 18, 41—*Larceny Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 2.

Criminal Law—Larceny—Simple larceny—Common law offence—Reference in charge to section 2 *of Larceny Act,* 1916, *surplusage.*

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REGINA v. BRYANT.

A person subject to military law who commits an offence coming within section 18 of the Army Act [1]—for example, the stealing of military property—should be charged under that section and not under the common law.

Simple larceny is an offence at common law, and when it is charged no reference should be made to section 2 of the Larceny Act, 1916.[2]

APPEAL against conviction.

The appellant, Sergeant John William Bryant, Royal Army Service Corps, was convicted before a court-martial sitting in the Canal Zone, Egypt, of stealing two Egyptian pounds, the property of the president of the regimental institute of No. 1 Cold Storage Depot, Royal Army Service Corps, and was sentenced to reduction to the ranks. The appellant was charged under section 41 of the Army Act of committing the civil offence of larceny "contrary "to section 2 of the Larceny Act, 1916," which prescribes a maximum sentence of five years' imprisonment for the offence. The appellant appealed on the ground that the charge should have been laid against him under section 18 of the Army Act, which deals specifically with the offence of stealing the property of a service institution, and which limits the punishment upon conviction to two years' imprisonment " . . . or such less

[1] Army Act, s. 18. "Every "person subject to military law who "commits any of the following "offences; that is to say . . . "(4) Steals, embezzles or fraudu- "lently misapplies or receives, "knowing it to have been stolen or "embezzled, any property belonging "to a person subject to military law, "or belonging to any service mess "or band or to any service institu- "tion, or to the Navy, Army and Air "Force Institutes, or any public "property . . . shall, on conviction "by court-martial, be liable to suffer "imprisonment, [for a term not ex- "ceeding two years] or such less "punishment as is in this Act "mentioned."

S. 41. "Subject to such regula- "tions for the purpose of preventing "interference with the jurisdiction "of the civil courts as are in this "Act after mentioned, every person "who, whilst he is subject to military "law, shall commit any of the "offences in this section mentioned "shall be deemed to be guilty of an "offence against military law, and if "charged under this section with any "such offence (in this Act referred "to as a civil offence) shall be liable "to be tried by court-martial, and "on conviction to be punished as "follows; that is to say . . . (5) If "he is convicted of any offence not "before in this section particularly "specified," [the offence of larceny is not particulary specified] "which "when committed in England is pun- "ishable by the law of England, be "liable, whether the offence is com- "mitted in England or elsewhere, "either to suffer such punishment as "might be awarded to him in "pursuance of this Act in respect of "an act to the prejudice of good "order and military discipline, or to "suffer any punishment assigned for "such offence by the law of "England."

S. 183. "In the application of "this Act to a non-commissioned "officer the following modifications "shall apply:— . . . (3) A non- "commissioned officer may, by the "sentence of a court-martial, be "ordered to be reduced to the "ranks . . ."

[2] Larceny Act, 1916, s. 2 [as modified by s. 1 (1) of the Criminal Justice Act, 1948]: "Stealing for "which no special punishment is "provided under this or any other "Act for the time being in force shall "be simple larceny and a felony "punishable with imprisonment for "any term not exceeding five "years . . ."

"punishment as is in this Act mentioned," which included reduction to the ranks.

W. P. Grieve for the appellant.
E. Garth Moore for the Army Council.

No cases were cited in argument.

LORD GODDARD C.J. The appellant was charged and convicted before a court-martial sitting in the Canal Zone of an offence which was stated in the charge sheet as "committing a civil "offence, that is to say, larceny contrary to section 2 of the "Larceny Act, 1916, in that he at Port Said on December 22, "1954, stole two Egyptian pounds, the property of the president "of the regimental institute of No. 1 Cold Storage Depot, Royal "Army Service Corps." The appellant does not dispute the justice of his conviction in the sense that he has not alleged on the merits that he was not guilty of theft. The point he took was that he ought to have been charged under section 18 of the Army Act and not under section 41. The judge-advocate advised the court that, although he might have been charged under section 18, he was nevertheless liable to be charged under section 41 and, accordingly, the court convicted him and sentenced him to be reduced to the ranks, he being a sergeant.

This court desires to state that they entirely agree that the appellant ought to have been charged under section 18. It is highly desirable that the prosecuting authorities should make up their minds before starting a prosecution what is the appropriate section of the Army Act under which an accused person should be tried and charge him under that section, but in the particular matter with which we are dealing, it does not make any difference to the conviction whether he was charged under section 41 of the Army Act with committing a civil offence punishable under the law of England or under section 18 of that Act, which specifically deals, inter alia, with the offence of stealing the property of a service institution. What is said here is that he ought to have been charged under section 18, and that he cannot be charged under section 2 of the Larceny Act, 1916, because section 2 of the Larceny Act states: "Stealing for which no "special punishment is provided under this or any other Act for "the time being in force shall be simple larceny and a felony "punishable with imprisonment for any term not exceeding five "years."

The first thing to be noted is that section 2 of the Larceny Act does not create an offence. Larceny was always an offence at common law. Section 2 of the Larceny Act, 1916, is a section solely concerned with punishment, that is to say, if a person is guilty of larceny and there is no other punishment provided by the Larceny Act or any other Act, he is liable to a maximum of five years' imprisonment for the offence. It is worthy of note that

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the words "contrary to section 2 of the Larceny Act, 1916," which are contained in the charge sheet, are surplusage. If a person is charged with simple larceny, he is charged with a common law offence and not an offence against a particular statute.

Byrne J. has reminded me of rule 4 (3) of Schedule I to the Indictments Act, 1915, which provides: "The statement of "offence shall describe the offence shortly in ordinary language, "avoiding as far as possible the use of technical terms, and "without necessarily stating all the essential elements of the "offence, and if the offence charged is one created by statute, "shall contain a reference to the section of the statute creating "the offence." Simple larceny is not an offence created by statute; it is an offence at common law. Therefore, the charge sheet might have left out the words "contrary to section 2" and simply stated "committing a civil offence," that is to say, larceny. A soldier commits larceny. What is the position?

[His Lordship read the relevant portions of section 41, and continued:] If the soldier is charged with larceny and is convicted, he is liable to serve such punishment as is assigned for such offence by the law of England. In cases of simple larceny, if there is no other section of the Larceny Act, 1916, or any other Act which imposes any particular sentence, he is liable under section 2 to five years. But section 18 of the Army Act provides: "Every person subject to military law who commits any of the "following offences; that is to say . . . (4) Steals, embezzles or "fraudulently misapplies or receives, knowing it to have been "stolen or embezzled, any property belonging to a person subject "to military law, or belonging to any service mess or band or "to any service institution, or to the Navy, Army and Air Force "Institutes, or any public property . . . shall, on conviction by "court-martial, be liable to suffer imprisonment, [for a term not "exceeding two years] . . ." That limits the penalty to two years, but it does not affect the offence; it affects the penalty. It limits the penalty to two years because the accused being a soldier convicted of simple larceny there is a special section which provides that two years is the maximum sentence. This is only limited to convictions by court-martial; he is liable to two years instead of being liable to five years. There is no question here of any length of sentence because the appellant was not sentenced to imprisonment at all. Section 18 provides that he shall "be liable "to suffer imprisonment for a term not exceeding two years, or "such less punishment as is in this Act mentioned," and such less punishment was reduction to the ranks. That was the sentence imposed.

Accordingly, the appeal is dismissed, but the court would emphasize the desirability of the prosecution making up their minds what the offence is that is charged, and the facts relating to the offence before they commence proceedings; and if it is an offence which falls within section 18, as does apparently stealing

government stores by a soldier, then he should be charged under section 18 and not under the common law. If the authorities do charge him under the common law, they should leave out any words relating to section 2 of the Larceny Act, 1916, and charge him, as it is proper to charge him in this country, simply with the common law offence of larceny.

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Appeal dismissed.

Solicitors: *Registrar, Courts-Martial Appeal Court; Director of Army Legal Services.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

* UNITED DOMINIONS TRUST (COMMERCIAL) LD. *v.* PARKWAY MOTORS LD.

1955 *May* 23.

McNAIR J.

[1954 U. No. 76.]

Hire Purchase — Hire-purchase agreement — Assignment — Prohibition against assignment of goods or benefit of agreement—Option to purchase—Sale of goods by hirer—Tender of balance of hire and purchase price by purchasers — Purchasers without rights under hire-purchase agreement—Damages not restricted to balance of hire and purchase price.

Detinue—Damages.

On October 8, 1952, the plaintiffs let a motor-van under a hire-purchase agreement which provided, inter alia, that "the hirer . . . "shall not sell, offer for sale, assign or charge the goods or the "benefit of this agreement . . ." and which contained a provision giving to the hirer, on payment of all instalments and moneys due under the agreement, an option to purchase the van for 10s. On December 24, 1953, during the currency of the hire-purchase agreement, the hirer sold the van to one T., who in turn sold it to the defendants. On January 4, 1954, the plaintiffs served a notice upon the hirer terminating the agreement and on the same day the defendants, on the basis that they had become entitled to exercise the right of the hirer under the agreement, tendered to the plaintiffs the amount of the unpaid balance of hire and the 10s. purchase-money. The plaintiffs, having refused to accept the tender, claimed in detinue for the return of the van or alternatively its value:—

Held, that since the hire-purchase agreement by its terms prohibited the hirer from assigning either the goods themselves or the benefit of the agreement, he was unable to pass any rights in the van or under the agreement to T. which T. could pass to the defendants; that the defendants, therefore, had no interest in the goods which diminished the value of them in their hands and no contractual rights against the plaintiffs enabling them to cut down the plaintiffs' prima facie right to recover the van or its value, and accordingly, in default of the return of the van the amount payable to the plaintiffs was not the outstanding balance of hire and the purchase-money, but was the full value of the van.

Belsize Motor Supply Co. v. *Cox* [1914] 1 K.B. 244 and *Whiteley Ld.* v. *Hilt* [1918] 2 K.B. 808; 34 T.L.R. 592 distinguished.

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Action.

By an agreement dated October 8, 1952, the plaintiffs, United Dominions Trust (Commercial) Ld., a company dealing in hire-purchase finance, let a 10 cwt. Morris Cowley van to one John Theodore Williams under a hire-purchase agreement, for a term of 18 months from October 8, 1952. The schedule to the agreement set out the price of the van as £579 15s. with charges of £46 8s., making a total hiring cost of £626 3s. An initial instalment of rent of £193 5s. was payable on the making of the agreement, leaving £432 18s. balance of hire to be paid by 18 monthly instalments of £24 1s. each, the first payable on November 8, 1952, and each subsequent instalment on the same day of each succeeding month.

By clause 1 of the agreement "The hiring shall commence "on the date [October 8, 1952] specified in the schedule and "unless determined by the hirer or the owner as hereinafter "provided shall continue for the period of hire . . ." By clause 2 "The hirer shall upon the making of this agreement "pay the initial instalment of rent . . . and shall punctually "pay the several instalments of the balance of hire as set out "in the schedule on the dates therein provided." Clause 6 of the agreement provided that "during the continuance of this agree-"ment the hirer shall keep the goods in his own possession at the "address specified in the schedule and maintain the goods in "proper repair and in good and serviceable condition and shall "not use or permit the goods to be used for any purpose for "which they are not designed or reasonably suitable and shall "not sell, offer for sale, assign or charge the goods or the benefit "of this agreement nor create any lien on the goods or pledge "the owner's credit either for repairs thereto or otherwise and "shall not make or allow any removal, obliteration or change of "any identification marks thereon or purport or attempt to do "any of such things." By clause 7 "The goods are and shall "remain the property of the owner unless and until the hirer "exercises the option to purchase contained in this agreement "after becoming entitled so to do and the hirer will at all times "allow the owner . . . reasonable facilities for inspection of the "goods and access for that purpose to any premises in or upon "which the goods may be." By clause 13 "If the hirer shall "make default for ten days in payment of any instalment . . . "or if the hirer shall commit any breach of any term hereof or "shall do or suffer anything whatsoever which in the owner's "opinion bona fide formed upon reasonable grounds will or may "have the effect of jeopardising the owner's rights of property "in the goods the owner shall have the right by notice forthwith "to terminate this agreement and to retake possession of the "goods . . . and thereupon this agreement shall cease and deter-"mine but the hirer shall be liable for, and the owner shall have "the right to recover against the hirer, all instalments which at

" the date of such termination shall then be in arrear and unpaid " together with interest thereon . . . and . . . any other sum " that may at the date of such termination be due from or " payable by the hirer to the owner." By clause 17 " . . . if " and when all instalments and other moneys payable by the " hirer to the owner under this agreement shall have been duly " paid and provided that the hirer shall not have committed any " breach of the provisions of this agreement then the hirer shall " have the option (but shall not be bound) to purchase the goods " for the sum of ten shillings."

Williams paid the initial payment and all the instalments as they fell due under the agreement up to December 8, 1953, but on that day, in breach of the covenant in clause 6, he advertised the van for sale. On December 24 one Trotter induced Williams to enter into an agreement to sell the van to him, and gave Williams a cheque for £453. That cheque was valueless and it was later held that the transaction in which Williams parted with the van to Trotter was a transaction obtained by false pretences. On December 26 Trotter purported to resell the van to the defendants. The defendants knew that the van was subject to hire-purchase terms but it was part of the terms as between them and Trotter that Trotter would see that Williams would exercise his right under clause 17 to pay to the plaintiffs the balance due under the hire-purchase agreement and the 10s. purchase-money, and the defendants paid Trotter £410 12s. On December 28, Williams reported the matter to the plaintiffs and paid the instalment which had become due on December 8. On January 4, 1954, the plaintiffs served a notice upon Williams terminating the hire-purchase agreement, and on the same day the defendants tendered to the plaintiffs by cheque the sum of £96 10s., the amount of the unpaid balance of hire and option money, and subsequently, when the cheque was returned, the same amount in cash, on the basis that they had become entitled to exercise the right of Williams under the agreement.

The plaintiffs refused to accept the tender by the defendants, but demanded the return of the van. They now claimed in detinue against the defendants, alleging that the defendants had wrongfully converted the van to their own use and claiming the return of the van; alternatively, its value and damages for its detention.

The defendants denied that the plaintiffs were entitled to possession of the van. They contended that on December 24, 1953, Williams, having paid all the moneys due under the hire-purchase agreement, was entitled on payment of the sum of £96 to purchase the van for 10s. and that, since the plaintiffs had not terminated the agreement by notice in accordance with clause 13 the plaintiffs, in refusing to accept payment of the sum of £96 10s., were in breach of the implied condition of the agreement that the hirer might exercise his option to purchase the van

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and that the plaintiffs would accept the payments in full discharge of the obligations under it.

Maurice Lyell Q.C. and *J. M. Rankin* for the plaintiffs.
John Thompson Q.C. and *J. W. Borders* for the defendants.

The following cases were referred to in argument: *Belsize Motor Supply Co. Ld.* v. *Cox* *; *Whiteley Ld.* v. *Hilt* †; *Brierly* v. *Kendall* ‡; *Chinery* v. *Viall* §; and *Johnson* v. *Stear*.‖

McNAIR J., having stated the facts substantially as set out above, and observed that since Williams had, on December 28, 1953, paid the instalment which was due on December 8, he was not on that date in breach of his agreement otherwise than by reason of the fact that he had sold or attempted to sell in breach of clause 6, continued: The real dispute between the parties is whether the plaintiffs are entitled to recover the value of the van at the date of conversion, the sum of £350, or whether their claim for damages is limited to the sum of £96 10s. Normally, a party who converts the property of another is bound to pay him the real value of the property so converted, but it is said on behalf of the defendants that while accepting that as a general rule the law recognizes an exception applicable to cases of this nature, namely, that in these circumstances the damages payable to the hire-purchase company are limited to the outstanding hire money and the money which it would be necessary to pay to exercise the option of purchase.

Mr. Thompson primarily relies in support of that contention on two cases: *Belsize Motor Supply Company* v. *Cox* [1] and *Whiteley Ld.* v. *Hilt*,[2] a decision of the Court of Appeal. In the former of those cases Channell J. had to consider two points: one, whether the hirer under a hire-purchase agreement in similar, but not identical, terms with the present, was a person who could part with property under section 25 of the Sale of Goods Act, 1893, to a person taking it from him in good faith; and, secondly, the question of damages.

I am not concerned here with the first question, but with the question of damages, on which, it being a question of a pledge, Channell J. held that as the pledgee had an interest in the vehicle the measure of damages was not the full value of the vehicle but was only the value of the owners' interest therein, that is, the amount of the hire and purchase-money remaining unpaid.

In the course of his judgment, he said [3]: "The second point "in the case is more doubtful. Does this case come within the

* [1914] 1 K.B. 244.
† [1918] 2 K.B. 808; 34 T.L.R. 592.
‡ (1852) 17 Q.B. 937.
§ (1860) 5 H. & N. 288.
‖ (1863) 15 C.B.(N.S.) 330.
[1] [1914] 1 K.B. 244.
[2] [1918] 2 K.B. 808.
[3] [1914] 1 K.B. 244, 251.

" exception to the general rule that in an action for conversion " the measure of damages is the value of the goods and chattels " converted? There is an exception to that rule where the " defendant has an interest in the goods and chattels converted; " then the measure of damages is the value of the plaintiff's " interest as between himself and the defendants. This exception " has often been recognized; for example, in *Brierly* v. *Kendall*,[4] " *Chinery* v. *Viall*,[5] and *Johnson* v. *Stear*.[6] I am not aware of " any binding authority applying this exception to a case where " the rights of the parties depend upon a hire and purchase " agreement. The defendant is not himself the original bailee, " but is a third person deriving title from the original bailee. In " the present case he is a pledgee. A pledgee or purchaser takes " such title as his pledgor or vendor has, and here, whether the " pledge to the defendant was rightful or wrongful (in this case " it was wrongful), yet the defendant thereby acquired such " rights as the Burgess Company, the original hirers, had."

In my judgment, it is quite clear that Channell J. took the view, as a matter of construction of that particular hire-purchase agreement, that the hire-purchase agreement itself was assignable. The clause in that case, concerning re-letting and selling part of the possession, is in these terms[7]: " The hirer shall not " re-let, sell or part with the possession of the said motor taxi- " cab . . . without the previous consent in writing of the owners " or their said agents." But there is nothing in *Belsize Motor Supply Co.* v. *Cox*[7] in any way comparable with the words in clause 6 of the agreement in the present case which prohibit the hirer from assigning the goods or the benefit of this agreement. That Channell J. took the view that an assignable interest in the contract passed to the defendants in the case he was considering is, I think, clear from the language to which I have referred and from the cases noted in his judgment upon which he relied. In each of those cases, which have been examined before me, the defendant had a contractual interest in the goods and when sued by the respective plaintiffs for conversion was able to say that as between him and the plaintiff he, the defendant, had an interest in the goods which had the effect of diminishing the value of the goods in his hands. In *Belsize Motor Supply Co.* v. *Cox*,[7] also, the defendant Cox was in a position to say that he had an interest arising under the hire-purchase agreement which gave him a right to obtain the ownership of the motor-vehicle on payment of the unpaid balance. That can only be upon the footing that that contractual option was an assignable option and had in fact in the circumstances been assigned to the pledgee.

Whiteley Ltd. v. *Hilt*[8] was a case arising out of a hire-purchase agreement under which a piano was let out on hire by Whiteley

[4] (1852) 17 Q.B. 937.
[5] (1860) 5 H. & N. 288.
[6] (1863) 15 C.B.(N.S.) 330.
[7] [1914] 1 Q.B. 244, 246.
[8] [1918] 2 K.B. 808.

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Ld. to a Miss Nolan and passed into the possession of the defendant. The question in that case, too, was whether, inasmuch as the original hirer, Miss Nolan, had a right to acquire ownership by exercising an option, the defendant, as her assignee, could exercise the same right and so limit the amount of damages recoverable. Swinfen Eady M.R., giving the leading judgment, states the question for the court as follows [9]: "The first question "which arises is whether Mrs. Widlake"—Mrs. Widlake was formerly Miss Nolan—"had any interest under the hire-purchase "agreement which she could lawfully assign." Warrington L.J.[10] and Duke L.J.[11] posed the question in the same terms.

It was only because the Court of Appeal came to the conclusion, on the facts of that case, that the original hire-purchase agreement was assignable that they limited the plaintiffs' right to recover in the same way as it had been limited by Channell J. in *Belsize Motor Supply Co.* v. *Cox.*[12] The *Belsize* case [12] is only referred to in the judgments by Warrington L.J.,[13] and I think it is clear from the way in which he refers to that case that he treats it as being a case parallel to the case then before the court.

If one turns to the particular contract here, it is quite clear that, by its terms, the hirer is prohibited from assigning or purporting to assign or attempting to assign either the goods themselves or the benefit of this agreement. Accordingly, as it seems to me, Williams, the hirer, was unable to pass any rights in the van or any rights under the agreement to Trotter; and if he could not pass any rights to Trotter then Trotter could not pass any rights to the defendants. Accordingly, the defendants are in the position of persons who have no interest in the goods and have no contractual rights or other rights against the plaintiffs which enable them to cut down the plaintiffs' prima facie right to recover the value of the goods. Accordingly, in my judgment, they are entitled to the return of the van or to recover the sum of £350, the approved value of the motor-van.

Judgment for the plaintiffs.

Solicitors: *H. Huband Harper; Linsley-Thomas & Co.*

J. F. L.

[9] Ibid. 817.
[10] Ibid. 819.
[11] Ibid. 822.
[12] [1914] 1 K.B. 244.
[13] [1918] 2 K.B. 808, 821.

[CHANCERY DIVISION.]

* *In re* CORY, DECD. CORY *v.* MOREL AND OTHERS.

1955
June 7.

Harman J.

[1955 C. No. 1145.]

Will—Construction—Omission—Implied power of appointment—Words inserted—No restriction on method of exercise—Drafting by scissors or paste.

A testator settled a share of his residuary estate on each of his four daughters for life, and provided that "... after the death "of [each] such daughter my trustees shall hold such share and "future income thereof upon trust for all or such one or more "exclusively of the others or other of the children or remoter issue "of such daughter and in default of and subject to any such "appointment in trust for all or any the children or child of such "daughter of mine ..."

On the hearing of a summons to ascertain whether on the true construction of his will the testator intended to confer on each of his daughters a special power of appointment enabling her to appoint her share of residue among her issue, (1) by deed or will or codicil, or (2) by will or codicil:—

Held, that the will should be read as it stood without the omission of any part of it, even though that would involve the addition of a power of appointment; but as it was not known what sort of a power the testator would have given, there should be inserted a power of appointment without any restriction on its exercise, and the will should read as if it contained the words "... as she shall "appoint ..." immediately before the words "... and in default "of and subject to any such appointment ..."

In re Follett [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22 distinguished.

ADJOURNED SUMMONS.

John Cory made his will on December 31, 1920, and two codicils thereto (not here material) in 1925 and 1931 respectively. He died in 1931, and his will was admitted to probate on January 23, 1932.

By clause 19 of his will the testator devised and bequeathed the residue of his real and personal estate to his trustees on the usual trusts for sale and conversion, and gave certain gifts of income to his wife and to a daughter. By clause 19 (*f*) of his will, subject to those bequests, the testator provided that his trustees were to stand possessed of the residue upon trust for his children, Amy, Alice, Florence, Edith, John and Charles, "... in equal shares share and share alike as tenants in "common ..." He settled his daughters' shares so that each daughter should have a life interest in her share, subject to restraint from anticipation; and the clause continued: "... and "after the death of such daughter my trustees shall hold such "share and future income thereof upon trust for all or such one "or more exclusively of the others or other of the children or "remoter issue of such daughter and in default of and subject

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" to any such appointment in trust for all or any the children " or child of such daughter of mine who shall be living at my " decease or born afterwards and who being a son or sons attain " the age of twenty one years or being a daughter attain that " age or marry and if more than one in equal shares . . ."

The trustees of the will took out this summons to ascertain whether on the true construction of the will the power of appointment referred to in clause 19 (*f*) was intended to confer on each of the testator's daughters (i) a special power of appointment enabling her to appoint her share of residue by deed or by will or codicil among her issue, or (ii) a special power enabling her to appoint by will or codicil, or (iii) any and if so what other power of appointment.

C. A. Settle for the plaintiffs, trustees of the will.

Allan Heyman for the first four defendants, the testator's daughters.

D. A. Thomas for the fifth defendant, a grandson of the testator.

Case cited in argument not referred to in the judgment: *In re Smith.*[1]

HARMAN J., having stated the facts, continued: It leaps to the eye that clause 19 (*f*) is imperfect. It is in common form and one's instinct is to say at once that the testator intended to give his daughters a power of appointment and left it out by mistake, because here the area of selection was clearly started by him—" such one or more exclusively of the others or other of the " children or remoter issue of such daughter "; but the power of selection is not given. Indeed, one finds the words " . . . and " in default of and subject to any such appointment in trust for " all or any the children . . ." It is clear, therefore, that there was, as the clause stands, an appointment in contemplation.

Mr. Thomas pointed out that in the edition of Key and Elphinstone then current (10th ed. (1914), vol. 2, p. 896), if one read to the end of paragraph 6 at the top of the page and went straight on to paragraph 7, without putting in the words creating the power to which reference has been made, one would produce exactly the result that was produced here. It may well be that that is what happened. But, he submitted, it is as easy to look at it the other way. One may suppose either that the words conferring the power were there and were purposely cut out, or that these words were assumed to be there and were accidentally left out. In other words, it is as easy on this document to use scissors as paste. That being so, a certain result can be produced with this document by putting things in, and an equally good result can be produced by taking them out to the like extent. The question is which should be done.

[1] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.

Mr. Thomas rightly pressed me with the decision of *In re Follett*,[1] where the Court of Appeal declined to follow the speculations, as they held them to be, of Roxburgh J., where he put in a number of words. Jenkins L.J. pointed out that it is possible that, after the clause had been discussed between the testator and his advisers, the testator was minded to cut it out, but the excision was imperfectly done.

Mr. Thomas also drew attention to the fact that there is no hotchpot clause in this will. It is usual—and I may take judicial notice of this—in wills giving powers of appointment unequally per stirpes to provide that an appointed stirps will bring into hotchpot what it takes under the clause, which operates in default of appointment. That is to produce, so far as may be, equality between the branches of the family.

He urges me to hold that the draftsman cut out the power and cut out the hotchpot clause but left more lines in than he should have done. That is very attractive, but it means that I must not read the whole of the will which has been admitted to probate, but must strike out a portion of it, because this is not a will such as that in *Follett's* case,[2] where, by a certain hard wresting of the language, one could make sense of it as it stood. It is clear that a power of selection was intended if I am to read the will as it stands. All that is left out is what power of selection was intended. I do not think that I ought to cut any words out of the will, unless I am forced to do so.

It was urged on me that the special powers now provided for in the various text books are always in a form of a power to appoint by deed or will. On the other hand, there is a form of special power, which is less fashionable today, which is the power which provides for various ancillary payments for education, advancement, etc., in the trustees' discretion, all to be imported into the power. There are many possibilities. In a will drawn in 1920 a man might well have provided that the appointment should be by deed which should be witnessed by more than two persons. By 1926, as it was pointed out, that was altered by section 159 of the Law of Property Act, 1925; but in 1920 such a provision was still not unlikely.

On the whole, I feel that this will must be read without excision, the whole of it being included, even though the result is to involve an addition. I think that here I am justified in adding the power. It is true that I do not know exactly what it is that the testator might have inserted as the power, so all that I propose to do is to add the power, without stating in any way what sort of power he intended.

I propose, therefore, to read the will by treating as added the words "... as she shall appoint ..." immediately before the words "... and in default of such appointment ..." That

[1] [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22.

[2] Ibid.

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being so, she can appoint in any way she thinks fit, as an exercise of the power.

Declaration accordingly.

Solicitors: *Crawley & de Reya for J. Harvard Davis & Winn-Jones, Cardiff.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

1955
May 25, 27.

Collingwood J.

* SILVER (ORSE. KRAFT) *v.* SILVER.

Husband and Wife—Nullity—Intention to marry—Marriage to evade immigration regulations—Intention to become man and wife—Valid marriage.

In 1925 a woman of German nationality went through a ceremony of marriage with an Englishman, the sole object of the marriage being to enable her to enter and remain in England and thus to continue an irregular association which she had formed in Germany with another Englishman who was already married and unable to obtain a divorce. The irregular association continued until 1948 and the parties themselves never lived together as man and wife. On the wife's petition that the marriage should be declared null and void:—

Held, dismissing that petition, that, where parties went through a ceremony of marriage only for the sake of representing it as such to the outside world but with the intention of becoming man and wife, in the absence of any element of duress, the marriage was valid.

Observations in *H.* v. *H.* [1954] P. 258, 269; [1953] 3 W.L.R. 849; [1953] 2 All E.R. 1229 applied.

United States v. *Rubenstein* (1945) 151 Fed.Rep. (2nd Ser.) 915 not followed.

WIFE'S UNDEFENDED PETITION for declaration of nullity or, in the alternative, divorce.

The following statement of facts is taken from the judgment. The petitioner, Bertha Anna Silver, otherwise Kraft, was born in Stuttgart, and there in 1919 met one Abraham Springer, whom she then thought to be unmarried. They fell in love with one another and became engaged. She went to England with him in 1921 and met his parents. She then for the first time discovered that he was a married man and had several children, though he was living apart from his wife. She returned to Germany, telling her parents nothing of the discovery which she had made during her visit to England. Later Abraham Springer returned to Germany and made it clear that he was unable to obtain a divorce, and the petitioner and he decided to live together as man and wife. This they did for a short time in England; later she returned to Germany with him and they lived together as man and wife in Cologne, where he had civilian employment with the army of occupation.

In 1925 Springer's employment in Germany ceased; he returned to England and the petitioner to her mother in Stuttgart. In the summer of that year he went out to Germany again and it was agreed between them that the petitioner should go through a ceremony of marriage with the respondent, Samuel Silver (the stepbrother of Abraham Springer), the object of this marriage being to enable the petitioner to enter England and remain there as long as she wished. In accordance with this plan, on November 13, 1925, Samuel Silver and the petitioner went through a ceremony of marriage at the register office in Stuttgart. After the ceremony they travelled back to London together; the petitioner met Abraham Springer at the station in London, and they resumed living together. The petitioner saw the respondent only once more before the death of Abraham Springer in 1948, and that was on an occasion, some six months after the marriage, when she accompanied him to the Home Office and there declared that she and the respondent had cohabited for six months, the object of that being to prevent her having to return to Germany again. Apart from that application she had no contact with the respondent from the time they parted in London until 1951. She continued to live with Abraham Springer until he died on June 23, 1948.

In 1951 she met another man, a German, whom she wished to marry. Some time after meeting him she traced the respondent and arranged to meet him; they did so, and discussed the possibility of a divorce. It was not, however, until 1954, after she had again met the German whom she wished to marry, that any further meeting was arranged between herself and the respondent. A meeting was arranged; the respondent did not attend but sent his sister, and from her the petitioner for the first time discovered that the respondent had, since 1940, been living with a woman by whom he had had three children.

H. V. Brandon for the wife petitioner.

The cases cited in argument are referred to in the judgment.

COLLINGWOOD J. stated the facts and continued: On those facts the court is asked to say that, the parties having agreed to go through a ceremony of marriage, solely for the purpose of representing themselves as married to the immigration authorities of this country and without any intention of ever living together as man and wife, the purported marriage was null and void for want of consent.

The voluntary consent of both parties is necessary for a valid marriage, and the marriage is void if such consent is lacking, as, for example, where it is procured by threats or duress. Mental reservations on the part of one or both of the parties to a

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marriage do not affect its validity. Thus, in *Brodic* v. *Brodic*,[1] the wife petitioned for restitution of conjugal rights and the husband pleaded an agreement signed by both parties before the marriage whereby it was agreed that he should, after the marriage, live separate and apart from his wife and that she should not require him to live with her by any legal proceeding. Horridge J. held the agreement to be void as against public policy and that the respondent's plea was no answer to the petition, and he granted the wife a decree of restitution, thereby affirming the validity of the marriage, which, indeed, was never in question in that case.

In *H.* v. *H.*[2] the wife petitioned for a declaration of nullity on the ground of duress. The ceremony took place in Budapest at a time when the Communist Government ruled Hungary, and the object of the marriage was to enable her to obtain a French passport and to leave the country. The parties agreed that the marriage should be in name only, and it was never, in fact, consummated. Karminski J. found that the fear entertained by the wife of the danger which remaining in Hungary would entail was of such a kind as to negative her consent to the marriage, and he granted a decree of nullity. In the course of his judgment he said[3]: "If the present case was devoid of the element of fear "I should be compelled to find that the parties to the present "suit intended that the petitioner should become the wife of the "respondent", and he declined to follow the reasoning in a decision in the United States Circuit Court of Appeal[4] that "if "the spouses agree to a marriage only for the sake of repre- "senting it as such to the outside world and with the under- "standing that they will put an end to it as soon as it has "served its purpose to deceive, they have never really agreed to "be married at all."

I respectfully agree with the view of Karminski J., and hold that the parties here intended that they should become man and wife, and went through the ceremony with that object, and that there being no element of duress the prayer for a decree of nullity must be rejected.

As to the prayer for dissolution, the court is asked to exercise its discretion in the petitioner's favour. In coming to a decision upon that question I have had regard to the interests of the petitioner, who wishes to marry again, the fact that no question arises of a possible reconciliation between the spouses, the interests of the woman with whom the respondent has been living for a number of years and the interests of the children whom she has borne, for, though marriage will not legitimize them, they can at least be adopted by their parents in the event of their marriage; and, finally, the interests of the community

[1] [1917] P. 271; 33 T.L.R. 525.

[2] [1954] P. 258; [1953] 3 W.L.R. 849; [1953] 2 All E.R. 1229.

[3] [1954] P. 258, 269.

[4] *United States* v. *Rubenstein* (1945) 151 Fed.Rep. (2nd Ser.) 915, 919.

at large. I can see no social advantage in insisting upon the maintenance of a union which has been a mere travesty from the beginning. Accordingly, there will be a decree nisi in the exercise of the discretion of the court.

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Decree nisi.

Solicitor: *Edward Isaacs.*

E. J.

[COURT OF APPEAL.]

* COBB *v.* COBB.

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Denning, Birkett and Romer L.JJ.

Husband and Wife—Property—Proceedings under Married Women's Property Act, 1882, *s.* 17—*House purchased jointly for home—Intention of parties that house be owned in equal shares and that husband meet mortgage payments — Wife's payment of certain household expenses—Part of mortgage repaid by husband—Application by husband for order that house belonged to him—Duty of court to give effect to intention of parties — Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

A house was conveyed to a husband and wife jointly, both contributing equal amounts towards the purchase price of £1,760, and both being parties to the mortgage deed for the balance. It was agreed between them that the husband would make the weekly payments on the mortgage, the wife paying other expenses of the matrimonial home out of her own earnings. Later the parties fell out, and though both continued to live in the house, the wife began proceedings against her husband for judicial separation. Before the hearing of that petition, the husband applied to the county court under section 17 of the Married Women's Property Act, 1882, for an order that the house belonged to him. At that time about half the mortgage had been paid off. The county court judge found that when the house was bought the parties intended that it should be owned in equal shares, but made an order for its sale with vacant possession, the wife to receive £300 only of the proceeds of sale. On appeal by the wife:—

Held, (1) that the evidence established that the wife had a right to an equal share in the property and the court had no power under section 17 of the Act of 1882 to vary those rights or to reduce her to the status of a mere creditor.

(2) That the order made under section 17 that the house be sold should be discharged, since the wife was entitled to remain in it both as a wife and as co-owner.

(3) That as there had been a breakdown of the marriage which had been the basis of the original arrangement that the husband should repay the mortgage, each party should from the date of the breakdown and until the house was sold be liable in equal shares for the balance of the mortgage repayments.

Rimmer v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863 applied.

APPEAL from Judge Lawson Campbell sitting at Wisbech County Court.

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The following statement of the facts is taken from the judgment of Denning L.J.: The parties, Frank Cobb and Hilda Margery Cobb, were married in 1936. The husband was a commercial buyer earning £7 a week and a bonus over and above it. The wife was a school teacher earning over £5 a week. On September 14, 1950, they bought a house, No. 114A, Osborne Road, Wisbech, intending it to be their matrimonial home. The purchase price was £1,700 plus legal costs of £60, making £1,760 altogether. In order to meet this sum the husband and the wife each paid in cash £230, making together £460, leaving £1,300 outstanding. They borrowed the remaining £1,300 from the husband's employers on mortgage at 4 per cent. interest. The advance was made to the husband and wife jointly and they both made themselves responsible for the mortgage, which was repayable at the rate of £3 a week. The husband made arrangements with his employers for the £3 a week to be deducted each week from his wage. The husband made no housekeeping allowance to his wife but he paid some of the household bills. The wife also paid some of the household expenses and bought furniture, replaced linen, crockery, and so forth.

In the middle of 1954 the parties fell out, but they remained living in the same house. On June 22, 1954, the wife launched a petition for divorce on the ground of her husband's adultery and cruelty. Her petition was later amended so as to claim only a judicial separation and not a divorce. The husband defended the case, but he made no cross-charges against his wife. The case had not been heard at the date of the appeal but had been certified as fit for a speedy trial.

One of the differences between the parties was because the wife's parents came to the house on April 16, 1954, and stayed for some months. The husband was so annoyed about this that he went to solicitors to get them out. Before the application was actually issued, however, the parents left, on September 7, 1954.

On September 9, 1954, the husband made an application to the county court judge under section 17 of the Married Women's Property Act, 1882,[1] in which he asked for an order that the house belonged to him, and that the wife should do everything necessary to vest it in his name, and that the wife should join in evicting her parents. As the parents had already gone, the latter part of the application was not pursued, but the husband went on with the claim that the house was his.

[1] Married Women's Property Act, 1882, s. 17: "In any question "between husband and wife as to "the title to or possession of pro- "perty, either party . . . may apply "by summons or otherwise in a "summary way to any judge of the "High Court of Justice in England ". . . or . . . in England to the "judge of the county court of the "district . . . and the judge of the "High Court of Justice or of the "county court, . . . may make such "order with respect to the property "in dispute, and as to the costs of "and consequent on the application "as he thinks fit . . ."

The case was heard on March 22, 1955, by which time £651 had been paid off the mortgage, leaving £649 still outstanding. It was agreed that the house was of approximately the same value as when it was bought, namely, £1,700.

The county court judge said that it was quite clear that, at the time of the purchase of the house in 1950, the parties had contributed in equal shares, and that it was their intention to own the property in equal shares. But, he continued, that was only part of the story. £1,300 had been raised on mortgage and the arrangement was that £3 a week should be deducted from the husband's wages and put aside towards the payment of the mortgage. That position continued until the parties fell out, by which time the husband had paid almost half the mortgage. The question he had to decide, the judge continued, was who owned what right in the house? The solicitor for the wife had argued that the parties were joint tenants and owned in equal shares; but that did not conclude the matter. The judge then referred to the dictum of Evershed M.R. in *Rimmer* v. *Rimmer*,[2] and said that the intention was that the husband should wipe off the mortgage, that he had done that, and that he (the county court judge) attached considerable importance to that in deciding to what share each party was entitled, and the contribution to household expenses.

The county court judge made an order that the house was to be sold with vacant possession, and that the proceeds were to be applied in the following way: first, in payment off of the balance due on the mortgage; secondly, in paying £300 to the wife; and thirdly, that the balance should be paid to the husband.

The wife appealed.

Norman Lermon for the wife.
M. P. Picard for the husband.

The following cases were cited in argument: *Rimmer* v. *Rimmer*[3]; *In re Rogers' Question*[4]; *Stewart* v. *Stewart*[5]; *Bull* v. *Bull*[6]; *Woodcock (Jess B.) & Sons Ld.* v. *Hobbs*[7]; *Newgrosh* v. *Newgrosh*.[8]

DENNING L.J. stated the facts and continued: Under section 17 of the Act the court can, on application, decide questions as to the title to or possession of property as between husband and wife. The first question in this case is, To whom does the house belong? The law in cases of this kind was considered by this

[2] [1953] 1 Q.B. 63, 72; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.
[3] [1953] 1 Q.B. 63.
[4] [1948] 1 All E.R. 328.
[5] [1948] 1 K.B. 507; 64 T.L.R. 115; [1947] 2 All E.R. 813.
[6] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.
[7] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.
[8] Unreported (referred to in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, 73).

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court quite recently in *Rimmer* v. *Rimmer*,[1] and I would like to repeat what I said there[2]: "In cases when it is clear that the "beneficial interest in the matrimonial home, or in the furniture, "belongs to one or other absolutely, or it is clear that they "intended to hold it in definite shares, the court will give effect "to their intention: . . . but when it is not clear to whom the "beneficial interest belongs, or in what proportions, then, in this "matter, as in others, equality is equity." I would only add that in the case of the family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost, and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares; and this is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal. All the more so when the property is taken, as here, in their joint names and it was intended to be owned by them in equal shares. The legal title is in them both jointly, and the beneficial interest is in them both as equitable tenants in common in equal shares. They hold the house as trustees on the statutory trusts for sale. But until the place is sold, each of them is entitled concurrently with the other to the possession of the house and to the use and enjoyment of it in a proper manner: and neither of them is entitled to turn out the other. The house cannot be sold with vacant possession unless both consent to it; but if one of them unreasonably refuses his or her consent, the other can go to the court and ask for an order for sale; and in aid of it, the court can order vacant possession to be given; but the court would only make such an order if it was satisfied it was right and proper to do so, and on such terms as it thought fit to impose; see the recent case in this court of *Bull* v. *Bull*,[3] and compare *Smith* v. *Smith*.[4]

The second question is whether the judge was right in ordering, as he did in this case, a sale with vacant possession, and in aid of it that the wife should be evicted. I do not think so. Apart altogether from the fact that she was co-owner of the house with her husband, she is his wife. It may be that she is an entirely innocent party and, if so, his duty as a husband is to provide a roof over her head. It would not be right for her to be turned out into the street. But as co-owner she is in an even stronger position. She cannot be turned out unless the court thinks it right to order a sale, and I do not think that this is the time or the occasion for such an order. The matter can best be considered by the matrimonial court when it comes to consider alimony or maintenance. That court could, on proper application being made, order a sale: but it might think it right to let the wife

[1] [1953] 1 Q.B. 63.
[2] [1953] 1 Q.B. 63, 73
[3] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.
[4] [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584.

stay in the house with a reduction in the maintenance which would otherwise be payable by the husband.

There remains, however, the difficult question about the sum of £649 which remains outstanding on mortgage repayable at £3 a week. If the house were to be sold, there can be little doubt that this £649 would have to be paid out of the proceeds of sale, and the balance would be divided equally between husband and wife. But if the house is not sold what is to happen to the £3 a week? I have no doubt that if the marriage had never broken down. and the married life had continued as the parties contemplated, the husband would have paid the £3 a week until the mortgage was paid off, and then the house unencumbered would have belonged to them in equal shares; but a fundamentally different situation has emerged which they did not anticipate and for which they have not provided. The marriage has broken down. The wife no longer performs wifely duties for the husband. In those circumstances the court must do what is just and reasonable between the parties. They are both liable to the mortgagees for the repayment of the mortgage; and, as between the two of them, I think the only reasonable and fair thing is that, as from the time the marriage broke down, each should pay one-half of the outstanding repayments due on the mortgage until the house is sold. We may take it that the marriage broke down on June 22, 1954, when the wife launched her petition. Romer L.J. has framed a form of declaration stating the rights of the parties. I have had the benefit of seeing it, and I agree with the form of declaration which he will in due course propose. I think that the appeal should be allowed accordingly.

BIRKETT L.J. I entirely agree with the judgment which has just been delivered. I might add that on the two major points in the action which were so fully argued, the rights to the house itself and the question of sale, I hold very clear views which have been expressed by my Lord on the matter. I, too, have had the advantage of seeing the declaration which has been framed by Romer L.J., and I, too, agree with it. I content myself, therefore, by saying that I agree with the judgment just delivered and the result must be that the appeal should be allowed.

ROMER L.J. I also agree. In cases of this kind one usually has no direct evidence of intention in relation to the ownership of the matrimonial home, because the parties to the marriage very seldom form one when they buy it; and the court has to attribute an intention from the course of conduct of husband and wife (including their respective contributions towards the purchase price) at the time when the home was purchased and subsequently. But in the present case the judge has made certain findings about the intention of Mr. and Mrs. Cobb when they bought their house in 1950, and it seems to me that the rights of the parties in respect of the house have to be determined

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in the light of those findings. Those findings were expressed by the judge as follows: "The parties were married in 1936 and in "1950 the house was conveyed to them as joint tenants; the "purchase price was £1,700 and of the deposit of £400, £230 was "paid by the wife and £170 by the husband, who also made "himself liable for the legal costs, about £60. It was quite clear "that at that time the parties contributed in equal shares, and "it was the intention of the parties that they should own the "property in equal shares. But that was only part of the story. "£1,300 was raised on mortgage and the arrangement was that "£3 a week should be deducted from the husband's wages and "should be put aside towards the payment of the mortgage. "This position continued until the parties fell out, by which time "the husband had paid almost half the mortgage. Interest does "not affect the position. Question I have to decide is who owns "what right in the house. Mr. Sessions argues that the parties "are joint tenants and own in equal shares, but this does not "conclude the matter—*Rimmer* v. *Rimmer*[5] the dictum the "Master of the Rolls read out, the intention was that the "husband should wipe off the mortgage, he has done this, and "I attach considerable importance to that in deciding to what "share each party was entitled and the contribution to household "expenses."

For myself, I was rather puzzled by what the judge meant by the second of those findings. I thought he was perhaps intending to say that the second intention, videlicet, as to the husband "wiping off" the mortgage, was arrived at subsequently to the original arrangement as to equal ownership and as a variation thereof; but as the original intention was, as the judge said, formed at the time of the conveyance, and as the date of the mortgage was the same as that of the conveyance, it seems to me that the judge was holding that there was only one composite intention, namely, that Mr. and Mrs. Cobb should own the property in equal shares, and that the husband, as between the two of them, should assume responsibility for the mortgage payment of £3 a week. Mr. Picard for the husband was, as I gathered, content to treat the case upon that footing, but submitted that the court has power under section 17 of the Act of 1882 to establish a title to property contrary to the intention of the parties, and that it should do so in the present case because the husband contributed so much more towards paying off the mortgage than the wife did. I think that there are two answers to that. The first is, that although the husband's contributions did in fact considerably exceed those of the wife, the payments which he made were precisely those which were originally contemplated and agreed that he should make, and no more. The second is, that I know of no power that the court has under section 17 to vary agreed or established titles to property. It

[5] [1953] 1 Q.B. 63, 72.

has power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence, and those rights have not been varied by subsequent agreement, the court cannot, in my opinion, under section 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement was unfair.

On the judge's findings, then, both husband and wife were to have an equal beneficial interest (as they had a joint legal interest) in what they intended to be the matrimonial home. The payments under the mortgage deed amounted to some £3 a week, which the husband promised to pay and which he did pay. For her part, the wife agreed to make certain contributions out of her own money towards the upkeep of the home in various ways. This arrangement was never subsequently varied and it therefore seems clear to me that the wife never changed from her original position as part owner of the house to that merely of secured creditor for the £230 which she contributed when the house was purchased. Nevertheless, she has been treated, in effect, as a creditor in the order which the judge made, and I am unable to accept the view that that was her position when the marriage broke down or is her position now. In my opinion, the facts as found by the judge lead directly to the conclusion that she has at all material times been, and is now, entitled to an equal half-share in the property, and not merely to repayment of the £230 plus the £70 which the judge thought right in all the circumstances to regard as the value of her subsequent contributions to the home. The property is now held by Mr. and Mrs. Cobb as trustees on trust for sale with power to postpone: see section 36 of the Law of Property Act, 1925. If and when a sale is effected, either by agreement or by an order under section 30 of the Law of Property Act, or by an order made in the divorce jurisdiction, it would not be right that the whole of the outstanding mortgage money amounting to over £600 should come out of the husband's share of the proceeds of sale in exoneration of the wife's share. The wife is no longer making any contribution to the expenses of the joint home, for there is no longer a joint home, and it is right, therefore, that she should bear one-half of the principal and interest payable under the mortgage deed. I would, accordingly, suggest an order made in the following form:

Discharge the order of the judge and declare that, subject to the legal charge dated September 14, 1950 (naming the parties thereto), the applicant and the respondent are beneficially entitled in equal shares to 114A, Osborne Road, Wisbech, and to the proceeds of sale thereof when sold; and declare that as from June 22, 1954, the applicant and the respondent have been and are liable as between themselves in equal shares for all sums payable under the said legal charge in respect of the principal moneys and interest thereby secured.

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Picard. Since June 22, 1954, the husband has paid a great many £3's. I take it that will have to be adjusted?

DENNING L.J. Yes, that will be adjusted, but we take that date as the date when the marriage broke down. From that date the payments on the mortgage are to be borne equally. No order for a sale will be made. That matter must be left over until the Divorce Court proceedings, and that action should be brought on speedily.

Appeal allowed.
Order of county court judge discharged.

Solicitors: *Jaques & Co., for Ollard, Ollard and Sessions, Wisbech; Metcalfe, Copeman & Pettefar.*

M. M. H.

[CHANCERY DIVISION.]

1955 *June* 8.

Harman J.

* *In re* MORGAN, DECD.
CECIL-WILLIAMS *v.* ATTORNEY-GENERAL AND ANOTHER.

[1954 M. 1778.]

Charity—Recreation—Recreation ground—Gift for a parish—Intention the maintenance and improvement of the health and welfare of the inhabitants — Whether valid charitable gift — Sports grounds already in existence—Application cy-près.

A bequest of a sum of money for the provision of a public recreation ground for the benefit of the inhabitants of a particular geographical area is a good charitable bequest.

A testator by his will dated July 12, 1946, bequeathed to his trustees the sum of £3,000 "... with a view to the maintenance and "improvement of the health and welfare of the inhabitants of [the "parish of J. in the county of Pembroke] by the purchase, equip- "ment and maintenance of a public recreation ground for amateur "activities" upon trust to apply the said sum "in the purchase "of a piece or parcel of land situated in or near the said village "of [J.] and in the improvement and equipping of the same as "a public recreation ground for amateur activities for the benefit "of the said parish of [J.] and in the maintenance thereof until "transfer of the balance of the said sum is made to the parish "council as hereinafter provided." The testator then decreed that so much of the £3,000 which was surplus to the requirements so far dictated should be handed over to the parish council to be treated as an endowment fund for the maintenance of the recreation ground.

Evidence was filed to the effect that in the view of the parish council a recreation ground as such was not required, in that the village already possessed a cricket ground and a football pitch, but that there was need of a parish hall or gymnasium:—

Held (it not being argued to the contrary), that the bequest of the sum of £3,000 was a valid charitable bequest, and that in the

circumstances it ought to be carried into effect cy-près by way of scheme.

In re Hadden [1932] 1 Ch. 133; 48 T.L.R. 9 followed.

Observations of Viscount Simonds and Lord Reid in *Inland Revenue Commissioners* v. *Baddeley* [1955] 2 W.L.R. 552, 559, 566; [1955] 1 All E.R. 525 applied.

ADJOURNED SUMMONS.

Henry Hall Morgan, who died on February 11, 1953, by clause 4 of his will, dated July 12, 1946, provided: "Subject "to the trust contained in clause 2 hereof and upon the death "[of two named persons] or the survivor of them with a view "to the maintenance and improvement of the health and welfare "of the inhabitants of the parish of Jeffreyston in the . . . county "of Pembroke by the purchase equipment and maintenance of "a public recreation ground for amateur activities I bequeath "unto my trustees the sum of three thousand pounds in the "purchase of a piece or parcel of land situated in or near the said "village of Jeffreyston and in the improvement and equipping of "the same as a public recreation ground for amateur activities for "the benefit of the said parish of Jeffreyston and in the mainten-"ance thereof until transfer of the balance of the said sum is made "to the parish council as hereinafter provided." The testator then provided that so much of the £3,000 as was surplus to the requirements so far directed should be handed over to the parish council to be treated as an endowment fund for the maintenance of the recreation ground.

According to the evidence the view of the parish council of Jeffreyston was that a recreation ground as such was not what the village required, as it already possessed a cricket ground and a football pitch, but that what was needed was a parish hall or gymnasium.

The present summons was taken out by the trustees for determination of the questions (1) whether the bequest of the sum of £3,000 contained in clause 4 of the will was a valid charitable bequest; (2) if so, whether the sum in question ought to be applied cy-près and the matter referred to chambers for a scheme to be brought in.

H. E. Francis for the plaintiff trustees.

Denys Buckley for the Attorney-General.

M. O. Stranders for the residuary legatees, a school charity, was instructed on the direction of the Minister of Education not to argue against the validity of the bequest. He referred to the observations of Viscount Simonds in *Inland Revenue Commissioners* v. *Baddeley*.[1]

In re King[2] was cited in argument in addition to the cases referred to in the judgment.

[1] [1955] 2 W.L.R. 552, 559; [1955] 1 All E.R. 525.

[2] [1923] 1 Ch. 243.

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MORGAN, DECD., *In re.* CECIL-WILLIAMS *v.* ATTORNEY-GENERAL.

HARMAN J. stated the facts and continued: The first question is whether there is a valid charitable gift. I am inclined to hold that there is. The whole matter has recently been very much canvassed in the House of Lords in *Inland Revenue Commissioners* v. *Baddeley*,[1] in which case I, sitting at first instance,[2] called attention to certain cases concerning bequests for the promotion of sport and what has been termed "mere" sport, and found some difficulty in Clauson J.'s decision in *In re Hadden*.[3] But Viscount Simonds, in the leading speech in the *Baddeley* case,[4] made this careful observation, having regard to the presence in that case as amicus curiae of the Attorney-General: "I think it right to say that, in my opinion, a gift of "land for use as a recreation ground by the community at large "or by the inhabitants of a particular geographical area may "well be supported as a valid charity." He then made two reservations; one, where the nexus is a class determined by adherence to a particular religion, and the other where the nexus is any special provision relating to a particular employment or industry. Apart from that, he was very careful to say that his view was that such a gift could be supported.

I think that Lord Somervell was of the same opinion. Lord Somervell, at the end of his speech, said[5]: "Nothing that I "have said is to be taken as throwing any doubt or light on these "matters. Where a ground or hall is for the public different "considerations clearly arise." He clearly did take the view that where the public were interested in a hall or ground charity was not excluded.

Lord Reid, in his dissenting speech,[6] founded himself very much on the reasoning of Clauson J. in *In re Hadden*,[7] which was followed in two unreported cases, *In re Foakes*[8] and *In re Chesters*,[9] where the gift of money for the provision of recreation grounds for the inhabitants of a particular geographical area was held to be a good charitable bequest. I think I am bound so to hold, and I do so. It seems to me, therefore, that clause 4 creates a valid charitable gift.

But when I come to apply that principle to the circumstances of the present case I find that the parish council take the view that a recreation ground, in the ordinary sense of the word, is not at all what Jeffreyston requires. There is already a cricket ground and a football pitch. It is an agricultural community. What the young people want is somewhere where they can enjoy recreation under a roof. The parish council would not object to a playground for children with a building attached. What they really want is a parish hall or a gymnasium. There appears to be a real need for something of that sort in this place. Therefore,

[1] [1955] 2 W.L.R. 552.
[2] [1953] 1 W.L.R. 84, 91; [1953] 1 All E.R. 63.
[3] [1932] 1 Ch. 133; 48 T.L.R. 9.
[4] [1955] 2 W.L.R. 552, 559.
[5] Ibid. 583.
[6] Ibid. 566.
[7] [1932] 1 Ch. 133.
[8] (1933) Feb. 21, unrep.
[9] (1934) July 25, unrep.

it seems to me that I am entitled to take the view that the gift provided by this testator to attain his object—the improvement of the health and welfare of the inhabitants of Jeffreyston—may be expended in that way. That does not mean that the gift for charitable purposes fails, but merely that the immediate method by which the testator wished to effect them is not available.

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Consequently, in my judgment, I think that the proper course is to direct the application of this sum cy-près by way of a scheme, and I propose to refer to chambers for a scheme to be brought in by the plaintiffs, who will, of course, consult the parish council on the matter, as they are the persons who will have to administer the trust, for providing something in the nature of a playground, gymnasium and village hall where recreation can be had by the inhabitants of the area in question. I have no doubt that it will not be difficult to frame a scheme which is practicable and conducive to attaining the objects which the testator had in mind, namely, the improvement of the health and welfare of the inhabitants of this place.

Declaration accordingly.

Solicitors: *Cecil-Williams & Co.; Treasury Solicitor.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

* GREEN *v.* ROZEN AND OTHERS.

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June 16, 17.

Slade J.

Practice—Settlement of action—Enforcement—Action settled by consent on terms indorsed on counsels' briefs—No order of court—Non-compliance by one party with terms of settlement—Jurisdiction to enforce settlement — Informal settlement of actions — Form of order—"Tomlin" order.

An action claiming the return of moneys lent was settled before trial, there being written on the front of the brief of counsel for the plaintiff "By consent, all proceedings stayed on terms indorsed "on briefs. Liberty to apply" and on the back the agreed terms signed by counsel on either side whereby the defendant was to pay to the plaintiff a certain sum of money by instalments and the costs of the action, the "whole debt and costs" to become "due "and payable at once" on any instalment being in arrear. When the action was called on for hearing the court was informed of the settlement and what the terms of the settlement were, but no order was made by the court. Subsequently an order for taxation was made by a master. The defendant failed to pay one of the instalments and the plaintiff applied to the court for judgment for the balance due under the terms of the settlement, an order for the costs as taxed and the costs of the application:—

Held, that judgment could not be given, for the court had made no order and the original cause of action had been superseded by

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the new agreement between the parties comprised in the terms of settlement, and the court had no further jurisdiction in the matter; if the terms of the new agreement were not complied with the remedy of the injured party was not by application to the court but by action upon the new agreement.

Quaere whether under the "Tomlin" form of order the terms of settlement set out in the order are enforceable by the court without a further order.

Observations upon the effect of informal settlement of actions.

APPLICATION.

On January 11, 1955, an action was called on for hearing before Slade J., when counsel then appearing for the plaintiff told the court that the action had been settled and what the agreed terms of settlement were. In the action the plaintiff had claimed against three defendants jointly for the return of moneys lent amounting to £500 and against the first defendant for a further £50. When the action was settled the terms of settlement were written on the brief of counsel for the plaintiff as follows: on the front of the brief were the words "Cor. Slade J. By consent, all "proceedings stayed on terms endorsed on briefs. Liberty to "either side to apply"; on the back of the brief were the agreed terms: "By consent Dt. to pay plaintiff as follows: (1) £100 "forthwith; (2) £100 20th February, 1955; (3) balance of £250 by "three equal monthly instalments, the first payable on the 20th "March, 1955; (4) costs to be taxed or agreed and added to the "balance of £250 and paid with the third and last instalment; "(5) if any instalment in arrear whole debt and costs become due "and payable at once" and those terms were signed by counsel on both sides. No order of any kind was in fact made by the court, but on May 10, 1955, the costs of the action were taxed at £68 1s. 9d. in pursuance of a master's order.

The defendants duly paid the first £100; the payment of £100 due on February 20, 1955, and the first two instalments of the balance, but failed to pay the third instalment or the costs. The plaintiff applied to the court for judgment for the £83 6s. 8d. (one-third of the balance of £250) which had not been paid, for an order for costs as taxed and for the costs of the application.

John Frankenburg for the plaintiff referred to the following cases: *Cristel* v. *Cristel* [1]; *Abbott* v. *Abbott* [2]; *Graves* v. *Graves* [3]; *Re Hearn* [4]; and *MacCabe* v. *Joynt*.[5]

The defendants did not appear and were not represented.

SLADE J. referred to the facts as set out above and continued: Perhaps it is not surprising that I have no recollection of the circumstances of this case but Mr. Frankenburg, who was not here on January 11, tells me now, and I accept it, that I was in fact

[1] [1951] 2 K.B. 725; [1951] 2 All E.R. 574.
[2] [1931] P. 26; 47 T.L.R. 207.
[3] (1893) 69 L.T. 420.
[4] (1913) 108 L.T. 452, (C.A.) 737.
[5] [1901] 2 Ir.R. 115.

informed what the agreed terms of settlement were. Again, I have no recollection of them, but I have before me a brief of counsel who then appeared for the plaintiff.

[His Lordship read the indorsements on the front and back of the brief set out above and continued:] Although no doubt it was the intention of the parties that all further proceedings should be stayed in the light of that compromise, I am informed by the associate, who was present on that day, and Mr. Frankenburg on his instructions agrees that in fact I made no actual order staying all further proceedings although no doubt, of course, I should contemplate, as the parties would, that all further proceedings would in fact be stayed upon the basis of what I will call the new agreement. Nor did I make any order for taxation of costs which was one of the agreed terms in default of the costs being agreed, and I am confirmed in that view because I have since been shown the taxing master's certificate dated May 10 which says: "In pursuance of an order herein bearing date 24th "day of March, 1955, I have been attended by solicitors for the "plaintiff and for the defendants and I certify I have taxed the "costs." Therefore, the order for taxation was not made by myself on January 11, 1955, but no doubt by one of the masters on March 24, 1955.

That being the position, Mr. Frankenburg applied to me yesterday for relief in these circumstances. He said that the defendants, or one of them, had paid £100 forthwith, had paid the £100 payable on February 20, 1955, had paid the first two instalments of one-third of £250 on the due date, but had failed to pay the third instalment of one-third of £250, that is to say, £83 6s. 8d., or the sum of £68 1s. 9d. which by the time the third instalment became due had been shown by the taxing master's certificate to be the taxed costs which the defendants had agreed to pay. He asked me to give him judgment for the one-third which had not been paid, namely £83 6s. 8d., to give him an order for the costs in the figure at which they had already been taxed, and he furthermore (I think perhaps somewhat optimistically in this case) asked me to give him an order for the costs of the present application.

There are various ways in which an action can be disposed of when terms of settlement are arrived at when the action comes on for trial, or in the course of the hearing. I have had experience of at least five methods of disposing of an action in such circumstances. They are not exhaustive. One can in an appropriate case, as was done in one of the cases to which Mr. Frankenburg referred, get the terms of the compromise made a rule of court provided it appears that one of the terms of the compromise is that the terms shall be made an order of the court. But I am dealing with methods of disposing of an action of a less formal character than that. The first method which I have found to be very useful where the terms of compromise consist of an agreement by the defendant to pay a specified sum

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of money by specified instalments on specified dates is to give judgment for the total amount agreed to be paid coupled with a stay of execution so long as the instalments are paid in accordance with the terms agreed. I am sometimes asked to give judgment by consent and sometimes by the defendants submitting to it, and I have pointed out when invited to give judgment by consent that section 27 of the Debtors Act, 1869, (it also appears in the Annual Practice, 1955, p. 2007) requires that a consent judgment shall be registered at the Central Office within 21 days and if it is not so registered it will be void against the defendant's creditors. In the result, therefore, the form usually adopted is for the defendant to submit to judgment in open court.

The second method, which is no doubt more appropriate when the terms of settlement are not so straightforward as the mere payment of an agreed sum of money by specified instalments, is to secure an order of the court made by consent that the plaintiff and the defendant shall do the things which they have respectively engaged themselves to do by the terms of settlement. In such a case the order would take this form. There would be the title and the preamble, and then the order would recite, the terms having been agreed between the parties: "It is ordered that (*a*) the defendant do," etc., "the plaintiff do." etc., making each of the agreed terms an order of the court that it shall be carried out.

The third method I have known is what has become known as the Tomlin form of order, a form suggested by Tomlin J.[1] The Annual Practice, 1955, at page 2007 says: "Where an action "is stayed by consent on terms scheduled, the terms cannot be "enforced on an application to commit or attach, but an injunc- "tion or an order for specific performance must first be obtained"; and it cites for the authority of that statement of practice *Dashwood* v. *Dashwood*.[2] Then it says (ibid.) "After this decision "Tomlin J. stated that in future when an action was proposed to "be stayed on agreed terms to be scheduled to the order, the "order should be as follows"—this is the Tomlin form of order —"And the plaintiff and defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further pro- "ceedings in this action be stayed"—now these are the important words—"except for the purpose of carrying such terms "into effect. Liberty to apply as to carrying such terms into effect." I understand from the chief associate that some doubt exists as to how far the Tomlin form of order will enable the terms set out in the order to be enforced by the court, at all events without first obtaining some further order such as a four-day order in the Chancery Division or an order of a judge in chambers in the Queen's Bench Division; possibly because it could be said first, that the schedule to the Tomlin form of order is not part of the order, and, secondly, that in any event all that the court has ordered is a stay of all further proceedings with a

[1] [1927] W.N. 290. [2] (1927) 64 L.J.N.C. 431.

qualification by implication that they shall not be stayed so far as is necessary for carrying the agreed terms into effect, there being no positive order of the court that the terms shall be carried into effect. Those are the difficulties which occurred to me and I was invited to endeavour to clear up any doubt which may exist. Mr. Frankenburg has helped me in every possible way but I have not had the advantage of argument from the other side and I think that I should limit myself to dealing with the point which actually arises in the present case where there was no Tomlin form of order. All that I can do is to indicate the methods of disposing of an action which has been settled of which I have had experience in the hope that parties in future may choose the one which they may think is least open to controversy in the event of default being made in the carrying out of the agreed terms.

The fourth method I have come across is an order of the court made by consent staying all further proceedings in the action upon the terms agreed and indorsed on counsels' briefs. In that method there is an order of the court staying all further proceedings, but in the fifth method, that adopted in the present case, there is no order of the court at all, the court merely being told by counsel that the case has been settled upon the terms indorsed on counsels' briefs. That method I have known to be supplemented by a request for leave to withdraw the record, and I think in the case of a trial by jury a request for the withdrawal of a juror, although I believe that in the latter case the action can be set down and reheard if the terms are not complied with.

It will perhaps emphasize which is the easiest method of disposing of an action to consider what steps can be taken in each case to enforce the terms if they are not complied with. The first one seems to be simplicity itself. The court has already given judgment and the stay of execution lasts only so long as the agreed terms are complied with. If there is a failure to comply with them the party who suffers merely has to proceed to levy execution.

In the second case, the court has made an order in the terms I have indicated, that the plaintiff do so-and-so, the defendant do so-and-so, and if the plaintiff or the defendant, as the case may be, fails to carry out the court's order it is only necessary for application to be made to the court and the court will enforce it, what each party is to do or refrain from doing being part of the order itself.

The third case is the Tomlin form of order with which I have already dealt, and parties who choose that form of order may, if the terms are not complied with, find contentions raised against the enforcement of it, the nature of which I have already indicated.

In the fourth case the court, at the request of the parties, has made an absolute and unqualified order for a stay of all further

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proceedings. I say " absolute and unqualified " in contradistinction to the form of order where it is qualified by the words " save " for the purpose of carrying the terms into effect." Parties who wish to adopt the fourth method would be wise before doing so to read the note which appears at the top of page 3182 of the Annual Practice, 1955. Under the rubric " Effect of a stay of " proceedings " it says: " Two views may be taken: first, that " it is a discontinuance, and therefore cannot be removed; " secondly, that it is not equivalent to a discontinuance, but may " be removed if proper grounds shown." If you are anxious to resolve an interesting point of law as to which of those two schools of thought is correct, you could not do better than adopt the fourth method.

The fifth method, which is the only one I propose to decide, is the one adopted in the present case. The court has made no order of any kind whatsoever, and having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the court has no further jurisdiction in respect of the original cause of action, because it has been superseded by the new agreement between the parties to the action, and if the terms of the new agreement are not complied with the injured party must seek his remedy upon the new agreement.

I mentioned to Mr. Frankenburg what I thought were one or two of the difficulties in his way. He is asking me to give him judgment for £83 6s. 8d. as well as the costs. £83 6s. 8d. is one-third of £250 and arises only under the terms of the new agreement. He cannot come here and ask me to remove the stay because I have made no order for the stay at all: there is nothing to be removed. In my judgment, therefore, the plaintiff's remedy in this case to enforce payment of the sum of £83 6s. 8d. plus the taxed costs which the defendants agreed to pay must be by action upon the new agreement. I am sorry to have to come to that conclusion because it may mean starting a new action, but in my judgment I have no jurisdiction—I am not dealing with discretion at all—to give Mr. Frankenburg's client the relief she seeks. In those circumstances the application must be refused.

Application refused.
Leave to appeal.

Solicitors: *Israel, Joslin & Co.*

J. F. L.

[COURT OF APPEAL.]

* SANDOWN PARK LD. *v.* CASTLE (VALUATION OFFICER) AND ANOTHER.

C. A.

1955 *May* 12.

Birkett and Romer L.JJ.

Costs—Lands Tribunal—Scale—Costs awarded by tribunal on county court scale 3—Order for costs of hearing before tribunal on scale 3 awarded to successful appellants by Court of Appeal—No application for certificates for increased charges and fees made until year after order as to costs—Grant of certificates out of time in discretion of court—County Court Rules, 1936 (*S.R. & O.* 1936, *No.* 626/*L.*17), *Ord.* 47, *r.* 21 (4).

Costs—County court action—Scale.

Order 47, r. 21 of the County Court Rules, 1936, provides that applications for certificates that charges and fees in the proceedings should not be limited to county court scale 3 may be made at the hearing or within seven days of the making of the order as to costs: "Provided that where an application which could have been made "at the hearing is made subsequently, the judge may refuse the "application on the ground that it ought to have been made at the "hearing."

On May 19, 1954, appellants from decisions of the Lands Tribunal succeeded in the Court of Appeal and were awarded their costs before the Lands Tribunal on scale 3. No applications were made under Ord. 47, r. 21 for certificates for increased charges and fees until May 12, 1955:—

Held, that the application ought to have been made at the hearing, since Order 47, r. 21, clearly intended that the applications for certificates should be made at the hearing or within a few days thereof, and the court, in the exercise of its inherent discretion, would not alter its order as to costs made at the hearing of the appeals on applications made after so considerable a lapse of time.

APPLICATION to alter order as to costs.

On May 19, 1954, judgments were delivered in the Court of Appeal in favour of Sandown Park Ld., in three appeals on rating matters from the Lands Tribunal, which had decided those matters in favour of the valuation officer, Alfred George Castle, and the Esher Urban District Council. The Lands Tribunal had awarded costs on county court scale 3, and the Court of Appeal, reversing those decisions, ordered that the successful appellants should have their costs before the Lands Tribunal on scale 3.

The unsuccessful respondents were given leave to appeal to the House of Lords, but the appeals were not pursued. When the time for appeal had run out, the question as to costs came before the taxing master, who was asked by the successful appellants to increase the scale of the costs awarded by the Court of Appeal, but he was of opinion that he had no power to do so. Sandown Park Ld. thereupon applied on May 12, 1955, under the County Court Rules, 1936, Ord. 47, r. 21,[1] for certificates (1) that fees

[1] County Court Rules, 1936, Ord. 47, r. 21: "(1) Where the costs of "any proceedings are on Scale 3, the "judge may certify that the proceedings are fit for the employment of "more counsel than one. . . . (4) An "application for a certificate pursuant "to the foregoing paragraphs of this

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for counsel ought not to be limited to the amount allowed under scale 3; (2) that the proceedings were fit for more than one counsel; and (3) that the solicitors' costs for taking instructions for brief to counsel on trial ought not to be limited to the amount appearing in county court scale 3.

G. D. Squibb for Sandown Park Ld.

Harold J. Brown Q.C. and *Nigel Curtis-Raleigh* for the Esher Urban District Council.

Patrick Browne for the valuation officer.

BIRKETT L.J. stated the circumstances in which the application was made, and continued: I have considerable sympathy for the applicants. The case was one of some complexity and difficulty. A great deal of legal authority had to be cited, and the matter was argued very expertly and at considerable length. It would seem that, in the ordinary way, the three certificates which are asked for in this application would be granted. But the difficulty that arises is that this is merely a question as to the costs before the Lands Tribunal. The tribunal gave the urban district council and the valuation officer an order that they should have the costs on scale 3 of the county court. Mr. Squibb tells us that that is the ordinary practice of the Lands Tribunal, though they have power under the Lands Tribunal Rules, rule 42 (2), to order a lump sum to be paid by way of costs or on a specified scale according to the Rules of the Supreme Court or according to the rules of the county court; but I rather gather that in practice the Lands Tribunal confine the matter of costs to the county court scale; and that was done.

Therefore, as the order stood, Sandown Park Ld., who had lost their case before the Lands Tribunal, were ordered to pay costs on scale 3. There was an appeal to the Court of Appeal, and the Court of Appeal reversed that decision. The Court of Appeal, apart from making the order about the costs of the appeal, had to deal with the costs before the Lands Tribunal, and they decided (as would seem rather natural) that as costs on scale 3 had been awarded against Sandown Park Ld. the same rule ought to apply now that they were successful. The Court of Appeal said: "Appeal allowed; costs before the Lands Tribunal to be "paid on scale 3."

That is the whole point of this application. Unfortunately, there has been some delay. Sandown Park Ld. are not wholly responsible for that delay. The Court of Appeal, when allowing the appeal from the Lands Tribunal, gave leave for an appeal to

"Rule may be made at the hearing "or on notice which shall be served "on the party sought to be made "liable within 7 days of the making "of the order awarding costs or "within 7 days of the receipt of "notice of payment into court or of "notice of discontinuance: Provided "that where an application which "could have been made at the hear- "ing is made subsequently, the judge "may refuse the application on the "ground that it ought to have been "made at the hearing."

the House of Lords, and nothing was done while that order was current; the appeal to the House of Lords was abandoned and it was then said: "We need not take any step now because the "taxing master's powers are sufficient to deal with this matter "as we would wish it to be dealt with." But the taxing master took the view that his powers were not sufficient and that an application ought to be made to this court.

The difficulty about the matter is that, under the County Court Rules, 1936, Ord. 47, r. 21 (4), it is provided: "An application "for a certificate pursuant to the foregoing paragraphs of this "Rule may be made at the hearing or on notice which shall be "served on the party sought to be made liable within seven days "of the making of the order awarding costs or within seven days "of the receipt of notice of payment into court or of notice of "discontinuance." The preceding paragraphs of rule 21 deal with the costs of the proceedings, which are on scale 3, and expressly state that the judge can certify that the proceedings are fit for the employment of more counsel than one. But the proviso to rule 21 (4) is in these words: "Provided that where an applica-"tion which could have been made at the hearing is made "subsequently, the judge may refuse the application on the "ground that it ought to have been made at the hearing."

Mr. Harold Brown intervened to say that that really means that the time that is given is limited to seven days and the proviso means that if within seven days subsequently to the making of the order an application is made, the judge has power to say "I refuse it on the ground that it ought to have been made "earlier." Mr. Squibb contended that that was not the meaning of the rule, and referred to Order 13, r. 5, of the County Court Rules, which provides: "(1) Subject to the provisions of these "Rules, any of the times fixed by these Rules for—(*a*) taking any "step in any proceedings; or (*b*) filing any document; or (*c*) giving "any notice; may be enlarged or abridged by consent of all parties "or by the court on the application of any party. (2) An order "enlarging time may be made although the application therefor "is not made until after the expiration of the time allowed or "appointed." Mr. Squibb says that the time is not limited to seven days; it is any subsequent time; and, indeed, he said expressly that a year or eight days makes no difference; it is "subsequently"; and it is a matter for the court.

I do not think it is necessary for us to determine the construction of the rule, and whether the time is limited to seven days or not. It is plain that the application has been made subsequently to the making of the order, and the discretion is in the court to deal with that matter. The conclusion to which I have come is that, while I have considerable sympathy with the substance of the application, I do not think it is an application to which we ought to accede. After all, the order was made by the Court of Appeal and nobody at the time ever raised any question about it. Nobody suggested: "This is a case where it

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"ought not to be confined to scale 3"; and they would have found it a little difficult to argue that, in view of the fact that up to that moment the order which had been made against them for them to pay was on that self-same scale. It is only in the development of the circumstances—that is to say, the abandonment of an appeal to the House of Lords and the attitude taken by the taxing master—that it is thought that an application ought to be made to the Court of Appeal to vary (or, as Mr. Squibb said, add to) the order which was made with regard to costs.

In my view we ought not to make any such order. The proviso to paragraph 4 of rule 21 says: "Provided that where an "application which could have been made at the hearing is made "subsequently, the judge may refuse the application on the "ground that it ought to have been made at the hearing." If this point with regard to these three matters was to be raised it ought to have been raised at the hearing. The application, coming at this time, is in my opinion too late. I would therefore dismiss the application.

Romer L.J. I agree. I also feel sympathy with Sandown Park Ld., in this sense, that I cannot help feeling that if the application for these three certificates had been made when the judgment of this court was delivered that application would, very probably, have been acceded to, having regard to the nature of the case and the importance of the issues raised. But I cannot feel that an application made a year after judgment in this court was delivered should be acceded to now, having regard to the obvious conception which was in the mind of the draftsman of this rule that the application should be made at or within a very few days of the hearing of the trial. Accordingly, I agree that we ought not to grant this application.

Patrick Browne. Your Lordship said in the course of your judgment that you understood it was the usual practice for the Lands Tribunal only to give costs on scale 3. I ought to say that that is not by any means the invariable practice.

Birkett L.J. I gathered Mr. Squibb to say that the Lands Tribunal were in the habit of giving costs on scale 3.

Squibb. That is what I did say, my Lord. There have been cases where they have made orders on the High Court scale, but my experience has usually been the other way.

Patrick Browne. I have known quite a lot of cases where the High Court scale has been given. I feel it right to point that out.

Application dismissed.

Solicitors: *Taylor & Taylor; Lees & Co. for Frederick Edwards, Esher; Solicitor, Inland Revenue.*

M. M. H.

[COURT OF APPEAL.]

C. A.

1955
June 7.

Evershed M.R., Jenkins and Parker L.JJ.

* *In re* WEST FERRY ROAD, POPLAR. *In re* PADWICK'S ESTATE.

Solicitor—Costs—Taxation—Compulsory purchase—Registered land—Sellers' costs payable by acquiring authority—Basis of taxation—Whether scale fee or itemised account—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 82, 83—*Solicitors' Remuneration Orders*, 1883 *to* 1953 (*S.R. & O.*, 1882[1]; *S.I.* 1953 *No.* 117/*L.*1), *Sch. II—Solicitors' Remuneration (Registered Land) Orders*, 1925 *to* 1953 (*S.R. & O.* 1926, *No.* 2/*L.*2; *S.I.* 1953, *No.* 118/*L.*2), *para.* 1 (D) (i), (G), (H).

Compulsory Purchase—Costs.

On the compulsory purchase of premises registered with an absolute title at H.M. Land Registry, the parties failed to agree the amount of the costs and expenses incurred by the sellers which, in accordance with section 82 of the Lands Clauses Consolidation Act, 1845, the purchasing authority was required to pay to the sellers. The bill of costs of the sellers' solicitors was taxed, but the purchasing authority objected to the basis of the taxation:—

Held, that, as the premises were registered with an absolute title, the remuneration of the solicitors was, by paragraph 1 (D) (i) of the Solicitors' Remuneration (Registered Land) Order, 1925, to be that prescribed in the schedule to that order (that is, a non-itemised scale fee based on the selling price of the property). The sellers were liable to pay that scale fee to their solicitor on the completed transfer and, therefore, that was the cost and expense incurred by them for the purposes of section 82 of the Act of 1845, irrespective of whether the work covered by the scale fee was or was not within the express terms of section 82.

In re Hampstead Junction Railway Co., ex parte Buck (1863) 1 Hem. & M. 519 distinguished.

Decision of Harman J. [1955] 1 W.L.R. 439; [1955] 1 All E.R. 197 affirmed.

APPEAL from Harman J.[2]

In 1954 the London County Council bought certain freehold premises in Poplar, London, from the trustees of an estate known as Padwick's Estate under the County of London (West Ferry Road, Poplar) Compulsory Purchase Order, made under the Town and Country Planning Acts, 1944–1947. The freehold title to each of the properties was registered with an absolute title in H.M. Land Registry.

The purchase being within section 81 of the Lands Clauses

[1] Note: This order which is printed in the Statutory Rules and Orders of 1882 and is referred to in Brickdale and Stewart-Wallace on the Land Registration Act, 1925, 4th ed., p. 503, as of 1882 came into force on January 1, 1883, and is referred to as the Solicitors' Remuneration Order, 1883: see the Solicitors' Remuneration Order, 1944 (S.R. & O., 1944, No. 203), cl. 2.

[2] [1955] 1 W.L.R. 439; [1955] 1 All E.R. 197.

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Consolidation Act, 1845,[3] in accordance with section 82 of the Act, the costs and expenses of the sale were payable by the London County Council to the sellers. Application was made in due course by the sellers to the London County Council for payment of the bill, amounting to £159 15s., which had been delivered to the sellers by their solicitors on September 10, 1954. This bill was a non-itemised bill, drawn on the footing that the solicitors were entitled as against their clients, the sellers, to payment in accordance with the scale fee in the schedule to the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953.[4]

The London County Council objected to paying the bill, and the costs, therefore, became taxable under section 83 of the Lands Clauses Consolidation Act, 1845; and on a petition under that section an order was made on October 7, 1954, for the taxation of the bill. The order recited that the petitioners were the

[3] Lands Clauses Consolidation Act, 1845, s. 81: "Conveyances of "lands to be purchased under the "provisions of this . . . Act . . . may "be according to the forms in the "schedules (A) and (B) respectively "to this Act annexed, or as near "thereto as the circumstances of the "case will admit, or by deed in any "other form which the promoters of "the undertaking may think fit; and "all [such] conveyances . . . shall be "effectual to vest the lands thereby "conveyed in the promoters of the "undertaking. . . ."

S. 82: "The costs of all such conveyances shall be borne by the promoters of the undertaking; and such "costs shall include all charges and "expenses, incurred on the part as "well of the seller as of the purchaser, "of all conveyances and assurances of "any such lands, and of any outstanding terms or interests therein, "and of deducing, evidencing, and "verifying the title to such lands, "terms, or interests, and of making "out and furnishing such abstracts "and attested copies as the promoters "of the undertaking may require, and "all other reasonable expenses incident to the investigation, deduction, "and verification of such title."

S. 83: "If the promoters of the "undertaking and the party entitled "to any such costs shall not agree as "to the amount thereof, such costs "shall be taxed by one of the taxing "masters of the Court of Chancery, ". . . upon an order of the same "court, to be obtained upon petition "in a summary way by either of the "parties; and the promoters of the "undertaking shall pay what the said "master shall certify to be due in "respect of such costs to the party "entitled thereto . . . and the expence "of taxing such costs shall be borne "by the promoters of the undertaking, "unless upon such taxation one-sixth "part of the amount of such costs "shall be disallowed, in which case "the costs of such taxation shall be "borne by the party whose costs shall "be so taxed, and the amount thereof "shall be ascertained by the said "master, and deducted by him accordingly in his certificate of such "taxation."

[4] Solicitors' Remuneration (Registered Land) Order, 1925, para. 1: "The remuneration of solicitors in "conveyancing and other non-contentious business under the Land "Registration Act, 1925, shall be "regulated as follows:—. . . (D) For "every completed transfer on sale . . . "(i) Where the land is registered with "absolute . . . title, the remuneration shall be that prescribed in the "schedule hereto. . . . [The Schedule provides a scale of remuneration related to the value of the land.] "(G) In all exchanges and other "transactions, save those hereinbefore "specified, item remuneration shall "apply." [By the Solicitors' Remuneration (Registered Land) Order, 1953, paras. 2 and 4, the remuneration specified in Sch. II to the Order of 1882–3, as amended in 1953, was subsitituted for "item" remuneration.] (H) "The remuneration prescribed by the Schedule hereto "covers . . . the preparation or "perusal (as the case may be) of "the contract, or conditions of sale, "if any, the perusal of any lease, or "other deed mentioned on the register, and all other work incidental "to or consequential on the transaction. . . ."

owners of certain lands for which the purchase-money had been paid and the deed of transfer executed. It further recited that by section 82 of the Act of 1845 the London County Council were liable to pay the sellers' costs of the conveyance of the lands, including all charges and expenses specified in the section, and that the London County Council did not agree the amount of the bill delivered on September 10, 1954, and that the petitioners were desirous of having the bill taxed under section 83 of the Act, and the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953. The taxing master allowed the bill as presented.

The London County Council, on January 17, 1955, entered the following objections to the taxation of the whole bill:

"(1) Because this taxation (being the taxation of vendors' "costs arising out of a sale to which the Lands Clauses Con- "solidation Act, 1845, applied) is governed by section 83 of that "Act, under which the taxing master had an unfettered discretion "to certify the amount to be paid by the respondents [the London "County Council] to the petitioners [the vendors] in respect of "their costs.

"(2) Because the Solicitors' Remuneration (Registered Land) "Orders, 1925, 1944 and 1953, do not apply to a taxation as "between the vendors and the promoters under section 83 of the "Lands Clauses Consolidation Act, 1845, but apply only on the "taxation of a solicitor's bill as between him and his client.

"(3) Because the Solicitors' Remuneration (Registered Land) "Order, 1925, is expressed to apply to the remuneration of "solicitors in conveyancing and other non-contentious business "under the Land Registration Act, 1925, whereas the business "between the petitioners and the respondents arose under the "Town and Country Planning Acts, 1944–1947, and the Lands "Clauses Consolidation Acts, 1845, 1860 and 1869, as well as the "Land Registration Act, 1925.

"(4) Because in exercising his said discretion the taxing "master ought to allow only such costs as are in all the "circumstances fair and reasonable, using as a guide (but not as "fettering his discretion) the Schedule II remuneration prescribed "by the Solicitors' Remuneration Orders.[5]

[5] Solicitors' Remuneration Order, 1883 [as amended by the Solicitors' Remuneration Order, 1953]: "2. ". . . the remuneration of a solicitor "in respect of business connected "with sales, purchases, leases . . . "and other matters of conveyancing ". . . is to be regulated as follows ". . . (*a*) In respect of sales, pur- "chases . . . the remuneration of the "solicitor having the conduct of the "business . . . is to be that pre- "scribed in Part I of Schedule I. ". . . (*c*) In respect of business "not hereinbefore provided for . . . "the remuneration is to be regulated "in accordance with Schedule II "hereto."

[Sch. I, Pt. I, provides a scale of charges related to the sale price or, where the property is not sold, to the reserve price.] Rule 11: ". . . In "cases of sales under the Lands "Clauses Consolidation Act or any "other private or public Act under "which the vendor's charges are paid "by the purchaser, the scale shall not "apply."

Sch. II: "Any business, not being "contentious business, for which no "charge is prescribed by Schedule I, "or in respect of which the solicitor

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" (5) Because, if and so far as the Solicitors' Remuneration " Orders are relevant, there is no reason in principle for dis- " tinguishing between unregistered land and registered land in " regard to the taxation of a vendor's costs arising out of sales " to which the Lands Clauses Consolidation Act, 1845, applied, " and that since the Solicitors' Remuneration Order, 1882, " expressly excludes the scale in the case of sales of unregistered " land a similar exclusion ought to be implied in the Solicitors' " Remuneration Orders relating to registered land."

On February 7, 1955, the master delivered the following answers, overruling the objections of the London County Council: " Schedule I, Part I, of the Solicitors' Remuneration Order, 1883,[5] " (as amended by the Order of 1953), lays down a scale of charges " on sales, purchases and mortgages of land other than ' registered " ' land ' which varies according to the amount of the considera- " tion involved in the transaction. Rule 11 of the Rules applicable " to that scale provides that ' in cases of sale under the Lands " ' Clauses Consolidation Act . . . under which the vendor's " ' charges are paid by the purchaser, the scale shall not apply.' " It would seem that it must have been in the contemplation of " the framers of that rule that, but for the exception contained " in the wording of the rule itself, the scale would have applied " to such transactions.

" A scale of remuneration is provided under the Solicitors' " Remuneration (Registered Land) Orders, 1925 to 1953, govern- " ing, according to the amount of consideration involved, the " charges which solicitors are entitled to make for ' transfers on " ' sale . . . ' where land concerned is ' registered land.'

" There is nothing in the Solicitors' Remuneration (Regis- " tered Land) Order, 1925 (as amended by the Order of 1953), " corresponding to the exception of the Lands Clauses Consolida- " tion Act and similar cases contained in rule 11. . . . I " therefore conclude that such cases were not intended to be " excluded from the operation of the scale when the land is " registered land, and it would appear that the appropriate scale " does apply to the bill of costs referred to me for taxation in " this case. The registered land scale is chargeable in full " whether a contract of sale is entered into between the parties " or not, as is shown by paragraph 1 (D) of the Order of 1925."

The London County Council took out a summons asking the

" has, in accordance with paragraph " 6 of this order, elected to charge " under Schedule II.

" Such sum as may be fair and " reasonable, having regard to all the " circumstances of the case and in " particular to: (1) the complexity of " the matter or the difficulty or " novelty of the questions raised; (2) " the skill, labour, specialised know- " ledge and responsibility involved on " the part of the solicitor; (3) the " number and importance of the docu- " ments prepared or perused, without " regard to length; (4) the place " where and circumstances in which " the business or any part thereof " is transacted; (5) the time ex- " pended by the solicitor; (6) where " money or property is involved, its " amount or value; and (7) the im- " portance of the matter to the " client. . . ."

court to review the taxation and allow the objections presented by them; but Harman J. held that the costs were correctly taxed according to the scale fee in the schedule to the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953. He therefore dismissed the summons. The London County Council appealed.

Maurice Lyell Q.C. and *H. E. Francis* for the London County Council.

John Brunyate for the sellers.

In addition to the case referred to in the judgments the following was cited in argument: *Institute of Patent Agents* v. *Lockwood*.[6]

EVERSHED M.R. This appeal concerns the extent of the liability of a local authority, upon a compulsory acquisition, for the costs and expenses incurred on the part of the seller, those last words being taken from section 82 of the Lands Clauses Consolidation Act, 1845. That section imposes upon a local authority in such a case as the present the obligation of paying such charges and expenses; but the section itself is in terms which, according to Mr. Lyell's argument, exclude from the liability of the local authority any costs, charges and expenses, which are related to work done on the seller's part, but which are not properly for work of or in connexion with the conveyance itself.

[His Lordship read section 82 and continued:] Section 83 provides that if the promoters and the party entitled to the costs shall not agree as to the amount thereof, such costs shall be taxed by one of the taxing masters of the court of Chancery "upon an order of the same court, to be obtained upon petition "in a summary way."

In the present case the land acquired was registered land, that is (as is conceded for the present argument) land which has been registered with an absolute or good leasehold title under the Land Registration Act, 1925.

The sellers under the compulsory purchase have sought to recover from the London County Council, the amount of the costs which they say that they became obliged to pay to their own solicitors, the costs being charged in accordance with the Solicitors' Remuneration (Registered Land) Order, 1925. The sum involved is not, in the circumstances, very large. We were told that the bill amounts to about £159 and it has not been suggested that that sum is by any particular amount excessive or indeed that it exceeds what, on a taxation under section 83, would have to be paid in any event by the London County Council.

[6] [1894] A.C. 347; 10 T.L.R. 527.

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The matter has, however, come before us, as it is said, upon a question of principle, that question being whether the terms of the Solicitors' Remuneration (Registered Land) Order, 1925, apply at all to the acquisition under compulsory powers by a local authority of registered land; or alternatively, if the order does apply in any such cases, to what cases it does so apply.

The powers and rights of solicitors to charge for their services have for some time been regulated by orders made under the authority of Acts of Parliament and in that respect for a great many years a distinction has been drawn between charges in respect of sales of registered land and charges in respect of sales of unregistered land. The question which has arisen in the present case, and the difficulty which has exhibited itself, largely depends I think on the circumstance that, as regards unregistered land, the relevant order, as amended from time to time, contains an express exclusion of its applicability to cases of sales under the Lands Clauses Consolidation Act, 1845, whereas there is no such exclusion in the case of registered land. In the case of unregistered land the matter is regulated by the Solicitors' Remuneration Order, 1883, which has been amended in certain respects, but which provides that a scale set out in Schedule I of that order shall be applied in the case of certain transactions, including completed sales; but, by rule 11 of that order it is provided that, in cases of sales under the Act of 1845 or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply. When, however, one comes to the relevant order relating to registered land, which is the Solicitors' Remuneration (Registered Land) Order, 1925, there is no such exclusion.

The relevant provisions of the order of 1925 are as follows: [His Lordship read subparagraph 1 (D) (i) and continued:] The schedule to the order of 1925 contains a scale of remuneration which is related strictly to the value of the land sold. Subparagraph (G) provides: "In all exchanges and other transactions, save those hereinbefore specified, item [Schedule II] remuneration shall apply." Schedule II, putting it briefly, now regulates the remuneration in accordance with general principles as regard the amount of the work done, the skill in doing it, and so forth, including (but not limited to) the value of the subject-matter dealt with. [His Lordship read subparagraph (H) and continued:]

The burden of Mr. Lyell's argument which I have already anticipated is, that the liability under section 82 of the Lands Clauses Consolidation Act, 1845, is limited, broadly speaking, to the costs and charges incurred in respect of the conveyance and other matters properly ancillary thereto, matters of title and so forth—in respect of matters, as he says, arising after the date of any contract which the solicitor might have been employed in drafting or perusing. Therefore, says Mr. Lyell, it will be seen that subparagraph (H) of the order of 1925, by

making the remuneration extend to and cover, and in effect be remuneration for, matters other than those specified in section 82, imposes or would, if it were applicable, impose upon the acquiring authority a greater liability to pay costs than section 82 ordained.

Mr. Lyell referred us to the decision of Page Wood V.-C. in *In re Hampstead Junction Railway Co., ex parte Buck.*[1] In that case an acquiring authority, a railway company, acquired parts of certain properties and, as a consequence, the seller had to apportion the rents which he had been receiving from them. He sought to charge the railway company, under the Lands Clauses Consolidation Act, 1845, with the costs of the apportionments in question.

Page Wood V.-C. said[2]: "I do not see in what way I can "give any costs under section 82, which are not costs of or "incidental to the conveyance. But the conveyance is a "perfectly distinct thing from that which is to be conveyed, "and from preliminary negotiations. The conveyance begins "when you have ascertained what is to be conveyed, and then "the provision of the Act is that the company are to pay the "costs of verifying the title and the expenses of conveyance." The Vice-Chancellor then gave one or two examples and concluded this part of his judgment thus[3]: "As regards the Act, "I think Mr. Speed's explanation the right one. Section 82 "deals simply with the legal expenses of making title and "conveying the property, taking these expenses in their "largest sense, but not with any costs of ascertaining what that "is which is to be put into the document."

Mr. Lyell has argued from that judgment that the costs properly attributable, for example, to the making of any contract preceding the conveyance are necessarily outside the ambit of the obligation imposed by section 82. It is not in my judgment necessary to express any view of the exact limits imposed by the terms of section 82 or to say whether in all cases, or in some cases, the costs of solicitors in preparing or perusing a contract would or would not be within the charge. I think that the answer to the present case depends upon the simple terms of the order of 1925, subparagraph (D). This is registered land. By the order of 1925 (the competence to make which has not been challenged and which in my judgment must be treated as a valid and effective order) the remuneration of solicitors in regard to conveyance of registered land is regulated by virtue of the order, so that under subparagraph (D), for every completed transfer of sale where the land is registered with absolute or good leasehold title, the remuneration shall be that prescribed in the schedule thereto.

[1] (1863) 1 Hem. & M. 519.
[2] Ibid., 523.
[3] Ibid.

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In my judgment it follows from those words that, the seller being liable to his solicitor by virtue of the order, which I have read, to pay a scale charge upon a completed transfer, those costs are inevitably, within the fair meaning of section 82, charges and expenses, incurred on the part of the seller, of the conveyance and assurance of the lands. I cannot for my part see any escape from that effect of the words which I find in this order. If it had not been for the exclusion, by virtue of rule 11 of the order of 1883, of sales upon compulsory acquisition of unregistered land, I should have thought, I must confess, that the matter was quite plain; but it is, as I have already mentioned, a curious and marked feature of the code of charges which has gradually been built up over the last three-quarters of a century that one does find in the case of unregistered land this express exclusion; and so it has been argued, and argued not without some force, that if a scale charge of this character is or was treated by the requisite authority as inapplicable to the case of unregistered land to compulsory purchasers, by the same token a scale charge in respect of registered land should be treated as equally inapplicable to such cases. Some attempt has been made in the course of argument to suggest reasons which may have influenced the order-making authority in making the exclusion in the one case and not the other. It is an exercise in speculation which does not, in my judgment, help the solution of the present case, although I think there is some force at any rate in Mr. Brunyate's contention that in the case of registered land, treating it in quite general terms, it would not be so easy to think of a fair method of assessing remuneration for work done which did not involve a calculation by reference to the value of the subject-matter sold—in other words, which did not in effect bring one back to the schedule to the order of 1925. However that may be, for some reason the exclusion is found in the one case and not in the other.

It is the function of the court now to construe together the Act of 1845, ss. 82 and 83, and the relevant solicitors' remuneration orders, and to see what in the result is the effect in such a case as the present. I have already indicated that in my judgment there is really no escape from the plain language of the order of 1925 and its consequence when one looks at section 82 of the Lands Clauses Consolidation Act, 1845. There was, however, this further point made which depends upon the terms of subparagraph (H) in the order of 1925. Subparagraph (H) makes it plain that the scale remuneration under the order of 1925 covers not merely the costs and expenses of and incidental to the conveyance, but also, amongst other things, the costs related to all other work incidental to the transaction; and Mr. Lyell has said, that the scale must therefore have been arrived at, taking one imaginary example with another, so as to give, upon an average, a fair remuneration, whether there was or was not in any given case work incidental to the transaction not being

work properly of or incidental to the conveyance. I can see the force of the argument, but in my judgment it cannot affect the result. Quite plainly—whether it is so in this case has never been inquired into—if there were no other work than work of or incidental to the conveyance, it would be, I think, exceedingly difficult to contend that the proper amount of charge which a solicitor could make was not that regulated by the express terms of the order of 1925, and that that sum was not in terms covered by section 82 of the Act of 1845. But assuming that in some cases there is work done which would not be within the scope of section 82, still, I think, the charges made under the order of 1925 are "charges and expenses of "the conveyance"; and not the less so because the solicitor is disabled from making any additional charge in respect of other matters which might as such be outside the scope of section 82.

There is the final point—for this reason I referred to subparagraph (G)—that if the remuneration is not to be the scale remuneration under the order of 1925, under what order is the solicitors' power to charge regulated at all? I think for myself that Mr. Brunyate is right when he says that subparagraph (G), which brings into operation Schedule II of the orders of 1883 to 1953, could not apply in such a case as the present since the transaction is one for which express provision has earlier been made in the order [of 1925]. But that is not necessarily conclusive because, as Mr. Lyell contends, the taxing master could still be invited to exercise his powers of taxation in general terms under section 83 of the Act of 1845. I find, however, the conception not an easy one to accept; for nowadays, 110 years after the Act of 1845, it seems to me difficult to suppose that the taxing master could be invited to tax upon some general discretion, altogether outside the ambit of any of the remuneration orders, the costs of a seller in a case such as the present. These matters, however, are but arguments, and no more, tending towards one or other of the two conclusions suggested on the strict wording of the Order of 1925.

For the reasons which I have already given it seems to me that the remuneration which the solicitors are entitled to charge, and indeed which, prima facie, they were bound to charge under that order for a completed transfer of sale, is within the exact language of section 82 as being charges and expenses incurred on the part of the sellers of the assurance.

I should like to say in conclusion that I have felt, and indeed expressed, some embarrassment, as Master of the Rolls, in this matter since the order-making authority in the case of solicitors' remuneration is vested in a committee of which the holder of my office for the time being is a member; and, as Mr. Lyell has indicated, these matters of solicitors' remuneration have been from time to time, and still are, matters of anxious consideration by that committee. The latest Schedule II order of 1953 was made during my own term of office. But I am

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fortunately disembarrassed, or at any rate substantially so, by the happy circumstance that both my colleagues have arrived at the same conclusion as myself. But for the reasons which I have stated I think that Harman J. rightly concluded this matter and I think the appeal should be dismissed.

JENKINS L.J. I agree and have nothing to add.

PARKER L.J. I agree and I would only add this. The London County Council, the promoters in this case, are bound, under section 82 of the Lands Clauses Consolidation Act, 1845, to pay the charges and expenses of certain work. As my Lord the Master of the Rolls has said, it is unnecessary to lay down exactly what is covered by section 82, but I will refer to it as X. Accordingly, if the sellers put forward a bill rendered by their solicitors in accordance with the appropriate statutory scale for that work, X, the promoters are bound to pay. It is perfectly true that if the bill rendered was a bill for work which the solicitors were only entitled to charge on the basis that they had done not merely X, but X plus Y, the promoters would be entitled to say that that was something more than they were bound to pay, but in the present case it seems to me to avail the promoters nothing to say that, if more work had been done than X and if X plus Y had been done, the solicitors could not have charged any more.

It seemed to me in the course of the argument that the only basis upon which the London County Council could succeed here would be if they could show that the two orders, the order in respect of registered land and the order in respect of unregistered land, must in some way be read together so that the exception in regard to compulsory sales, which is specifically laid down in the order dealing with unregistered land, should apply equally to registered land. Not only do I see no grounds whatever for reading the orders in that way, but it is to be observed that in 1953. both orders were amended by orders laid before Parliament, and whereas occasion was taken to amend that very exception in rule 11 of the unregistered land order, the opportunity was not taken, and presumably deliberately not taken, to amend the registered land order by including a similar exception. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *J. G. Barr; Coward, Chance & Co.*

E. D.

[HOUSE OF LORDS.]

* TOOL METAL MANUFACTURING CO. LD. APPELLANTS;
AND
TUNGSTEN ELECTRIC CO. LD. . . . . RESPONDENTS.

H. L. (E.)†
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Apr. 20, 21, 25, 26, 27, 28; *May* 2, 3; *June* 16.

Contract—Suspension—Notice to determine—Nature of notice—Patent—Licence subject to compensation for exceeding quota—Agreement to suspend payments of compensation—Litigation between parties—Counterclaim seeking to enforce payments—Whether sufficient notice—Patent—Licence—Condition—"Prohibit or restrict"—Meaning—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 38 (1). *Patent.*

By section 38 (1) of the Patents and Designs Act, 1907: "It "shall not be lawful in any contract . . . in relation to the . . . "licence to use . . . any article . . . protected by a patent to "insert a condition the effect of which will be—(*a*) to prohibit or "restrict the . . . licensee from using any article or class of "articles, whether patented or not . . . supplied . . . by any "person other than the . . . licensor or his nominees; or (*b*) to "require the . . . licensee to acquire from the . . . licensor or his "nominees, any article or class of articles not protected by the "patent; . . ."

The appellants, the registered proprietors of certain British letters patent, entered into an agreement with the respondents authorising them to manufacture under the patents subject to a quota. Clause 5 provided that if in any month the aggregate quantity of contract material, as defined by the agreement, sold or used by the respondents (other than material supplied to them by the appellants) should exceed a stated quantity, the respondents should pay compensation equal to 30 per cent. of the sum representing the excess net value. As a result of discussions between the parties in 1942 the appellants agreed to suspend enforcement of payments of compensation pending the foundation of a new agreement. In 1945 there was litigation between the parties, the respondents being plaintiffs and the appellants defendants, and on March 28, 1946, the appellants counterclaimed payment of compensation under the agreement but failed on the ground that when the counterclaim was delivered the waiver was still continuing. Subsequently the appellants commenced an action claiming payment of compensation alleged to be due for a period commencing January 1, 1947:—

Held, that in the circumstances the delivery of the counterclaim constituted sufficient notice of the intention of the appellants to terminate the suspension of the enforcement of the compensation provisions in clause 5, although no date of termination was specified. There is no universal rule that such an arrangement must always be terminated in one way.

Canadian Pacific Railway Co. v. *The King* [1931] A.C. 414 distinguished.

Hughes v. *Metropolitan Railway Co.* (1877) 2 App.Cas. 439 considered.

Held, further, that clause 5 was not void as imposing a penalty or being in restraint of trade.

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD TUCKER and LORD COHEN.

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Held, further (*per* Lord Oaksey, Lord Tucker and Lord Cohen; Viscount Simonds dissenting), that clause 5 was not void as contravening section 38 (1) of the Patents and Designs Act, 1907, since the words "prohibit," and "restrict" and "require" indicated legal obligation and not mere financial inducement.

Decision of the Court of Appeal [1954] 1 W.L.R. 862; [1954] 2 All E.R. 28 reversed.

Appeal from the Court of Appeal (Somervell, Birkett and Romer L.JJ.).

This was an appeal from a judgment of the Court of Appeal dated March 29, 1954, whereby the court wholly set aside the judgment entered for the appellant company, Tool Metal Manufacturing Co. Ld., on November 16, 1953, in an action tried before Pearson J., without a jury, on November 9, 10, 11, 12, 13 and 16, 1953, by which the appellant company claimed certain sums described as "compensation" which the respondent company, Tungsten Electric Co. Ld. were, subject to the other questions raised, liable to pay them under a deed and licence both dated April 2, 1938.

The facts are set out in the opinions of Lord Oaksey and Lord Cohen.

F. W. Beney Q.C. and *T. G. Roche* for the appellant company.

Gilbert Beyfus Q.C., *Kenneth Johnston Q.C.* and *A. C. Warshaw* for the respondent company.

Besides the authorities cited in their Lordships' opinions, the following cases were referred to in argument: *Hartley* v. *Hymans* [1]; *Cornish* v. *Stubbs* [2]; *A/S Tankexpress* v. *Compagnie Financière Belge des Petroles S.A.* [3]; *Combe* v. *Combe* [4]; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ld.* [5]; *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ld.* [6]; *North Western Salt Co. Ld.* v. *Electrolytic Alkali Co. Ld.* [7]; *Sarason* v. *Frénay* [8]; *Morris* v. *Mellin* [9]; *Palmolive Co. (of England) Ld.* v. *Freedman.* [10]

Their Lordships took time for consideration.

June 16. Viscount Simonds. My Lords, the facts in this complicated case are fully stated in the speech of my noble and learned friend, Lord Cohen, which I have had the privilege of reading, and I do not think it necessary to trouble your Lordships by referring, except incidentally, to the events which preceded the issue of the writ in the action in which this appeal is brought.

[1] [1920] 3 K.B. 475; 36 T.L.R. 805.
[2] (1870) L.R. 5 C.P. 334.
[3] [1949] A.C. 76; [1948] 2 All E.R. 939.
[4] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767.
[5] [1894] A.C. 535; 10 T.L.R. 636.
[6] [1913] A.C. 781; 29 T.L.R. 743.
[7] [1914] A.C. 461.
[8] [1914] 2 Ch. 474.
[9] (1827) 6 B. & C. 446.
[10] [1928] Ch. 264; 44 T.L.R. 86.

It was in the circumstances stated by my noble friend that the appellants, by writ issued on September 11, 1950, claimed from the respondents as compensation under clause 5 of the deed as from January 1, 1947, to January 26, 1950, a quantified sum of £84,050, and an account of compensation payable under the same clause from January 26, 1950, to July 27, 1950, when the licence terminated.

To this claim the respondents put in a number of defences. They pleaded that the provisions of clause 5 were void on three separate grounds: (a) because they imposed a penalty; (b) because they were an unreasonable restraint of trade; and (c) because they contravened section 38 of the Patents and Designs Act, 1907. They also pleaded that the delivery of the counterclaim in the first action did not operate as notice to terminate the equitable arrangement which, as was held in that action, existed at any rate until such delivery, and that it was a condition of its termination that the notice determining it (a) should be unequivocal and (b) should specify the date of termination, and further that that date should give them a reasonable time to adjust their business affairs to meet the altered circumstances. To this, in effect, the appellants replied that the delivery of the counterclaim was a sufficient intimation of their intention to reassert their legal rights and that, that intimation having been given, equity demanded nothing more than that a reasonable time should be allowed before they sought to enforce them. And they further said (nor was this denied by the respondents) that upon this footing a reasonable time was given since the counterclaim was delivered in March, 1946, and compensation claimed from January, 1947.

Upon this part of the case I will be as brief as I can, for, having read the opinion of Lord Cohen in which the facts are set out at greater length, I am not prepared to dissent from his conclusion. It would not, however, be right in a case in which I find myself unable to agree with the decision of the Court of Appeal to say nothing on the far-reaching conclusion to which they have come.

My Lords, the decision of the Court of Appeal in the first action was based on nothing else than the principle of equity stated in this House in *Hughes* v. *Metropolitan Railway Co.*[1] and interpreted by Bowen L.J. in *Birmingham and District Land Co.* v. *London & North Western Railway Co.*[2] in these terms: "It seems to "me to amount to this, that if persons who have contractual "rights against others induce by their conduct those against "whom they have such rights to believe that such rights will "either not be enforced or will be kept in suspense or abeyance "for some particular time, those persons will not be allowed "by a court of equity to enforce the rights until such time "has elapsed, without at all events placing the parties in the

[1] (1877) 2 App.Cas. 439. [2] (1888) 40 Ch.D. 268, 286; 4 T.L.R. 437.

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"same position as they were before." These last words are important, for they emphasize that the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of the principle which is to be found in *Combe* v. *Combe* [3] and may well be far too widely stated.

The difficulty in the present case lies in the fact that in the first action, in which it was held that between these parties the principle applies, neither of them in any pleading or other statement between the delivery of the counterclaim in March, 1946, and judgment in April, 1950, took their stand upon its existence. The respondents asserted a binding agreement for the complete and final abrogation of any compensation: the appellants, though willing to make some concession in regard to the past, denied any agreement in respect of any period at all. The position of neither of them was compatible with the existence of an equitable arrangement by which the right to receive and the obligation to pay compensation were suspended for a period which lasted at least until March, 1946, and for a debatable period thereafter.

My Lords, I think that at this point the issue is a very narrow one. On the one hand it is said that a plea resting on the denial of an agreement cannot be a notice determining that agreement. This is the view taken by Romer L.J. in which the other members of the Court of Appeal concurred. On the other hand, it is urged that, since the suspensory period is due to the gratuitous willingness of the one party to forgo their rights, nothing can be a clearer intimation that they propose no longer to forgo them than a claim which, though it may ask too much, can leave the other party in no doubt that they must not expect further indulgence. The problem may perhaps be stated in this way. Did equity require that the appellants should expressly and unequivocably refer to an equitable arrangement which the respondents had not pleaded and they did not recognize? Or was it sufficient for them by a reassertion of their legal rights to proclaim that the period of indulgence was over? In favour of the latter view it is added that such an attitude on the part of the appellants could not surprise the respondents who had not hesitated to bring against them a serious charge of fraud.

My Lords, it is not clear to me what conclusion the Court of Appeal would have reached but for the authority of the case of the *Canadian Pacific Railway Co.* v. *The King*,[4] to which I must refer later. For my part I have, after some hesitation, formed the opinion that, as soon as the counterclaim was delivered, the respondents must be taken to know that the suspensory period

[3] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767.

[4] [1931] A.C. 414.

was at an end and were bound to put their house in order. The position is a very artificial one, but it was their own ignorance of a suspensory period, or at least their failure to plead it, which created the difficulty, and I do not think that they can take advantage of their own ignorance or default and say that they were entitled to a further period of grace until a further notice was given. Equity demands that all the circumstances of the case should be regarded, and I think that the fair and reasonable view is that the respondents could not, after they had received the counterclaim, regard themselves as entitled to further indulgence.

It was, however, urged on behalf of the respondents that, even if the counterclaim could otherwise be regarded as a sufficient notice that the equitable arrangement was at an end, yet it was defective in that it did not name a certain future date at which it was to take effect. To this the reply was made that equity did not require a future date to be named in the notice, but that what it did require was that a reasonable time should be allowed to elapse before it was sought to enforce it. Here, too, the Court of Appeal favoured the view of the respondents, again feeling themselves constrained by the decision in the *Canadian Pacific Railway* case.[4] And here, too, I am forced to the opposite conclusion. Equity is not held in a strait-jacket. There is no universal rule that an equitable arrangement must always be determined in one way. It may in some cases be right and fair that a dated notice should be given. But in this case what was the position in January, 1947, which I take to be the critical date? Then for nine months, the respondents must, in my opinion, be taken to have been aware that the appellants proposed to stand on their legal rights. It is not denied that those nine months gave them ample time to readjust their position. I cannot regard it as a requirement of equity that in such circumstances they should have been expressly notified in March, 1946, that they would have nine months and no more to take such steps as the altered circumstances required. In coming to this conclusion I do not think I run counter to any authority that was cited to us unless it be the *Canadian Pacific Railway* case[4] to which I must now refer.

My Lords, in his judgment in the Court of Appeal Romer L.J. introduced that case with these words[5]: "In my opinion, "although in many cases the equity, to which *Hughes* v. *Metro-*"*politan Railway Co.*[6] gave recognition and high authority, is "satisfied by merely conforming to the terms in which Lord "Cairns (and subsequently Bowen L.J.) formulated it, there are "other cases where justice requires that the resumption of legal "rights which have been suspended for a period must be preceded "by a notification to the other party concerned specifying a fixed

[4] [1931] A.C. 414.
[5] [1954] 1 W.L.R. 862, 879; [1954] 2 All E.R. 28.
[6] 2 App.Cas. 439.

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" period of grace during which that party can put his house in " order; and that in such cases a notification such as that will " be a condition precedent to the valid reassumption of the " owner's legal rights." " Such a case," the Lord Justice proceeds, " was *Canadian Pacific Railway Co.* v. *The King.*" [7]

My Lords, it is undoubtedly the fact that the *Canadian Pacific Railway* case [7] decided that what I have called a " dated notice " was required in that case to terminate an existing licence and that the Crown, the licensor, had in that case the duty and the risk of fixing a reasonable period of notice, but I must observe that not only was the equitable principle, which was recognized in *Hughes'* case,[8] not invoked, but Lord Russell of Killowen in delivering the opinion of the Board expressly disclaimed any reference to that or any other equitable principle. The relevant problem there was whether a licence to occupy land by placing telegraph poles thereon had been revoked by the institution of proceedings by the Crown, and the question was what term in regard to revocation should be implied in the licence which the Crown was assumed to have granted. I have no doubt that the question is analogous to that which we have to decide in this case, for the implication of a term as to revocation, upon which the licence is silent, must depend on what is fair and reasonable between the parties. The court will be guided by the same principles in the one case and the other. The passage which I cited from Bowen L.J.'s judgment in the *Birmingham* case [9] ended with these words: " That is the principle to be applied. " I will not say that it is not a principle that was recognized by " courts of law as well as of equity. It is not necessary to " consider how far it was always a principle of common law." Nor, my Lords, is it necessary today, but in the House of Justice it would be difficult to distinguish between the equitable principle recognized in *Hughes'* case [10] and the rule well established at common law long before the fusion of law and equity that a licensor must give reasonable notice to determine a licence. It was this rule which was applied in the *Canadian Pacific Railway* case [11] and, in applying it, Lord Russell of Killowen said: " Whether any and what restrictions exist on the power of a " licensor to determine a revocable licence must, their Lordships " think, depend upon the circumstances of each case." And, as I read the decision, it was the circumstances of that case and nothing else, certainly not any general rule, which led him to say [12] that " it will be for the Crown to determine the licence " by service of a notice the sufficiency of which, if called in " question, will have to be decided, upon proper evidence, in " subsequent proceedings. It will be for the Crown, at its risk, " to fix the length of notice." The circumstances of that case were very unusual, and I do not doubt that they fully justified

[7] [1931] A.C. 414.
[8] 2 App.Cas. 439.
[9] 40 Ch.D. 268, 286.
[10] 2 App.Cas. 439.
[11] [1931] A.C. 414, 432.
[12] Ibid. 433.

the rule being applied in that way. But so also in the present case the circumstances are very unusual: it is hardly possible that they should be repeated, and even if I apply in the amplest way to the termination of the equitable arrangement between the parties in this case the rule applicable to the revocation of licence, I find nothing in the *Canadian Pacific Railway* case [13] which precludes me from reaching the conclusion which I have already stated, viz., that the appellants gave sufficient notice that the suspensory period was at an end, and allowed enough time to elapse before seeking to enforce their rights. For these reasons I think that this defence fails and that the judgment of the Court of Appeal cannot on this ground be upheld.

The plea that the provisions of the deed are unenforceable because they impose a penalty clearly cannot be maintained. It is perhaps enough to say that they do not impose, or purport to impose, a penalty. No doubt the consequences of certain actions by the respondents may be detrimental to them, but that does not involve that a penalty is imposed in the sense in which that word is used in the equitable doctrine that equity relieves against penalties. No case was cited where the doctrine was invoked otherwise than for a penalty payable upon the breach of a contractual obligation.

The further plea that the provisions of the deed are unenforceable, because they constitute an unreasonable restraint of trade, must also fail. It was conceded that as between the parties the restraint was reasonable. But it was contended that it was unreasonable in the public interest. The onus of proof here lay with the respondents and it is a notoriously heavy burden. In my opinion, the respondents did not discharge it, and I concur so fully in the reasoning and conclusion of Romer L.J. that I need say no more.

My Lords, having come to the conclusion that it has not been established that clause 5 of the deed of April 2, 1938, is under the general law void as in restraint of trade, it is necessary now to consider whether it is avoided by section 38 of the Patents and Designs Act, 1907. The Patents Act, 1949, has substituted a new section for that section but it is with the earlier section that we are here concerned. It had by 1907 become notorious that patentees were seeking by virtue of their patents to obtain a collateral advantage by imposing conditions upon licensees such as that the patented article should not be used save in conjunction with some other article produced by the patentee, or that the patented article alone should be used, or that the user should purchase his raw materials from the patentee: see Terrell on Patents, 9th ed., p. 262, and cases there cited. And it is, I think, clear that the object of the legislature was to put an end to this grave abuse of monopoly rights. How far it has done so must depend on the true construction of section 38 of the Act of 1907,

[13] [1931] A.C. 414.

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but the background is one in which I see first the common law rejection of a monopoly, then the statutory grant under the Statute of Monopolies, 1628, and the succeeding Patent Acts of limited monopolies hedged about with divers safeguards in the public interest against their abuse, then the attempt by patentees, in spite of such safeguards, to secure for themselves collateral advantages by virtue of their monopoly, and finally the attempt to check such attempts by prohibitory legislation with powerful sanctions. Romer L.J. in *Huntoon Co.* v. *Kolynos (Incorporated)*[14] accurately stated the purport of the legislation in one aspect when he said that its language "would seem to suggest that the object "of the Legislature was to prevent persons who had obtained "a monopoly in respect of an article or a process by means of a "patent, so using that monopoly as to obtain for themselves a "virtual monopoly in respect of other articles and processes for "which they have not obtained any patent." His statement would be equally applicable to articles which had been patented but the patents had expired. Nothing, I suppose, could be in more direct conflict with the law relating to patents than a contractual provision which indirectly secured for a patentee a monopoly extending beyond the statutory period of his patent.

I now turn to section 38 (1), and for the sake of clarity state the first subsection, with the omission of words not relevant to the present case: "It shall not be lawful in any contract . . . "in relation to the . . . licence to use . . . any article . . . "protected by a patent to insert a condition the effect of which "will be (*a*) to prohibit or restrict the . . . licensee from using any "article or class of articles, whether patented or not . . . supplied ". . . by any person other than the . . . licensor or his nominees; "or (*b*) to require the . . . licensee to acquire from the . . . "licensor, or his nominees, any article or class of articles not "protected by the patent; . . ." I need not at the present stage refer to the provisoes to this subsection nor to the other subsections.

Upon the meaning and effect of the words that I have cited numerous questions have arisen, but the controversy has chiefly centred round the words "the effect of which *will* be" and the words "prohibit or restrict."

I think that it is clear that the words "the effect of which will "be" have a wider scope than the words "which will," and I cannot find a more accurate way of stating the difference than by saying that the former phrase emphasises that the result may be directly or indirectly achieved. But it is the word "will" which has caused the greater difficulty. It was pointed out truly enough that the word is "will" not "may," and from this the short step was taken of saying that it must be shown by evidence that the condition necessarily will or, in other words, must have a certain effect. But, in my opinion, too much stress is laid on

[14] [1930] 1 Ch. 528, 562; 46 T.L.R. 253.

the use of the future tense. The subsection looks forward to the future; it opens with the words "It shall not be lawful in any "contract," and in describing what could only be a future condition in a future contract it was, I think, good grammar to use the words "the effect of which will be." The problem is precisely the same as if the present tense had been used, or as if (leaving out the words "the effect of which will be") the subsection had run "condition prohibiting or restricting," etc., or (giving their proper meaning to the words I have for the moment omitted) "condition directly or indirectly prohibiting or restrict-"ing." It is common ground that the matter must be examined as at the date of the execution of the contract. That is a date at which the surrounding circumstances are known but the future cannot be foreseen, and nobody can predict that such and such a result will inevitably ensue. The court, then, in my opinion, in considering whether section 38 operates to avoid a condition, has the task of determining whether its essential quality is (I will not repeat "directly" or "indirectly") prohibitive or restrictive of a certain course of conduct. This cannot as a rule, I think, be a difficult task.

Obviously, no condition will have the effect of prohibiting or restricting me from following a certain course if I have never wanted and never shall want to follow that course. The fundamental supposition is that, if I do want to follow it, I shall be faced with the condition, and it is fair to assume that it is just because I may want to follow it, that the condition is imposed. If I find such a condition in a contract, it is, in my view, idle to speculate (as was done at great length in this case) whether and when I shall want to do a certain thing: the question is whether, when I want to do it, I shall find myself prohibited or restricted.

What, then, is the meaning of "prohibit" and "restrict"? It has been urged by the appellants and was, I think, held by Pearson J. that both these words cover only a direct contractual provision, e.g. "The licensee will not use any hard alloys except "those supplied by the licensor" or "the licensee will not use "more than 25 per cent. of hard alloys supplied by any other "supplier than the licensor," the former taken as an example of a prohibiting, the latter of a restricting, condition. And, if I understood the argument, it proceeded on the footing that "prohibit" meant "forbid," that "forbid" connoted such a contractual provision as I have stated and that "restrict," being found in immediate conjunction with "prohibit," must be given a similar meaning. I cannot accept this argument. In the first place, it wholly ignores the words "the effect of which will be." But, secondly, I see no reason in the context for so limiting the meaning of the word "prohibit" or, if indeed that word has a limited meaning, for saying that "restrict" must be similarly limited. I put to learned counsel the hypothesis of a penalty which must in fact effectually deter the licensee from purchasing in the market and he admitted candidly that his construction

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required him to deny that that operated to prohibit the licensee. It appears to me that, while one meaning of "prohibit" is "forbid" it has another meaning, which I would by no means call a secondary meaning, and that is "prevent." If a modest tourist say that the prices of a certain hotel are prohibitive, he is not thinking in terms of contractual provision. The prices are so high that he is prevented from entering that hotel. It is interesting to note that he might say that the condition of his purse forbade it. I would say then that a man may be prohibited from a course of action equally by the express terms of his contract, by the law of the land, or by economic circumstance. Nor do I see any reason for giving the word in the context of section 38 a narrower meaning than it fairly bears. True enough it is in a sense a penal provision. But I do not detract one jot from what I said in *London & North Eastern Railway Co.* v. *Berriman*[15] if I insist that, it being the plain purpose of the section to prohibit (or prevent) the licensor from using his monopoly to obtain a collateral advantage, nothing less than its fair meaning should be given to the clause. It would be a strange piece of legislation which disallowed a direct contractual provision but allowed a condition which indirectly had the same effect. It was, perhaps, in order to avoid the possibility of such a conclusion that the words "the "effect of which will be" were introduced.

But to "prohibit" must be added "restrict." If I am wrong in thinking that prohibition covers prevention as well by economic circumstance as by direct contractual provision, why should "restrict" be so limited? I see no reason for saying that it follows from an application or misapplication of the ejusdem generis rule. The argument, I think, involves that "prohibit" means "totally prohibit" and "restrict" means "partially "prohibit" and in either case by means of an express contractual provision: for otherwise I do not know what meaning can, upon this footing, be given to "restrict." But this would be surplusage: for it could not be maintained that a condition was not prohibitive, if it forbade the user of material supplied by outsiders to the extent of (say) 75 per cent. In truth, however, there is no valid reason in the context or otherwise for giving a limited meaning to this word. A word of command, the fear of penal consequences, or barbed wire may equally restrict my movement. I do not know why the means by which I am restricted should affect the fact that I am restricted in a real sense of that word. And I would say that in the sphere of commerce nothing could more truly restrict a trader than the fact that, wishing to purchase the goods of A rather than the goods of B, he finds that he can only do so at the cost of paying a heavy penalty to B. That is the effect which the penalty is intended to have and it will probably have it.

I do not find anything contained in the other subsections which

[15] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

throws any light upon the meaning of the relevant words. The proviso to subsection (1) offers some mitigation to its stringency and subsection (4) gives cogent evidence of the importance attached by the legislature to subsection (1). Some comment was made on the fact that the section does not preclude a condition prohibiting sale by the licensee of goods supplied by outsiders, but I do not see why this omission should lead to a narrow construction of " prohibit " and " restrict " in relation to user. There may be good reason for thinking that a selling agent may fairly be restrained by the licensor from selling the goods of an outsider. This seems to be the motive of subsection (5) (*a*).

After this too long exposition of the section I return to the present case and ask whether, on April 2, 1938, it could fairly be said of clause 5 that it was a condition which will have the effect of prohibiting or restricting TECO from using contract material supplied by suppliers other than T.M.M.C. As I have already indicated, it must have been an idle and irrelevant speculation at that date whether at any time in the next ten years TECO would want to do so. The penal clause is inserted upon the assumption that they may or will want to do so and to meet just that eventuality. Assuming then, that the time comes when TECO wants to use contract material obtained from an outsider, will this clause have a prohibitive or restrictive effect? I do not see how it can fail to do so. The assumption is that TECO want to obtain their material from an outsider either because they can get it cheaper or because they think it better material or for some other good commercial reason. If there was no clause, they would do so. But the clause is there and at once the position is changed. They can pursue their chosen course only at the expense of a penalty which will not be borne by their own competitors in the market, and so they are compelled to buy from their licensors. I repeat that the compulsion of economic conditions is as truly prohibitive or restrictive as a direct contractual obligation. Its intention and its effect are to confine them to purchase from their licensor, when unhampered by the clause they would be free to purchase from another. That is, in my opinion, a restrictive condition which section 38 (1) of the Act avoids.

On this ground, and this ground only, I would dismiss this appeal.

LORD OAKSEY. My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend, LORD REID, who has not yet taken the Oath in your Lordships' House on account of his absence from the country, and as I entirely agree with his opinion I propose to read it as my own, and to vote accordingly.

My Lords, Krupps of Essen had been developing processes for the manufacture of hard metal alloys and in 1931 they formed the appellant company, whom I shall call " T.M.M.C.,"

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to operate in Britain. T.M.M.C. owned a number of British patents and they sought to stop what they alleged to be infringements by certain British companies including the respondents TECO who had been making hard tips for machine tools and other articles from tungsten carbide powder. After much negotiation, on April 2, 1938, two deeds were executed by which T.M.M.C. granted a licence to TECO to import, make, use and sell under certain conditions hard alloys made in accordance with the inventions the subjects of their patents (called "contract material") and TECO agreed to pay a royalty of 10 per cent. and in addition "compensation" at the rate of 30 per cent. of the value of contract material sold or used by them in excess of 50 kilograms per month. This was a very heavy burden on TECO and they only agreed to it because the alternatives were either to defend an action for infringement, which would have been disastrous for them if they were unsuccessful, or to go out of business and perhaps also pay damages for past infringements. Before the war TECO paid about £16,000 to T.M.M.C. as "compensation."

Shortly before the war Krupps sold their interest in T.M.M.C. to British buyers and early in the war TECO settled their liability for compensation down to the date of settlement by paying a further sum of over £3,000. Thereafter no demand for further payment of compensation was made until after the end of hostilities.

In July, 1945, TECO sued T.M.M.C. for repayment of those sums amounting in all to £19,521, alleging that the deeds of 1938 had been obtained by fraudulent misrepresentation, and they also pleaded that T.M.M.C. had agreed that no further compensation should be payable. On March 26, 1946, T.M.M.C. lodged a defence and counterclaim denying fraud and claiming payment of royalties and also of compensation as from June 1, 1945. The case was finally decided by the Court of Appeal on April 4, 1950. Fraud was not proved and the counterclaim for compensation failed. In that action there was no plea or suggestion by TECO that their agreement to pay compensation was void or voidable on any other ground than fraud.

On September 11, 1950, T.M.M.C. raised the present action claiming compensation as from January 1, 1947, and TECO's defence was delivered on November 10, 1950. Four defences were pleaded; first, that no notice had been given by T.M.M.C. which entitled them to demand compensation, secondly, that the clause in the 1938 agreement imposing liability to pay compensation was in restraint of trade and illegal, thirdly, that this clause provided for the imposition of a penalty which was irrecoverable at law, and fourthly, that the clause was null and void in that it offended against section 38 (1) (*a*) of the Patents and Designs Act, 1907. I agree with your Lordships that the first and third defences fail, and I propose only to deal with the other two.

If these defences, or either of them, are valid it is somewhat remarkable that nothing was said about them in the earlier action but it is admitted that it is competent to raise them now for the first time. In order to deal with them I must first consider the terms of the clause against which they are directed. It is clause 5 of the agreement of 1938, which is in these terms: "If in any month during the continuance of the said "licence the aggregate quantity of contract material sold or used "by TECO and Industrial (other than contract material supplied "to TECO by the grantors or any licensees under the said "patents) shall exceed a quota of 50 kilograms (50 Kg) TECO "shall whether all or any of such material shall be subject to "royalty hereunder or not pay to the grantors compensation "equal to thirty per cent. (30%) of the sum which represents "the excess net value that is to say the average net value per "kilogram of all contract material sold or used by TECO and "Industrial in the said month multiplied by the weight in kilo-"grams of all such contract material as aforesaid sold or used "by TECO and Industrial during such month in excess of fifty "kilograms (50 Kg) Provided that contract material sold by "TECO to Industrial shall only be taken into account for the "purposes of this clause on the occasion of its sale or use by "Industrial."

Before considering this clause in detail it is necessary to have in mind something about the nature of contract material. TECO's process begins by taking tungsten carbide and any other desired ingredient in finely powdered form and the object of the process is to get the grains or particles to adhere to each other so that the finished product is an extremely hard object of the required shape. This is done by sintering in two stages. After the first stage the powder has been compacted into an object which can be fairly easily worked to approximately the right size and shape. The second stage then makes the object so hard that it is difficult to grind away any of it. It is only when this second stage is completed that the object becomes contract material within the meaning of the agreement. The manufacturer can then sell the object in this state or he can grind it after the second stage is completed so as to sharpen its edge or bring it to the exact shape which his customer wants. It is admitted that any such operation after the second stage is use of contract material by the manufacturer within the meaning of the agreement.

It appears that there are two grades of contract material, the iron grade and the steel grade. They are made by somewhat different processes and both were within the scope of the patents in force in 1938. But the patents with regard to the iron grade expired in 1941: thereafter only the patents with regard to the steel grade remained. So the clause operated in this way. Down to 1941 the only possible ways in which TECO could get contract material which they could sell or use were by making

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it themselves or by buying it from T.M.M.C or their other licensees. If in any month TECO sold or used more than 50 Kg. of contract material made by themselves they had to pay compensation on the excess, but they would pay no compensation in respect of selling or using any contract material which they had acquired from T.M.M.C. or their licensees. This was not, in my view, calculated to confer any preference on T.M.M.C. or to induce TECO to buy from T.M.M.C. rather than make the material themselves. There were price fixing arrangements in the deeds which, if I understand them rightly, would give little encouragement to TECO to buy from T.M.M.C. even though they could do so without compensation affecting material so bought, and I can find nothing to indicate that TECO did buy from T.M.M.C or that it was contemplated that they would make a practice of doing so. But the inclusion of this exemption in clause 5 and of a similar exemption from royalty in clause 3 shows that the parties thought that such purchases might occur and the most likely reason for the exemption would seem to be that, if TECO bought direct from T.M.M.C., T.M.M.C. would get their full profit on what they sold to TECO in the same way as if they had sold to anyone else, and that, if TECO bought from another licensee of T.M.M.C., the material sold by that licensee would be taken into account in assessing the compensation payable by that licensee. So, if material acquired by TECO from T.M.M.C. or their licensees were taken into account to increase the compensation payable by TECO, the effect would be that T.M.M.C. would get a double profit from the same material and that no doubt was thought to be unfair, and to require the insertion of the exemption.

But after the iron grade patents had expired the situation with regard to iron grade contract material might be different. It was then open to anyone to make that material and, if that material was then made by some manufacturer independent of T.M.M.C. it was open to TECO to buy it and use it or resell it. In 1938 no one could say whether after 1941 independent manufacturers would manufacture this material or whether, if they did, the price and quality of their product would offer any inducement to TECO to buy from them rather than make the material themselves or buy it from T.M.M.C. But the terms of clause 5 are certainly wide enough to require TECO to bring into computation for the purpose of compensation any material which they might then buy from independent manufacturers and use or resell themselves. And it is also clear that after the iron grade patents had expired TECO were still liable to pay compensation in respect of iron grade contract material manufactured by themselves.

TECO now say that inasmuch as clause 5 required payment of compensation to T.M.M.C. in respect of iron grade material after T.M.M.C.'s patents relating to that material had expired it was in restraint of trade. I think that in the circumstances

of this case it may be presumed that this obligation would tend to have the effect of diminishing the amount of iron grade material which TECO would be able to sell at a profit and putting them at some disadvantage in competing with T.M.M.C. But even if that were sufficient to show that clause 5 is objectionable it is still necessary to consider whether any restraint which it might cause is justifiable as being reasonable in the interests of the parties and in the public interest. As regards the parties, counsel for TECO rightly admitted that in view of their disadvantageous position, which I have already mentioned, it was reasonable for them to accept the 1938 agreement. T.M.M.C. no doubt drove a hard bargain but I cannot hold that they took an unconscionable advantage of their position, or that clause 5 was commercially unjustifiable or unreasonable for the protection of their trading interests. Counsel argued that a restraint may be reasonable in the interests of the parties and yet against the public interest, and so it may be. But I am unable to hold that this restraint was against the public interest. There is nothing to show that it either limited or was likely to limit the total supply of the material available for purchase by the public or that it had or was likely to have any substantial effect on the price which consumers would have to pay. If TECO had refused to make the agreement it was not argued that there was any provision in the Patents Act which could have been invoked. The most that can be said is that T.M.M.C. instead of trying to drive TECO out of business, which they could probably have done without in any way offending against the law, offered to TECO an agreement which, although it might limit their activities, allowed to them a substantial share of the trade: and I know of no authority for holding that that is against the public interest. To hold that that is against the public interest would only encourage a trader in an advantageous position to act more ruthlessly against his rival than he might be inclined to do.

TECO's last defence is that clause 5 of the agreement of 1938 offends against section 38 (1) (*a*) of the Patents and Designs Act, 1907, and is therefore null and void. Section 38 (1) is in these terms: "It shall not be lawful in any contract made "after the passing of this Act in relation to the sale or lease "of, or licence to use or work, any article or process protected "by a patent to insert a condition the effect of which will be— "(*a*) to prohibit or restrict the purchaser, lessee, or licensee from "using any article or class of articles, whether patented or not, "or any patented process, supplied or owned by any person "other than the seller, lessor, or licensor or his nominees; or "(*b*) to require the purchaser, lessee, or licensee to acquire "from the seller, lessor, licensor, or his nominees, any article "or class of articles not protected by the patent; and any such "condition shall be null and void, as being in restraint of trade "and contrary to public policy:"

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This is not an easy subsection to interpret. Let me therefore first take a case to which it clearly applies. Before the section was enacted the owner of a patented process might and sometimes did attach to a licence to use the process a condition that the licensee must buy raw material used in the process from him and from no one else. Such a condition was prohibited by the section, no doubt because it was regarded as an abuse of the patentee's monopoly in that it imposed on the licensee a restraint beyond the scope of the patent. The condition might be a positive obligation to buy the raw material from the licensor —that is made unlawful by subsection (1) (*b*)—or it might be a negative obligation prohibiting the licensee from buying it from any person other than the licensor and that is prohibited by subsection (1) (*a*). In the same way the seller of a machine protected by a patent might require the buyer to purchase raw material from him or prohibit the buyer from purchasing it from any other person and that is also made illegal.

Obviously, a condition restricting the right of the licensee to choose from whom he would buy articles not protected by the licensor's patents need not be drafted in such direct terms. It it not difficult to imagine circumstances where a condition which did not expressly require the licensee to buy from the licensor or prohibit him from buying elsewhere would in fact operate to deprive the licensee of the right to buy in the open market and the section is drafted in terms wide enough to nullify such a condition. It is not limited to conditions which in terms prohibit or restrict or require: it makes unlawful any condition the effect of which will be to prohibit or restrict the licensee from buying from others or to require him to buy from the licensor.

In trying to simpify my explanation I have stated the effect of subsection (1) (*a*) rather too widely. For some reason that is not apparent to me this subsection does not nullify a condition prohibiting or restricting the licensee from purchasing articles from any person other than the licensor: it only affects conditions the effect of which will be to prohibit or restrict the licensee from using such articles. No doubt the effect would generally be the same because generally the licensee would purchase with a view to using the articles but it is worth noting in connection with the present case that, if the licensee desired to buy for resale and not for use, a condition might have the effect of restricting his right to buy in the open market and yet be unobjectionable, provided that its effect was not to require him to buy from the licensor.

Before turning to the question at issue in the present case I should perhaps deal rather more fully with the phraseology of subsection (1) (*a*). I read it as affecting, first, any article or class of articles, whether patented or not, supplied by any person other than the licensor, and, secondly, any patented process owned by any person other than the licensor; and the patented articles or patented processes must, I think, be articles

or processes protected by other patents than those under which the licence is granted. I have tried to explain the subsection using only the words "licensee" and "licensor": I do not think that it is necessary to elaborate my explanation to include all the words "purchaser, lessee or licensee" on the one hand and "seller, lessor, or licensor, or his nominees" on the other. And I must further note that it is admitted that section 38 does not apply to a condition the effect of which is merely to restrict the volume of the licensee's trade or the amount of unpatented raw material which he can use in his manufacture while leaving him free to buy the restricted amount where he chooses. Such a condition is left to the ordinary law of restraint of trade. The purpose and effect of section 38 is to prevent the licensor from limiting the right of the licensee to trade with others so as in effect to compel the licensee to trade with him.

I now turn back to the facts of the present case. I have already said that the terms of clause 5 show that the parties contemplated at least the possibility that TECO would want to buy contract material as well as make it themselves; and that after the expiry of the iron grade patents they might be able to buy iron grade material from other manufacturers than T.M.M.C. and their licensees. If then they wanted to buy iron grade material and if supplies from such outside manufacturers were available, they would not be prevented by clause 5 from buying from outsiders but there would be an inducement to buy from T.M.M.C. and not from outsiders because purchases from outsiders would come into the computation for paying compensation, whereas purchases from T.M.M.C. would not. It is said that the effect of this inducement would be to restrict TECO from buying material from persons other than T.M.M.C. or their other licensees, and if TECO were not buying to resell but were buying to use the material themselves, then the effect of this inducement would be to restrict TECO from using material bought from persons other than T.M.M.C. or their other licensees. That and that alone is said to bring clause 5 within the scope of section 38 and to make it null and void.

It will be seen that a number of contingencies were involved before this inducement could operate: TECO must want to buy iron grade material instead of making it and they must want to buy it for use and not for immediate resale; some independent manufacturer must have started making the material; and the material must be of suitable quality and must be available at a competitive price. If then the independent manufacturer's price were more than 30 per cent. below T.M.M.C.'s price the 30 per cent. compensation would not matter as it would still pay TECO to buy from the independent manufacturer, and if that manufacturer's price were above T.M.M.C.'s price the compensation would not matter as TECO would in any case buy from T.M.M.C. But if that manufacturer's price were below, but less than 30 per cent. below, T.M.M.C.'s price, then the liability to

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pay compensation would probably induce TECO to buy from T.M.M.C. whereas, in the absence of clause 5, they would probably have bought from the independent manufacturer. It is the possibility of that happening which, on the argument for TECO, makes it necessary to hold that the effect of clause 5 "will be" to restrict TECO from using iron grade material supplied by any person other than T.M.M.C. and their licensees.

There appear to me to be four key words in the subsection—"the effect of which *will* be (*a*) to *prohibit* or *restrict* . . . or "(*b*) to *require* . . . ." To my mind, the natural meaning of the subsection is that the effect of the condition must be to limit the right of the licensee to make a choice, and I do not think that these words are appropriate to cover a case such as the present where the licensee remains free to choose but the presence of the condition will in some circumstances create an inducement to choose to buy from the licensor. I take first the word "require" in subsection (1) (*b*): the effect of a particular condition may be to offer so great an advantage to the licensee if he buys from the licensor that it would be extremely foolish of him not to do that, but I do not think that in the ordinary use of language it could properly be said that the effect of such a condition will be to "require" the licensee to do it. I feel bound to hold that subsection (1) (*b*) only applies if the effect of the condition is that, whenever certain circumstances occur, the licensee, if he wishes to buy the article, is obliged to buy it from the licensor. Then I take the word "prohibit" in subsection (1) (*a*). It is true that the adjective "prohibitive" is frequently used when there is no legal prohibition, as in the phrase "a prohibitive price," and it may be that the verb "prohibit" is sometimes used in that way; but I would not expect the word "prohibit" to be used in this context to denote a state of affairs where the inducement not to buy the other person's goods is so great that no reasonable person would choose to do so, and I see nothing in the context pointing to such a meaning. I think that the meaning is that the effect of the condition will be such as to oblige the licensee in certain circumstances not to use the other person's goods. Then I come to the word "restrict." A person, though not prohibited, is restricted from using something if he is permitted to use it to a certain extent or subject to certain conditions but otherwise obliged not to use it, but I do not think that a person is properly said to be restricted from using something by a condition the effect of which is to offer him some inducement not to use it, or in some other way to influence his choice. To my mind, the more natural meaning here is restriction of the licensee's right to use the article and I am fortified in that opinion by two considerations.

If I am right in thinking that "require" and "prohibit" refer to legal obligations to buy or not to use, I see nothing to suggest that "restrict" is used in quite a different sense

which has nothing to do with legal obligation but which relates to financial disadvantage. And, secondly, to say that the effect *will* be to restrict seems to me much more appropriate if restriction refers to restriction of the licensee's right to use than it would be if restriction refers to an inducement not to use. The legality of the condition has to be determined at the time when the licence is granted and if the terms of the conditions are such as to restrict the licensee's right to use an article in certain circumstances, then it can properly be said that its effect will be to restrict him from using it. But if, as in the present case, all that can be said is that the effect of the condition in some circumstances will be to offer a financial advantage, which may be considerable or may be small, if the licensee uses the licensor's goods, I do not see how it can be said that its effect *will* be to restrict the licensee from using other goods. The licensee may be influenced by this financial advantage or he may, perhaps for good reason, choose to disregard it: it is impossible to say in advance what the effect will be.

I recognize that to give this meaning to the section leaves room for evasion. I do not think that the primary purpose of clause 5 was to evade this section and the absence of any reported case in a period of 48 years since the section was enacted would seem to show that evasion of this kind has not been common. But undoubtedly it would often be possible to achieve a preference for the licensor by coupling the licence with a condition which, though not having the effect of limiting the licensee's freedom of choice, imposed some burden on the licensee if he bought certain articles in the open market. The question is whether it is legitimate to stretch the words of section 38 to make them apply to such a case. Section 38 (1) is a highly penal provision. It not only makes the whole condition void, although the circumstances in which it would have the effect of restricting the licensee may be very unlikely to occur, but by subsection (4) it also makes the existence of the condition a defence to an action for infringement of the patent. At best the section is ambiguous, and if a penal provision is ambiguous it ought not, in my view, to be construed in a wider sense than the ordinary meaning of its terms requires. This section appears to have been enacted to deal with a definite and limited abuse, and if Parliament failed to take the opportunity to deal with the whole matter sufficiently comprehensively, then the remedy was an amending Act of Parliament.

I would allow this appeal, and restore the order of Pearson J. The respondents must pay the costs in your Lordships' House and in the Court of Appeal.

LORD TUCKER. My Lords, the Court of Appeal allowed the appeal of the present respondents (hereinafter referred to as "TECO") on the ground that the appellants (hereinafter referred to as "T.M.M.C.") were not entitled to recover sums called

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"compensation" under clause 5 of a deed dated April 2, 1938, to which T.M.M.C. and TECO were parties, because they had not before action brought given a sufficient notice to terminate a period of suspension during the currency of which payment of compensation money could not be enforced by reason of the equitable principle enunciated in *Hughes* v. *Metropolitan Railway Co.*[16] It may be convenient at this stage to quote the language used by Lord Cairns L.C. in that case. He said[17]: "It was not argued at your Lordships' Bar, and it could not be "argued, that there was any right of a court of equity, or any "practice of a court of equity, to give relief in cases of this kind, "by way of mercy, or by way merely of saving property from "forfeiture, but it is the first principle upon which all courts of "equity proceed, that if parties who have entered into definite "and distinct terms involving certain legal results—certain "penalties or legal forfeiture—afterwards by their own act or "with their own consent enter upon a course of negotiation which "has the effect of leading one of the parties to suppose that the "strict rights arising under the contract will not be enforced, or "will be kept in suspense, or held in abeyance, the person who "otherwise might have enforced those rights will not be allowed "to enforce them where it would be inequitable having regard to "the dealings which have thus taken place between the parties."

The present is the second of two actions between these parties arising out of the deed of April 2, 1938, which contained the terms and conditions under which a licence under certain letters patent was granted by T.M.M.C. to TECO. In the first action (*Tungsten Electric Co. Ld.* v. *Tool Metal Manufacturing Co. Ld.*[18]) TECO claimed damages for fraud against T.M.M.C. They alleged that as a result of certain fraudulent misrepresentations they had paid sums for compensation under clause 5, and in paragraph 10 of their statement of claim they said: "Thereafter the plaintiffs "and defendants agreed that no sums should be payable in "respect of compensation after December 31, 1939, or alterna-"tively that the defendants would accept the amount of the "royalties in full satisfaction of all sums payable under the said "deeds as from December 31, 1939."

By their defence, T.M.M.C., in paragraph 8, denied the agreement alleged and alternatively relied on the Statute of Frauds and lack of consideration. In paragraph 17 of their counterclaim T.M.M.C. said: "In breach of their obligations "under clauses 3, 5, 7 and 8 of the deed of agreement the first "plaintiffs" (i.e., TECO) "have not since March 31, 1942, "rendered any accounts or paid the sums due for 'royalties' or "compensation. The defendants do not desire to enforce pay-"ment of compensation in respect of deliveries made after "December 31, 1939, but before the end of hostilities with "Germany."

[16] 2 App.Cas. 439.
[17] Ibid. 448.
[18] (1950) 69 R.P.C. 108.

In their claim for relief they asked for delivery of accounts in the form specified in clause 7 of the deed of all material sold or used since March 31, 1942, and for an inquiry into the sum due from TECO for compensation since June 1, 1945.

In their reply TECO admitted that they had not rendered accounts or paid any sum to the defendants (T.M.M.C.) but otherwise did not admit paragraph 17 of the counterclaim.

It is perhaps relevant to refer also to paragraph 3 of the reply in which, inter alia, TECO relied on part performance in answer to the plea of the Statute of Frauds. The particulars thereunder are as follows: " Subsequent to the date of the said oral agree- " ment the plaintiffs have not paid any compensation and have " received no complaint from the defendants in respect of such " non-payment. Subsequent to the said date the defendants have " never made any demand upon the plaintiffs for the payment of " compensation but have confined their requests for payment to " payments due in respect of royalty, and in particular the " plaintiffs will rely upon letters passing between the first named " plaintiffs and the defendants " (the dates of which are then set out).

It will be observed that nowhere in the pleadings is there any statement of facts relied upon as giving rise to the application of the principle in *Hughes* v. *Metropolitan Railway Co.*[19] whereby T.M.M.C. would be precluded from recovering compensation for a limited period or for a period which would continue until terminated by notice. Nor are any facts set out showing in what manner and to what extent TECO altered their position in reliance on any promise or forbearance on the part of T.M.M.C.

At the trial before Devlin J. no amendments were made to the pleadings with respect to these matters although other amendments were made. Devlin J. found against TECO both on the issue of fraud and with regard to the agreement alleged in paragraph 10 of the statement of claim. After referring to the extremely vague and unsatisfactory evidence of Mr. McLeod on behalf of TECO with regard to the alleged agreement he said[20]: " Accordingly, the plaintiff has been forced to rely mainly upon " the evidence of a Mr. Bateman, a witness called for the defen- " dants, and Mr. Bateman's evidence was in these terms, that " on an occasion in 1942 he heard Mr. Wickman say to Mr. " McLeod when this topic was being discussed words to this " effect—he cannot of course remember the precise words—' I " ' have already told you that you will not be charged compensa- " ' tion and you will get a new agreement in which we hope there " ' will not be a quota.' That evidence, taken in conjunction with " the evidence of the plaintiff, vague though it is, satisfies me " that some agreement of some sort was made. When I use the " word ' agreement ' I am using it now in a very broad sense; " I am not attempting to consider the question of whether it is

[19] 2 App.Cas. 439.

[20] 69 R.P.C. 108, 110–1.

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" an agreement that is binding in law. But it is quite plain that " something was said by Mr. Wickman to these licensees, some- " thing which resulted in their not paying compensation, at any " rate for the duration of the war, and I have no doubt that the " sort of thing that was said—and indeed it is the best evidence " the plaintiff could produce—is the sort of thing that Mr. " Bateman heard said. That being so, what I have to consider " is whether those words support the plaintiff's contention. The " plaintiff says that an agreement was made which relieved him " from the obligation of ever paying compensation again, and " thus to that extent varied the deed into which he had entered " in 1938, by striking out from it the compensation provisions. " I think that that is putting far too great a weight on the words " used by Mr. Wickman as Mr. Bateman heard them. One has " to have regard to the circumstances in which they were used. " They were used in relation to a plan (if I may so put it) that " a new agreement was in course of preparation, and that in this " new agreement there was going to be some sort of redrawing " of quotas. It seems to me extremely unlikely, since the idea " was then in the minds of the parties that a new agreement was " to be drawn up, that Mr. Wickman should have intended or " should have been understood to be striking something for ever " out of the old agreement."

After stating that that view is borne out by some further considerations, to which he refers, he went on[21]: " He is less " likely to have taken either of those courses if he treated it as " being merely a temporary remission of the obligation to pay " compensation, a remission that was to last only during certain " circumstances, or only until it was recalled by the defendants." Finally he said[21]: " The result is that I reject the view that " there was any agreement that was intended to continue, which " was to vary the original agreement. The agreement that was " made was, in my view, one of two things. I do not think " there was anything in it which could be said to limit its opera- " tion for the duration of the war, although that may have been " the intention of the defendant company. But I think it fairly " emerges, from the language which Mr. Wickman was heard to " use, that it was intended to be a temporary modification pending " the new agreement. Accordingly I think that when the new " agreement was presented to Mr. McLeod and was rejected by " him the temporary relief which he had been granted came to " an end. I do not mean that it came at once to an end. It is " obvious that it would be a reasonable provision that he should " have some reasonable notice in order to make the necessary " alterations. Compensation is now claimed from June, 1945, " which is some nine months after the new agreement was " presented to him, and I think that gives him sufficient time."

I have set out these passages at some length as I consider it

[21] Ibid. 111.

important to see precisely what the learned judge decided. He uses the word "agreement" more than once, but explains that he is using it in a very broad sense, and when his findings are examined it appears that what he found as a fact was that Mr. Wickman had made a promise not to charge compensation pending the new agreement and that he had carried out his promise by not claiming it. That and nothing more.

On appeal the Court of Appeal held, with regard to the counterclaim, that the findings of Devlin J. made the principle laid down by Lord Cairns L.C. in *Hughes* v. *Metropolitan Railway Co.*[22] and by Bowen L.J. in *Birmingham and District Land Co.* v. *London & North Western Railway Co.*[23] applicable, but they differed from his view that the temporary period of suspension ended with the presentation of the new draft agreement or when the negotiations broke down. Somervell L.J. said[24]: "I "think, against that background, the plaintiffs were entitled to "an express notice if the old terms were to be enforced again "according to their literal provisions. If you read the corre- "spondence the plaintiffs wrote objecting to the agreement, "there was ample opportunity for the defendants to say: 'Well, "'you know, if you do not like this agreement we shall withdraw "'our terms of not collecting the 30 per cent. and you will be "'back on the letter of the old pre-war contract.' They not "having done that, I do not think they can rely on anything "until we come to the counterclaim. That plainly indicates the "view that they were taking." Cohen L.J. agreed and said[25]: "Now, as my Lord has said, the direct evidence that the plaintiffs "acted on that invitation may be somewhat scanty, but I "respectfully agree with him in accepting the argument of Mr. "Beyfus that the matter is really one of res ipsa loquitur, and "I feel no doubt that the plaintiffs carried on their business "during the war on the basis that the compensation would not "be demanded until due intimation of the intention so to do "was given." This last sentence sums up the essence of the decision on this point so far as the present action is concerned. The defendants could not get the relief they claimed in their counterclaim because they had given no previous intimation of their intention to demand payment. That left open for decision in a subsequent action whether or not the counterclaim was a sufficient intimation.

My Lords, the parties to the present action are estopped from disputing the correctness of the decision of the Court of Appeal in the first action to the effect that circumstances existed which gave rise to the application of the equitable principle in *Hughes* v. *Metropolitan Railway Co.*[26] and that no sufficient intimation to terminate the period of suspension of payment had been given prior to the counterclaim in that action, but it would be wrong,

[22] 2 App.Cas. 439.
[23] 40 Ch.D. 268, 286.
[24] 69 R.P.C. 108, 115.
[25] Ibid. 116.
[26] 2 App.Cas. 439.

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in my opinion, if the view were to prevail that your Lordships in the present case are tacitly accepting the correctness of that decision. If it were permissible to go into these matters on the present appeal I should—with all respect—have desired to hear argument as to the application of this equitable doctrine to a case where the party who says he has been misled and altered his position has done so in reliance on an agreement which is found never to have been entered into and which is essentially different from the promise which is held to have been made and who gives no precise evidence with regard to the manner or extent of the alteration of his position. The sole question, therefore, before the courts on this issue in the present action has been throughout: Was the counterclaim in the first action a sufficient intimation to terminate the period of suspension which has been found to exist? Pearson J. held that it was. He said [27]: "The result of these "cases in my opinion is that, where the rule of equity applies, "the period of suspension comes to an end when it is in all the "circumstances equitable that it should come to an end, and "that is, normally at any rate, according to the circumstances, "either at or within a reasonable time after the termination of "the state of affairs which is the cause or basis of the suspension. "It is not necessary that the person whose legal rights have been "suspended should give a notice purporting to terminate the "suspension, although of course it would be fair and reasonable "and advisable for him to do so. In this case the state of affairs "which was the cause or basis of the suspension would have "been, according to the view taken in the court of first instance "in the former action, the continuance of the negotiations for "new licensing arrangements, but according to the view of the "Court of Appeal the state of affairs was, I think, the attitude "of T.M.M.C. in not requiring payment of the compensation "for the time being. When that attitude was reversed, a "reasonable time for resumption of compensation payments "began to run. The making of the counterclaim in the first "action clearly involved a reversal of the previous attitude, and "therefore it started running a reasonable time for resumption "of compensation payments."

In the Court of Appeal it was argued on behalf of TECO that the counterclaim did not purport to determine any existing agreement and that in any event it was deficient in that it specified no date for the termination. These submissions were largely based upon a judgment of the Privy Council in the case of *Canadian Pacific Railway Co.* v. *The King*,[28] which was cited for the first time in the Court of Appeal. It was a decision relating to a licence to erect certain telegraph poles and wires on property belonging to the Crown in Canada. I shall return to examine this case at a later stage. Both these submissions prevailed and

[27] (1954) 71 R.P.C. 1, 21–2. [28] [1931] A.C. 414.

the judgment of Pearson J. was reversed. Hence the present appeal.

My Lords, it is difficult to keep these two submissions entirely separate as they both involve consideration of what is necessary to terminate a period of suspension and restore the parties to their previous position. It has been said more than once that every case involving the application of this equitable doctrine must depend upon its own particular circumstances. It is, of course, clear, as Pearson J. pointed out, that there are some cases where the period of suspension clearly terminates on the happening of a certain event or the cessation of a previously existing state of affairs or on the lapse of a reasonable period thereafter. In such cases no intimation or notice of any kind may be necessary. But in other cases where there is nothing to fix the end of the period which may be dependent upon the will of the person who has given or made the concession, equity will no doubt require some notice or intimation together with a reasonable period for readjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold that in all such cases the notice must take any particular form or specify a date for the termination of the suspensory period. This is not surprising having regard to the infinite variety of circumstances which may give rise to this principle which was stated in broad terms and must now be regarded as of general application. It should, I think, be applied with great caution to purely creditor and debtor relationships which involve no question of forfeiture or cancellation, and it would be unfortunate if the law were to introduce into this field technical requirements with regard to notice and the like which might tend to penalise or discourage the making of reasonable concessions.

My Lords, in the present case I can find nothing which persuades me that equity could require anything further than that which is contained in the counterclaim in the first action. It is true that it does not purport to be putting an end to an existing "agreement" for a temporary suspension. No such agreement had been pleaded. It does, however, contain a clear intimation of a reversal by T.M.M.C. of their previous attitude with regard to the payment of compensation and of their intention to enforce compliance with clause 5 of the agreement and for an account thereunder.

It does not, I think, lie in the mouth of TECO, who had consistently failed to comply with their obligations to render the returns required by the deed, now to complain that the notice should have specified a named future date upon which the suspensory period was to come to an end.

I turn now to the case of *Canadian Pacific Railway Co.* v. *The King*,[28] which was so much relied upon by Romer L.J. in the Court of Appeal. It dealt with the withdrawal of a licence

[28] [1931] A.C. 414.

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to erect telegraph poles. Licence cases are sometimes somewhat similar to the present class of case, but I do not consider that they are safe guides to the solution of the application of the equitable principle with which alone your Lordships are now concerned. Even licence cases are, however, largely dependent upon their special facts, as was pointed out by Lord Russell of Killowen in delivering the judgment of the Board in the *Canadian Pacific* case.[29] Furthermore, in that case it was expressly stated that it was not decided on equitable grounds. Lord Russell says[30]: "Upon the facts of the present case their Lordships can "find no foundation for the application of any equitable doctrine "in favour of the appellant. There was no mistaken belief by "the appellant as to the ownership of or the rights over the "Intercolonial property, still less was there any such mistaken "belief, which was known to the Crown. There was no conduct "on the part of the Crown which induced the appellant to build "in the belief that rights in perpetuity would be acquired. There "was nothing upon which to ground any estoppel. The facts are "all the other way." There was, moreover, one feature in that case which is alone sufficient to explain the decision requiring the Crown to specify a date in its notice, namely, that a letter had been written indicating that unless the poles were removed at once it would be necessary for the Crown to fix a date for their removal. No such date was ever fixed or notified to the company before the proceedings were commenced. In similar circumstances it might well be held inequitable to allow T.M.M.C. to enforce clause 5 of the deed by issuing a writ without first giving notice specifying a date. I do not, however, think it is profitable to examine the circumstances in which notices may have been required in other cases or the precise form of such notices unless some principle of general application is to be found therein. I can find no such general principle in the *Canadian Pacific* case[31] nor in any other of the cases referred to in argument on this appeal.

I should, perhaps, add that those cases where a licence has been given contractually, in my view, afford no assistance since in such cases the requirements with regard to notice must necessarily be dependent upon the construction of the contract by virtue of which the licence was obtained. I have not therefore thought it necessary to refer to the views expressed on that subject by the noble Lords who took part in *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.*[32]

Where I respectfully differ from the views expressed by Romer L.J. in the Court of Appeal in the present case is that I am unable to obtain the same help from the *Canadian Pacific* case,[33] and I feel that he has laid undue emphasis on the word "agreement" as constituting the basis for the application of

[29] Ibid. 432.
[30] Ibid. 430.
[31] [1931] A.C. 414.
[32] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.
[33] [1931] A.C. 414.

the equitable doctrine and consequently imposing on T.M.M.C. steps which would normally be required from a party to a contract who desires to determine a contractual relationship.

In my view, the counterclaim of March 26, 1946, followed by a period of nine months to January 1, 1947, from which date compensation in the present action is claimed, is sufficient to satisfy the requirements of equity and entitle T.M.M.C. to recover compensation under clause 5 of the deed as from the latter date. In the somewhat peculiar circumstances of the present case any other result would, I think, be highly inequitable.

My Lords, with regard to the other defences relied on by TECO I agree that those of restraint of trade and penalty fail. As to the remaining defence of section 38 of the Patents and Designs Act, 1907, which involves a question of construction which, I confess has caused me considerable difficulty, I have reached the conclusion, for the reasons which have been stated by my noble and learned friend, Lord Oaksey, that the courts below were right in holding that this defence did not avail the respondents in the present case.

In the result, therefore, I would allow the appeal.

LORD COHEN. My Lords, the dispute between the parties is as to the right of the appellants to what was called compensation and arose out of two deeds, one a deed of agreement and the other a licence, both executed on April 2, 1938, and made between the appellants (to whom I shall refer hereafter as "T.M.M.C.") of the first part, the respondents (to whom I shall refer hereafter as "TECO") of the second part, and Tungsten Industrial Products Ld. (therein defined as "Industrial") of the third part. Industrial were the distributors of the products of TECO and played no part in the disputes with which your Lordships are concerned.

These deeds have given rise to two actions between the parties. The facts leading to the first action were carefully and elaborately marshalled in the judgment of Devlin J. therein and the events which subsequently occurred are stated with sufficiency and accuracy in the judgment of Pearson J. whose order, dated November 16, 1953, directing the payment by TECO to T.M.M.C. of the sum of £84,050 4s. 4d. with interest at the rate of 4 per cent. from September 11, 1950, to the date of judgment, was reversed by the Court of Appeal. It is from that order that the appeal now before your Lordships has been brought. Like Romer L.J. in the Court of Appeal, I shall confine myself to stating as briefly as I can the matters which appear to me to be relevant to the points argued before your Lordships.

In 1931 T.M.M.C. was incorporated in England by Krupps of Essen, the well-known German firm, for the purpose of developing as their subsidiary certain patents which Krupps had acquired in relation to Tungsten carbide. Under these patents T.M.M.C. manufactured articles which were, in the main, machine tool tips,

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and they marketed them under the name of "Wimet." In or about 1934 T.M.M.C. brought proceedings against the British Thomson-Houston Co. Ld. (hereinafter referred to as "B.T.H.") for infringement of the said patents, but those proceedings were settled upon the terms of an agreement made on January 1, 1936, under which B.T.H. acknowledged the validity of T.M.M.C.'s patents and were granted an exclusive licence to manufacture under such patents in territory which included the United Kingdom. One result of this agreement was that T.M.M.C. could only grant subsequent licences with the consent of B.T.H. but they were entitled to and did continue to manufacture themselves under the patents.

Some time later the activities of TECO came to the notice of T.M.M.C., who took the view that TECO were infringing T.M.M.C.'s patents. Negotiations took place and ultimately, with the consent of B.T.H., heads of agreement were signed on June 1, 1937, under which TECO received a licence under the said patents. I need not refer to the terms of the heads of agreement as they were superseded by the two deeds of April 2, 1938, which in substance incorporated the terms of the heads of agreement.

The licence was a non-exclusive licence under the patents to import, make, use, and, subject as thereinafter mentioned, to sell contract material as therein defined in Territory A as therein defined, and to sell contract material in and for export to Territory B as therein defined, upon and subject to the conditions therein and in the deed of even date contained. The licence was to commence from June 29, 1937, and to continue until September 18, 1947, and thereafter until determined by either T.M.M.C. or TECO on six months' notice in writing. Contract material was defined as: "Hard metal alloys made in accordance with the "inventions the subjects of the said patents or any of them whether made before or after the expiry of such patent or patents." The hard metal alloys mentioned in the said definition fell into two classes, "iron grade" and "steel grade." The last of the patents relating to iron grade expired in December, 1941. Broadly speaking, Territory A consisted of the United Kingdom and Territory B included the British Commonwealth and Empire but not Canada.

The agreement of even date with the licence contained a recital that TECO had made and sold hard metal alloys of a composition and by a process which fell within one of the said patents. Under clause 2 T.M.M.C. waived all claims against TECO and Industrial and TECO's customers in respect of any infringement of the patents.

Under clause 3 TECO had to pay to T.M.M.C. a royalty of 10 per cent. on the net value of all contract material sold or used by TECO and/or Industrial (other than contract material supplied to TECO by the Grantors or any licensees under the said patents) during the continuance of the said licence and made in

accordance with one or more of the said patents (other than or in addition to letters patent No. 262,723) which should be in force at the date of sale or use thereof by TECO and/or Industrial, such royalty being payable in the case of contract material sold by TECO to Industrial only upon its use or sale by Industrial.

Clause 4 contained price regulation provisions which I need not set out in detail but which were said to throw light on the question of unlawful restraint of trade.

Clause 5 provided for the payment of what was called "compensation" and so far as material is in the following terms:— "If in any month during the continuance of the said Licence the "aggregate quantity of contract material sold or used by TECO "and Industrial (other than contract material supplied to TECO "by the grantors or any licensees under the said patents) shall "exceed a quota of fifty kilograms (50 Kg.) TECO shall whether "all or any of such material shall be subject to royalty hereunder "or not pay to the grantors compensation equal to thirty per cent. "(30%) of the sum which represents the excess net value." The clause then proceeded to define "excess net value."

Clause 7 provided for monthly returns of contract material sold or used by TECO and Industrial in the preceding month, and clause 8 provided for the monthly payment of royalty and compensation.

Clause 12 gave TECO certain rights in respect to improvements upon or modifications of the inventions the subject of the said patents.

I need not refer to any other provision of the deed of agreement.

The effect of clause 5 having regard to the division into iron grades and steel grades and to the dates of the relevant patents is accurately summarized by Pearson J. as follows[34]: "The "effect of the compensation provisions over the period of the "licence can be worked out in this way: June 1, 1937, to March, "1939: Both the iron grades and the steel grades are protected by "patents, and bear royalty, and also bear compensation on the "excess over the quota. For the period March, 1939, to "December, 1941, the iron grades are still protected by the "patent No. 4 in the schedule, they do not bear royalty, but they "bear compensation on the excess over the quota. The steel "grades are still protected by patents and still bear royalty and "compensation on the excess over the quota. In the third period, "December, 1941 to July, 1947, the iron grades are not protected "by any patent (unless possibly there might be some later patents "under clause 12), they do not bear royalty, but they do bear "compensation on the excess over the quota. The steel grades "are protected by patents, or at least one patent, and bear "royalty and bear compensation on the excess over the quota. "Then there is the fourth short period, July to September, 1947, "and both the iron grades and the steel grades are unprotected by

[34] 71 R.P.C. 1, 10.

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"patents (unless conceivably there might be some later patents "under clause 12) and they do not bear royalty but they do bear "compensation on the excess over quota."

It is convenient here to observe that between June 1, 1937, the date of the heads of agreement, and April 2, 1938, the output of TECO was in every month in excess of 50 kilograms and in March, 1938, amounted to 168 kilograms.

At the time of the execution of the agreements Mr. McLeod, who was the managing director of TECO raised no objection to the compensation provisions of the agreement, but finding that he could not pass the burden thereof on to his customers he was, even before the outbreak of war, protesting against them. Shortly before the outbreak of war the control of T.M.M.C. had passed from German to British hands and Mr. McLeod, who had been making his complaints to a Dr. Louis, an agent of Krupps, renewed them to Mr. Wickman, who was connected with the persons then in control of T.M.M.C. TECO, however, continued to make returns and to pay royalty and compensation down to the outbreak of war. TECO then defaulted, but in May, 1940, paid a sum in satisfaction of royalty and compensation due down to December 31, 1939. TECO continued to make returns and pay royalties, but not compensation, up to March 31, 1942. After that date returns were made up to some date which I am unable to specify in 1943, but nothing further was paid for royalty or compensation prior to the commencement of the first action.

Discussions appear to have gone on between Mr. McLeod for TECO and Mr. Wickman or other representatives of T.M.M.C. in regard to compensation. It seems clear that prior to the commencement of the first action T.M.M.C. did not make any claim for compensation in respect of any period after December 31, 1939, and in the first action TECO alleged a binding agreement for cancellation of the obligation to pay such compensation. The evidence as to what transpired is very sketchy. It is conveniently summarized by Devlin J. in his judgment in the first action as follows[35]: "The plaintiff has set up by way of defence "to that that there was an agreement between him and Mr. "Wickman, made on behalf of their respective companies, that "compensation should be washed out altogether. The evidence "which he has given about it is so vague that Mr. Beyfus has "said that if the matter was left there he could hardly rely upon "it. Mr. McLeod first stated that it was said by Mr. Wickman "on February 19, 1941, but Mr. Wickman was not in the "country, he was in America on February 19, 1941. Mr. "McLeod then said that though he might have been mistaken "about the date, at any rate it was said by Mr. Wickman on "some occasion in 1943. All he could remember about it was "that Mr. Wickman had said that compensation was washed "out and all that was wanted was a flat 10 per cent. royalty.

[35] 69 R.P.C. 108, 110.

"He had no recollection really of the circumstances in which it "was said, and he really accepted that he had no real recollec- "tion of the interview at all. Accordingly, the plaintiff has been "forced to rely mainly upon the evidence of a Mr. Bateman, "a witness called for the defendants, and Mr. Bateman's "evidence was in these terms, that on an occasion in 1942 he "heard Mr. Wickman say to Mr. McLeod when this topic was "being discussed words to this effect—he cannot of course "remember the precise words—'I have already told you that "'you will not be charged compensation and you will get a new "'agreement in which we hope there will not be a quota.' That "evidence, taken in conjunction with the evidence of the plaintiff, "vague though it is, satisfies me that some agreement of some "sort was made. When I use the word 'agreement' I am using "it now in a very broad sense; I am not attempting to consider "the question of whether it is an agreement that is binding in "law. But it is quite plain that something was said by Mr. "Wickman to these licensees, something which resulted in their "not paying compensation, at any rate for the duration of the "war, and I have no doubt that the sort of thing that was said— "and indeed it is the best evidence the plaintiff could produce— "is the sort of thing that Mr. Bateman heard said."

On September 21, 1944, T.M.M.C. submitted to TECO the draft of the proposed new agreement. It did not abolish quotas but it provided for the distribution of any compensation payable by any of the licensees who exceeded their quotas amongst those licensees who failed to achieve their quota.

TECO did not accept the proposed new agreement and on January 17, 1945, issued the writ in the first action claiming damages for fraud or alternatively breach of warranty and damages for breaches of the contracts contained in the two deeds of April 2, 1938. In formulating their claim for damages in paragraph 6 of the statement of claim they alleged that they had paid as compensation £19,521 12s. 7d. and that thereafter it had been agreed that no sums should be payable in respect of compensation after December 31, 1939. By paragraph 10 of their defence T.M.M.C. denied any such agreement and in the alternative relied on the Statute of Frauds. In the further alternative they alleged that if (which was denied) any such agreement was made there was no consideration for it. By their counterclaim they alleged breaches by TECO of their obligation to pay royalties and compensation but stated that they did not desire to enforce payment of compensation in respect of deliveries after December 31, 1939, but before the termination of hostilities.

It is to be observed that neither in their statement of claim nor in their reply did TECO allege any equitable bar to the enforcement of the relief claimed by T.M.M.C. in their counterclaim though it must have been clear to TECO that T.M.M.C. were claiming to be entitled as from the termination of hostilities

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to enforce their strict legal rights under the two deeds of April 2, 1938.

On January 20, 1950, Devlin J. dismissed the plaintiffs' claim except in respect of a minor breach of the agreement of April 2, 1938, for which he awarded nominal damages of 40s. That part of his decision is irrelevant to the matter now before your Lordships. As regards the counterclaim, he negatived the assistance of any agreement binding in law for the final termination of the payment of compensation. I have already read one passage of his judgment dealing with this point. He concluded his judgment on this point of the case by saying[36]: "The result is that I "reject the view that there was any agreement that was intended "to continue, which was to vary the original agreement. The "agreement that was made was, in my view, one of two things. "I do not think there was anything in it which could be said to "limit its operation for the duration of the war, although that "may have been the intention of the defendant company. But "I think it fairly emerges, from the language which Mr. Wick-"man was heard to use, that it was intended to be a temporary "modification pending the new agreement. Accordingly I think "that when the new agreement was presented to Mr. McLeod "and was rejected by him the temporary relief which he had "been granted came to an end. I do not mean that it came at "once to an end. It is obvious that it would be a reasonable "provision that he should have some reasonable notice in order "to make the necessary alterations. Compensation is now "claimed from June, 1945, which is some nine months after the "new agreement was presented to him, and I think that gives "him sufficient time. If I should be wrong about that view then "I should hold that it was a temporary arrangement which was "made subject to the right of the defendant company to ter-"minate by giving reasonable notice. I should regard the "presentation of a new agreement in such circumstances as "amounting to a reasonable notice. I do not think that in this "type of case it is necessary that the notice should be express. "The rule that protects a party in circumstances such as these "is a broad rule of equity and justice. It is not thought right "that a man who has indicated that he is not going to insist "upon his strict rights, as a result of which the other party has "altered his position, should be able to turn round at a minute's "notice and insist upon his rights, however inconvenient it may "be to the party who thought he was temporarily relieved. "Equity requires that he should give reasonable notice that he "is going to resume his strict rights. But all that is necessary "to comply with that broad rule of equity is that the notice "should be such as to put an ordinary person clearly in mind that "the other party is going to resume his strict rights. I think it "is plain that when one man is served with a draft of a new

[36] 69 R.P.C. 108, 111–2.

" agreement which shows that the compensation provisions are " going to be set in force again, he should understand from that " that he must either accept the new agreement or return to the " strict position under the old agreement." No such arrangement had been pleaded and had the judge thought that it afforded any defence to the counterclaim he would no doubt have required TECO to amend their reply, but on the view he formed of the matter any equitable bar to the relief claimed by T.M.M.C. in their counterclaim had been removed before the counterclaim was delivered. In the result T.M.M.C. succeeded on their counterclaim.

TECO appealed to the Court of Appeal, who dismissed the appeal so far as their claim in the action was concerned, but they allowed it as far as that part of the counterclaim was concerned which dealt with compensation. The court, which consisted of Somervell L.J., Singleton L.J. and myself, took a different view from that formed by Devlin J. as to the result in equity of the conversation between Mr. McLeod and Mr. Wickman and of the conduct of T.M.M.C. in not claiming compensation after December 31, 1939, at any time prior to the delivery of the counterclaim. Romer L.J. in the present action has cited relevant passages from the judgments of Somervell L.J. and myself in the first action, and I will content myself with three short citations. The first from the judgment of Somervell L.J.[37]: " I think, against that " background, the plaintiffs were entitled to an express notice if " the old terms were to be enforced again according to their " literal provisions. If you read the correspondence the plaintiffs " wrote objecting to the agreement, there was ample opportunity " for the defendants to say: ' Well, you know, if you do not " ' like this agreement we shall withdraw our terms of not collect- " ' ing the 30 per cent. and you will be back on the letter of the " ' old pre-war contract.' They not having done that, I do not " think they can rely on anything until we come to the counter- " claim. That plainly indicates the view that they were taking. " I think the plaintiffs would be entitled to a reasonable time " after that." I say[38]: " I think that there was the plainest " possible indication by the defendants that they did not intend " for the time being to claim compensation, and that they con- " veyed that intimation in terms which amounted to an invitation " to the plaintiffs to continue to conduct their business on the " basis that until something was done, until notice was given, no " royalty would be demanded. Now, as my Lord has said, the " direct evidence that the plaintiffs acted on that invitation may " be somewhat scanty, but I respectfully agree with him in " accepting the argument of Mr. Beyfus that the matter is really " one of res ipsa loquitur, and I feel no doubt that the plaintiffs " carried on their business during the war on the basis that the " compensation would not be demanded until due intimation of

[37] Ibid. 115.

[38] Ibid. 116.

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" the intention so to do was given." Later I say: " I think the " plaintiffs were entitled . . . to receive notice if the defendants " were proposing to enforce a right to compensation which had " been in suspense for five years or thereabouts. So far as I can " see, nothing equivalent to such notice was given before, as I " have said, the counterclaim was delivered, and in my opinion, " therefore, compensation did not become payable until a reason- " able time after delivery of the counterclaim."

It is, I think, plain from these judgments that at that time the Court of Appeal was of opinion that the counterclaim was a sufficient notice, and that after the lapse of a reasonable time to enable TECO to make the necessary adjustments in the conduct of their business compensation would be payable without the necessity for further action by T.M.M.C. But our observations on that point must be regard as obiter since once we came to the conclusion that (1) some positive action by TECO determining the temporary arrangement was required, and that a reasonable time must be allowed to enable TECO to adjust their position after that action had been taken before T.M.M.C. could enforce their strict legal rights, and (2) as no such positive action had been taken before the delivery of the counterclaim, the counterclaim so far as compensation was claimed must necessarily fail.

Reaching the conclusion that we did we should, I think, have required TECO to amend their reply so as to raise the equitable defence which they had successfully advanced in their arguments. Unfortunately we did not so do.

In the course of his judgment Somervell L.J. had dropped the hint that nine months might be a reasonable time after which compensation would be payable, and on September 11, 1950, T.M.M.C. issued the writ in the present action claiming compensation from January 1, 1947. By paragraph 4 of their defence TECO pleaded as follows: " In or about March, 1943, and on " an occasion prior thereto which the defendants cannot now " more particularly specify, the plaintiffs agreed to forgo the " payment of compensation by the defendants until a reasonable " time should elapse after notice given by the plaintiffs to the " defendants to resume such payment. No such notice has been " given to the defendants. Alternatively, if such notice has been " given to the defendants, a reasonable time thereafter had not " elapsed by January 1, 1947, or by any date during the currency " of the 1938 deeds." They do not now allege that if the counterclaim was a sufficient notice, the action was brought prematurely.

In paragraphs 6 and 7 of the defence they allege in the alternative that clause 5 of the agreement of April 2, 1938, was invalid either (a) as being an unreasonable and unnecessary restraint of TECO's trade, or (b) as being a penalty not recoverable at law, or (c) as offending against section 38 (1) (*a*) of the Patents and Designs Act, 1907.

On November 16, 1953, Pearson J. rejected all these defences and gave the judgment for T.M.M.C., the effect of which I have

already indicated. He dealt first with the allegation of unreasonable restraint of trade and rejected it on the ground that the compensation clause did not contain any restraint of trade, but that even if it did, the provisions of the agreement and licence as a whole were reasonable both as between the parties and in relation to the public interest. He rejected the penalty argument because, as he found, no penalty was involved. He also held that clause 5 did not infringe section 38 of the Patents and Designs Act, 1907. I shall return to this subject later.

On the question of the sufficiency of the notice to determine the temporary arrangement, he summarised his conclusion as follows[39]: "The result of these cases [*Hughes* v. *Metropolitan* "*Railway Co.*[40]; *Birmingham and District Land Co.* v. *London &* "*North Western Railway Co.*[41]; *Central London Property Trust* "*Ld.* v. *High Trees House Ld.*[42]] in my opinion is that, where "the rule of equity applies, the period of suspension comes to an "end when it is in all the circumstances equitable that it should "come to an end, and that is, normally at any rate, according "to the circumstances, either at or within a reasonble time after "the termination of the state of affairs which is the cause or "basis of the suspension. It is not necessary that the person "whose legal rights have been suspended should give a notice "purporting to terminate the suspension, although of course it "would be fair and reasonable and advisable for him to do so. "In this case the state of affairs which was the cause or basis of "the suspension would have been, according to the view taken "in the court of first instance in the former action, the continu-"ance of the negotiations for new licensing arrangements, but "according to the view of the Court of Appeal the state of affairs "was, I think, the attitude of T.M.M.C. in not requiring payment "of the compensation for the time being. When that attitude "was reversed, a reasonable time for resumption of compensation "payments began to run. The making of the counterclaim in the "first action clearly involved a reversal of the previous attitude, "and therefore it started running a reasonable time for resumption "of compensation payments."

TECO appealed to the Court of Appeal, who allowed the appeal. Romer L.J., in whose judgment Somervell L.J. and Birkett L.J. concurred, agreed with Pearson J. on the issues of unreasonable restraint of trade and penalty, and agreed provisionally with his conclusion on the issue arising under section 38 of the Patents and Designs Act, 1907, but stated that he did not necessarily agree with all the reasoning upon which that conclusion was founded. On the question of the issue as to the sufficiency of the notice to terminate the temporary arrangement for suspension of compensation payment the Court of Appeal differed from Pearson J. and, accordingly, reversed his order and entered judgment for TECO with costs.

[39] 71 R.P.C. 1, 21–2.
[40] 2 App.Cas. 439.
[41] 40 Ch.D. 268.
[42] [1947] K.B. 130; 62 T.L.R. 557.

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My Lords, Romer L.J. based his conclusion on the notice point mainly on the decision of the Privy Council in *Canadian Pacific Railway Co.* v. *The King*.[43] He said[44]: "In my opinion, "although in many cases the equity, to which *Hughes* v. *Metro-*"*politan Railway Co.*[45] gave recognition and high authority, is "satisfied by merely conforming to the terms in which Lord "Cairns (and subsequently Bowen L.J.) formulated it, there are "other cases where justice requires that the resumption of legal "rights which have been suspended for a period must be preceded "by a notification to the other party concerned specifying a fixed "period of grace during which that party can put his house in "order; and that in such cases a notification such as that will "be a condition precedent to the valid reassumption of the "owner's legal rights. Such a case was *Canadian Pacific Rail-*"*way Co.* v. *The King*."[46]

I must, therefore, examine closely what were the facts and what was the reason for the decision in the case last cited. The Canadian Pacific Railway had erected poles carrying telegraph wires on the roadway of a Canadian Government railway at various times ranging from 1888 to 1911. There were some negotiations between the parties as to parts of the telegraph line but at no time was any written agreement ever concluded. As to what was called the "main telegraph line" there was correspondence in the course of which a representative of the Department of Justice of Canada wrote on March 20, 1924, withdrawing offers which had been made for settling the dispute between the parties and saying that wires and poles must be removed. The letter ended: "No time has been fixed within "which you must effect this removal, but unless you agree to "act at once in the matter, a date will be fixed by the Depart-"ment of Railways and Canals." No such date was fixed nor were the wires and poles ever removed from any section of the telegraph line. Accordingly, in 1926, the Crown commenced proceedings against the Canadian Pacific Railway alleging trespass and claiming damages. The trial judge found that as to the whole line the telegraph poles were on the Crown land by the leave and licence of the Crown, but that the licence was not irrevocable. He gave leave to apply for further directions. On appeal to the Supreme Court of Canada that court found that the Canadian Pacific Railway were trespassers except as to a small section as to which they had an irrevocable licence. The Privy Council agreed with the trial judge that as to the whole line the Canadian Pacific Railway had a revocable licence, and held that it had not been determined before the commencement of the proceedings. The Board then proceeded to consider how that revocable licence could be determined. Upon the facts of the case their Lordships were unable to find any foundation for the application of any

[43] [1931] A.C. 414.
[44] [1954] 1 W.L.R. 862, 879.
[45] 2 App.Cas. 439.
[46] [1931] A.C. 414.

equitable doctrine in favour of the Canadian Pacific Railway nor were they able to see anything upon which to found an estoppel.[47] They went on to say[48]: "Whether any and what restrictions "exist on the power of a licensor to determine a revocable licence "must, their Lordships think, depend upon the circumstances "of each case. The general proposition would appear to be that a "licensee whose licence is revocable is entitled to reasonable "notice of revocation." They then proceeded to examine the facts of the particular case and came to the conclusion that it was "peculiarly a case in which grave injustice might ensue if the "Crown were at liberty by the mere initiation of legal pro-"ceedings to determine summarily the rights of the appellant, "and turn the appellant's occupancy into trespass. For the "appellant is not the only one concerned; the telegraph line is "part of a system in the existence and continuance of which the "public has a very considerable interest." They accordingly concluded that the case was one in which the licence could only be effectively ended after notice had been served upon the Canadian Pacific Railway to determine the licence on such a specified date in the future as would give the Canadian Pacific Railway an interval of time between the service of the notice and the specified date sufficient not only to allow the removal of the poles and wires but also to make arrangements for the continuance of the telegraph line on another site.

My Lords, I have, I think, sufficiently stated the circumstances to indicate the very considerable differences between this case and the case now before your Lordships. In the *Canadian Pacific Railway* case[49] the Crown had, at any rate, as regards one section, expressly stated they would name a date by which the poles and wires must be removed. Moreover, a paramount public interest was involved. In these circumstances I cannot see that the facts are so analogous that the decision can be safely taken as a sure guide in the present case.

The *Canadian Pacific Railway* case[49] was considered by the Court of Appeal in *Minister of Health* v. *Bellotti*,[50] where Lord Greene M.R. said that the only proposition of general application which he could extract from the *Canadian Pacific Railway* case[51] was to be found in the paragraph I have already cited, which reads: "Whether any and what restrictions exist on the power "of a licensor to determine a revocable licence must, their "Lordships think, depend upon the circumstances of each case." With that observation of the then Master of the Rolls I respectfully agree.

Before I turn to the circumstances of the present case, I must observe that the *Canadian Pacific Railway* case[52] was not determined on equitable principles. Indeed, Lord Russell of Killowen,

[47] Ibid. 430.
[48] Ibid. 432.
[49] [1931] A.C. 414.
[50] [1944] K.B. 298, 304; 60 T.L.R. 228; [1944] 1 All E.R. 238.
[51] [1931] A.C. 414, 432.
[52] [1931] A.C. 414.

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in delivering the judgment of the Board, expressly pointed out that no equitable doctrine was involved. It is no doubt true, as Mr. Beyfus argued, that any condition or restriction affecting the power to determine a revocable licence which the law would imply would be one which equity would regard as reasonable, but before reaching a conclusion on the matter it seems desirable to look at the two cases relied upon by the Court of Appeal in the first action as laying down the principles applicable to the case.

In *Hughes* v. *Metropolitan Railway Co.*[53] the respondents sought to recover possession of premises for breach of a lessee's covenant to repair within six months after notice calling upon him to do so. That notice had been given on October 22, 1874, but in December negotiations started between the parties for the purchase by the appellant of the respondents' interest. These did not break down until December 31, 1874. On April 28, 1875, the writ in the action was issued. The repairs were completed some time in June. The question arose whether, having regard to the negotiations, they had been completed within due time. It was held in this House that the negotiations had the effect of suspending the notice and that the suspension did not cease to operate until December 31, 1874. In the course of his judgment Lord Cairns stated the equitable principle involved in these words[54]: "It was not argued at your Lordships' Bar, and it could not be "argued, that there was any right of a court of equity, or any "practice of a court of equity, to give relief in cases of this "kind, by way of mercy, or by way merely of saving property "from forfeiture, but it is the first principle upon which all "courts of equity proceed, that if parties who have entered into "definite and distinct terms involving certain legal results— "certain penalties or legal forfeiture—afterwards by their own "act or with their own consent enter upon a course of negotiation "which has the effect of leading one of the parties to suppose "that the strict rights arising under the contract will not be "enforced, or will be kept in suspense, or held in abeyance, the "person who otherwise might have enforced those rights will not "be allowed to enforce them where it would be inequitable having "regard to the dealings which have thus taken place between the "parties."

In *Birmingham and District Land Co.* v. *London & North Western Railway Co.*[55] a similar question arose, and the Court of Appeal applied the principle as laid down by Lord Cairns in the passage I have quoted. After citing it, Bowen L.J. pointed out that it had nothing to do with forfeiture, and went on[56]: "It seems to me to amount to this, that if persons who have "contractual rights against others induce by their conduct those "against whom they have such rights to believe that such rights

[53] 2 App.Cas. 439.
[54] Ibid. 448.
[55] 40 Ch.D. 268.
[56] Ibid. 286.

" will either not be enforced or will be kept in suspense or abey-
" ance for some particular time, those persons will not be allowed
" by a court of equity to enforce the rights until such time has
" elapsed, without at all events placing the parties in the same
" position as they were before. That is the principle to be applied.
" I will not say it is not a principle that was recognised by
" courts of law as well as of equity. It is not necessary to
" consider how far it was always a principle of common law."
Though he does not, in terms, say so, it is implicit in what he says that to make the principle applicable the party setting up the doctrine must show that he has acted on the belief induced by the other party, but this factor is of no importance in the instant case as it has been decided in the first action that the principle is applicable. Does this principle afford a defence to the claim in the present action?

I have already stated the findings of the Court of Appeal in the first action as to the circumstances which brought the equity into operation. These findings necessarily involve that in the present case equity required T.M.M.C. to give some form of notice to TECO before compensation would become payable. But it has never been decided that in every case notice should be given before a temporary concession ceases to operate. It might, for instance, cease automatically on the occurrence of a particular event. Still less has any case decided that where notice is necessary it must take a particular form.

Romer L.J. seems to have taken the view that the counterclaim could not be a notice because you cannot terminate an agreement by repudiating it. With all respect, the fallacy of this argument consists in treating the arrangement found to exist by the Court of Appeal in the first action as an agreement binding in law. It was not an agreement, it was a voluntary concession by T.M.M.C. which, for reasons of equity, the court held T.M.M.C. could not cease to allow without plain intimation to TECO of their intention so to do. The counterclaim seems to me a plain intimation of such change of intention operating as from June 1, 1945, and for the future. None the less, the intimation would fall short of what was required if it was the duty of T.M.M.C. to specify in the intimation the reasonable time which they would allow after receipt of the intimation to enable TECO to readjust their business to the altered conditions. I see no reason why equity should impose this burden on T.M.M.C. Having regard to the nature of the concession—a mere cessation of money payments—and to the fact that TECO were the only persons in a position to judge what time would reasonably be required to make such adjustments as were necessary, I think that TECO were sufficiently protected by the fact that if T.M.M.C. commenced proceedings before what the court should determine to be a reasonable time, the action would fail. I agree, therefore, in substance with Pearson J. on this part of the case.

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On the questions of unreasonable restraint of trade and penalty I find myself in complete agreement with Romer L.J. and I do not desire to add anything to the reasons given by him and by your Lordships for rejecting these defences.

I turn therefore to the question whether clause 5 of the agreement offends against section 38 of the Patents and Designs Act, 1907. I had written some lengthy observations on this question, but since doing so I have had the opportunity of reading in print the observations of my noble and learned friend, Lord Oaksey. I find myself so completely in agreement with him that I will add no reasons of my own for rejecting this defence.

For the reasons I have given I would allow the appeal and restore the order of Pearson J.

Appeal allowed.

Solicitors: *Bristows, Cooke & Carpmael; Hancock & Willis.*

F. C.

[COURT OF APPEAL.]

C. A.
1955
June 20.
Evershed M.R., Jenkins and Parker L.JJ.

* *In re* JOYCE. *Ex parte* JOYCE.

[No. 593 of 1953.]

Bankruptcy—Appeal—Certificate of misfortune—Refusal—Whether appeal against refusal to be inter partes—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 32 (2) (*b*)—*Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 26 (4).

A bankrupt appealed ex parte against the refusal of the registrar to grant him a certificate of misfortune when ordering that he should be granted a discharge after an interval of two years. The order of discharge recited that the bankrupt had been guilty of forgery and of misconduct in company dealings:—

Held, that the facts found by the registrar showed that the bankruptcy was not caused by misfortune without any misconduct by the bankrupt and the certificate was, therefore, rightly refused.

Per curiam. An application for a certificate of misfortune, pursuant to section 32 (2) (*b*) of the Bankruptcy Act, 1883, is not, properly speaking, ex parte. Where, as in the present case, it is made on the occasion of the hearing of the application for discharge, it is not necessary to make a separate substantive application for such a certificate, but if the application is refused and the applicant wishes to appeal, notice of appeal inter partes must be given and the procedure for appeals inter partes must be observed.

APPEAL from a decision of Mr. Registrar Cunliffe.

Alfred Arthur Joyce, formerly a solicitor's managing clerk, was adjudicated a bankrupt on November 11, 1953. On May 18, 1955, Mr. Registrar Cunliffe made an order granting to the debtor his discharge subject to suspension for two years from February 23,

1955. The order recited, among other things, that the debtor, with intent to defraud, had forged a certain document connected with an insurance policy, and had been guilty of misconduct in his dealings with the affairs of three companies, the Globe Hotel (King's Lynn) Ld., the Plough Hotel (Cheltenham) Ld., and John Walker (Thame) Ld. The order concluded by refusing to grant to the debtor a certificate of misfortune under section 32 (2) (*b*) of the Bankruptcy Act, 1883.[1] The debtor applied ex parte under section 26 (4) of the Bankruptcy Act, 1914.[2] The court adjourned the hearing so that the official receiver might be heard, and on the second occasion the application was treated as an appeal by the direction of the court.

The debtor appeared in person.

Muir Hunter for the official receiver, the trustee in bankruptcy, as amicus curiae.

In addition to the cases referred to in the judgments, the following were cited in argument: *In re Burgess*[3]; *In re Thompson.*[4]

EVERSHED M.R. This is an appeal (under the express provisions for that purpose of section 26 (4) of the Bankruptcy Act, 1914) against the refusal of the Bankruptcy Court, on the occasion of granting to the debtor his discharge, suspended for two years, to grant at that time a certificate of misfortune.

[His Lordship referred to the recitals and terms of the order, and continued:] It will be observed that the appeal is against the refusal of the certificate—no more. It does not appear to me that there has (by way of appeal) been any other challenge to the order; and, of course, if that is a correct view of the approach to the question, it is fatal to the appeal: for (without any attempt at elaboration) it is quite obvious from the recitals in the order that nobody could quarrel with the registrar's refusal to grant, on those found facts, a certificate of misfortune. But in case that be thought to be too technical a view (though I do not myself think it really is) I am still quite unpersuaded by the

[1] Bankruptcy Act, 1883, s. 32: "(2) The disqualifications to which a "bankrupt is subject under this section" [as set out in subsection (1)] "shall be removed and cease if and "when (*a*) the adjudication of bankruptcy against him is annulled; or "(*b*) he obtains from the court his "discharge with a certificate to the "effect that his bankruptcy was "caused by misfortune without any "misconduct on his part. The court "may grant or withhold such certificate as it thinks fit, but any "refusal of such certificate shall be "subject to appeal."

[2] Bankruptcy Act, 1914, s. 26: "(4) With a view to removing any "statutory disqualification on account "of bankruptcy which is removed if "the bankrupt obtains from the court "his discharge with a certificate to "the effect that the bankruptcy was "caused by misfortune without any "misconduct on his part, the court "may, if it thinks fit, grant such a "certificate, but a refusal to grant "such a certificate shall be subject to "appeal."

[3] (1887) 4 Morr. 186.

[4] [1918–19] B. & C.R. 150.

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debtor's arguments to accept the view that the registrar wrongly refused this certificate.

[His Lordship read section 32 (2) (*b*) of the Bankruptcy Act, 1883, and continued:] It seems to me that, even if full allowance is made for the explanations which the debtor has here suggested, it would still be impossible to quarrel with the exercise by the court of the discretion to withhold the certificate, on the facts as they clearly are and as the debtor really concedes them to be. But I can go further: the "misfortune" which is contemplated is, by the terms of the section, "misfortune without any misconduct"; and in the recent case, in this court, of *In re Boulton Brothers & Co.*,[1] Lord Hanworth M.R. quoted language of Lord Esher M.R. from *In re Lord Colin Campbell*[2]: "'It is impossible to give an exhaustive definition of the meaning to be attached to "misfortune." I think, however, we must hold that, when the bankruptcy is not solely the result of some accident over which, or over the direct conducing causes of which, the debtor has no control, it cannot be said to arise from "misfortune."'" Lord Hanworth M.R. went on[3]: "It appears to me that what Lord Esher meant is that we ought in considering 'misfortune' to reject active conduct on the part of the debtor from being included in the word. But I think also that we must consider 'misfortune' in relation to the purposes for which it is used—namely, the removal of a statutory disqualification. . . . Fry L.J. said: 'It appears to me that what the Legislature had in view in this proviso was, the possibility of there being cases in which a man might become a bankrupt without thereby raising the presumption of his unfitness for holding a public position.'"

I follow Lord Hanworth M.R. in making no attempt at definition. But I mention these further facts; and they are by no means the whole story. I have referred to the recitals about the forged document relating to the policy. That it was forged is not now in doubt. That it was connected with the bankruptcy seems to me clear, when it is considered that the insurance company made advances on the faith of the assignment and are now proving in the bankruptcy for a sum of which, I gather, little or nothing is likely to be recovered by them. But the debtor says: "True I may have mismanaged the affairs of these companies: that is not the same thing as misconduct." I am not prepared to accept that view. If the test which Fry L.J. indicated is applied, to say no more, it seems to me that the story of mismanagement of these companies, coupled with the fact that at all material times the debtor was a solicitor's managing clerk, provides more than ample justification for the view that the statutory disqualifications ought not to be removed.

On the merits, therefore, I am unable to accede to the application. But we have considered also the procedural aspects

[1] [1927] 1 Ch. 79, 89.
[2] (1888) 20 Q.B.D. 816, 821.
[3] [1927] 1 Ch. 79, 89.

of this matter, and it may be right that I should say a word or two upon that. I have read all that is material from section 32 of the Act of 1883. This matter of certificates of misfortune is picked up by subsection (4) of section 26 of the Act of 1914, and although there is one other later reference to it, the whole thing is left a little casually or in the air by the Act. No clear or precise rules are laid down, or intimated, in the Act, of the procedure which was thought appropriate, particularly by the last words of subsection (4), "but a refusal to grant such a certificate "shall be subject to appeal." Thus has been raised the question, what kind of appeal is contemplated? The subsection shows that a discharge might be obtained and that with the discharge there might be coupled (as one of the qualities, so to speak, of the discharge) this certificate. There is nothing, as my brother Jenkins observed during the argument, to show that the certificate might not be granted and attached, so to say, to the discharge on the court's own motion. On the other hand, it appears from the books (including the *Lord Colin Campbell* case [4]) that sometimes a discharge has been obtained and then later, by some substantive application, a debtor has gone back to the Bankruptcy Court and asked to have such a certificate. In those cases, no doubt, it would be necessary for some substantive application to be made. But in the present case, and what I imagine would be the ordinary case, no separate application, I conceive, would be made: the debtor would apply, in the ordinary course, and following ordinary procedure, for his discharge, and the matter would then be gone into. As we were informed by Mr. Muir Hunter, the trustee in bankruptcy, and perhaps a creditor or creditors, would attend, if they desired to oppose; and the question of an immediate discharge or a lengthy suspension would be debated on the merits of the case. Then (and I am speaking again of the ordinary case) if things went on the whole well for the bankrupt, at the end of the day, and when the registrar intimated that he was prepared to grant to the bankrupt, then or after an interval, his discharge, the bankrupt would ask at that stage for such a certificate; and if anybody (for all the parties would be there) had anything to say, they would no doubt say it.

In the present case things did not go at all well, obviously, for the debtor, because the order recites a number of damaging findings of fact. But still, the debtor asked, as he was entitled to do, for a certificate. He got a negative answer, and he has come here, as he is also entitled to do. But he came here in the first instance by way of ex parte application, and that raised at once two difficulties. First, it seemed to us, at the time when he first mentioned this matter, that it would be desirable (and I now think it would be in most cases essential) that we should have the benefit of assistance from somebody representing the official receiver. And the second question emerges: If the proper procedure is by way of notice of appeal served on the trustee, then

[4] 20 Q.B.D. 816.

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what of the security which a debtor, on making such an appeal, has normally to give? In the present case that difficulty was got over by treating the appeal as ex parte; and it was only adjourned in order (as has happened, to our advantage) that Mr. Muir Hunter should be instructed by the official receiver to attend and assist the court. But, having now considered the procedural aspect of the matter, although I do not in any way quarrel with the existing practice in making applications to the registrar, I think nevertheless that the right procedure, if the debtor wishes to exercise his right of appeal, is that he should do so by way of a notice of appeal inter partes in the ordinary way—particularly if the debtor desires to challenge any part of the order save merely the expression of the refusal to grant a certificate.

The argument was suggested to our minds that, since the application to the registrar was ex parte, then by virtue of R.S.C.. Ord. 58, r. 10, the appeal to this court would be ex parte; but in my judgment, an application for a certificate is not, properly speaking, ex parte at all. As I have already said, I do not think that in the average case, in nine cases out of ten, any separate substantive application would be necessary. But that is not to say that it is ex parte. The certificate is asked for as one of the things which the statute says the registrar may grant when the bankrupt obtains his discharge. But the debtor asks to have that relief at a time when the whole thing is being dealt with inter partes before the registrar; and if that is so I think it follows that Mr. Muir Hunter was right to say that appeals against a refusal should come before this court inter partes, following the appropriate procedure for that purpose. In the circumstances of this case we have not dealt with it as such and the matter has but academic relevance now; but, for future guidance, that is my view of the proper procedure. It will, of course, involve this result, that the debtor normally would have to provide the security usually required before he could sustain an appeal.

On the merits of this case I see no grounds which could possibly justify interference with the view taken by the registrar; and I think the appeal should be dismissed.

JENKINS L.J. I agree.

PARKER L.J. I also agree.

Appeal dismissed.

Solicitor: *Solicitor of Board of Trade.*

E. D.

[PROBATE, ETC., DIVISION.]

* TRATHAN *v.* TRATHAN.

1955
May 13.

Lord Merriman P. and Davies J.

Husband and Wife — Justices — Maintenance — Jurisdiction — Wife's application for increase of amount — Husband's application at hearing to discharge order — No complaint made by husband — No jurisdiction to discharge without complaint.

On an application by a wife for an increase in the amount payable under an order, a court of summary jurisdiction has no power, unless proper steps by a cross-summons are taken, to entertain an application by the husband to discharge that order.

A wife applied to the justices for an increase in the maintenance payable for her and the child of her marriage under an existing order. The husband resisted her application and attempted to raise at the hearing, without having made prior complaint, a case that the order should be discharged altogether. The justices increased the order to 30s. a week for the wife and £2 for the child:—

Held, (1) that as the husband had failed to take the proper steps before the hearing the justices had no jurisdiction to investigate the question whether the order should stand or be discharged.

(2) That as the child's maintenance had been increased beyond the statutory limit the order should be varied to £2 for the wife and 30s. for the child.

Rigby v. *Rigby* [1944] P. 33; 60 T.L.R. 238; [1944] 1 All E.R. 336 applied.

HUSBAND'S APPEAL from an order of the justices for the borough of Reigate.

On November 11, 1954, the wife obtained an order of the justices on the ground that the husband had wilfully neglected to provide reasonable maintenance for her and the child of the marriage, and the husband was ordered to pay maintenance of £1 a week for the wife and 30s. a week for the child of the marriage. A complaint of desertion was dismissed.

The wife subsequently applied for an increase in the amounts payable under the order, and on January 6, 1955, the justices varied the order on her complaint by increasing the amounts to 30s. a week for the wife and £2 for the child.

At the hearing the husband, who had made no prior complaint, attempted to assert that the wife had deserted him since the date of the original order because he had made an offer to resume cohabitation which the wife, he alleged, had unreasonably refused; and he sought to have the order discharged or at least reduced to a nominal amount.

The justices considered the evidence on the allegations made by the husband, but rejected his submissions. In his notice of appeal, and at the hearing of the appeal, the husband sought to prove that his contentions in the court below were justified, and that the order should be discharged.

Desmond Ackner and *E. H. Laughton-Scott* for the husband appellant.

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Peter Boydell for the wife respondent.

LORD MERRIMAN P., after referring to the previous order and to the variation made by the justices, said: It is important in those circumstances to say at once that this appeal raises two entirely separate questions. The justices have made an order which in one respect cannot possibly be supported as regards quantum when they decided to increase the amount of the order. On the other hand, the appeal raises, apart from that, a much more serious question. It is suggested (though the notes on this topic are somewhat scanty) that the husband attempted to raise at the hearing the case that the order should be discharged altogether, or at the very least should be reduced to a purely nominal amount. I confess I do not appreciate the foundation on which, if the grounds for discharge of the order altogether are right, there could be any question of substituting a nominal order. The substance of the matter is that the husband was trying to assert at the hearing that since the making of the order the wife had deserted him, because he had made an offer to resume cohabitation which the wife was said unreasonably to have refused.

The justices apparently went into this question, at any rate to a certain extent, for they have dealt with it in one of their reasons, and save for the question of the particular point regarding amount, which I will deal with separately in a moment, the whole of this appeal is directed to the issue that the wife ought to have been held to have become a deserter, because she ought to have been held unreasonably to have refused the husband's overtures for a resumption of cohabitation, and, therefore, the order ought to have been discharged, or at the very least reduced to a nominal amount, or, alternatively, that on that ground and for those reasons—and I emphasize these words—her complaint asking for an increase ought to have been dismissed.

That raises, in my opinion, some cardinal questions. But I will deal, first of all, with the difficulty about the amount. The original order, as I have said, was for £1, plus 30s. in respect of the child. The justices have increased it to 30s. in respect of the wife, and by 10s. in respect of the child, bringing the maintenance in respect of the child to £2. That fact has only to be stated to show that they have gone wrong, and it is not suggested that there is any answer to the appeal in that respect, for, though the wife's own maintenance is well within the statutory limit, which has now been increased, the maintenance in respect of the child, of whom she was given custody, has been increased to a sum which is 10s. more than the justices have power to award, and to that there is no answer.

The question is whether, in the circumstances of this case, we can and should substitute for that form of increase another form which—with one exception—would arrive at precisely the same result, namely, that the whole of the extra £1 should be put on to the wife's own maintenance. I say with one exception. The

exception, of course, is that there would be an automatic terminus ad quem as regards the remaining 30s. when the child attains the age of 16 years. But I do not think that is a matter of the slightest importance, for at any time it is open to the husband, or the wife, to get an appropriate variation in the amount of the maintenance payable directly to the wife within the statutory limit, which has never been reached so far as she is concerned. I will content myself for the moment with saying that Mr. Laughton-Scott, who this morning took up Mr. Ackner's unfinished argument very capably, did not dispute that we have power, under the rules, to substitute any order in this respect which the justices should have made; but he has raised certain considerations on the question whether we ought to do that which we are entitled to do, and I would prefer to leave that over until I have discussed, and expressed my opinion about what is the real point in this case.

It is just as well, in connexion with both these issues, to begin by saying what the wife's complaint was, and when I say "complaint" I mean complaint in the technical sense in which that word has been used for over 100 years in courts of summary jurisdiction, and is now used in the Magistrates' Courts Act, 1952. Her complaint was that the original order should be varied by an order requiring the weekly payment for her maintenance to be increased on the ground that she was no longer in employment and was unable to secure further employment of a part-time nature. There was an additional complaint, dealing solely with the question of access, to which it is unnecessary to refer. It was in respect of the first complaint that the order to which I have referred was made, and made erroneously so far as the child's maintenance was concerned. But it is only right to say, by way of excuse for the justices, who have gone wrong in that matter of jurisdiction, that the wife herself, when she was giving evidence, said that she wanted another £1, and suggested that 10s. should be added for her and 10s. should be added in respect of the child; and unfortunately the justices fell into the trap. I do not mean "trap" in the offensive sense of the word: she, of course, was not laying any trap at all: but that, no doubt, is what led them into the error.

I used the word "cardinal" in connexion with the second issue. Now, in my opinion, it is of cardinal importance to discover what jurisdiction these justices had on January 6, 1955. The wife's complaint was that which I have just read. It is common ground that the husband himself made no complaint. There was no application, formal or otherwise, made by him to discharge the order. It is true that he gave evidence about his alleged offer and said that it had been refused, and the justices have given reasons for rejecting it, and it is true that no less than four of the grounds of this appeal are directed solely to that issue: "(1) That "the justices were wrong in law in failing to find that the respon- "dent in refusing to live with the appellant had deserted him; "(2) that the justices were wrong in law in finding that the

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" appellant was under any liability to maintain the respondent " (a ground of appeal which, of course, must be nonsense unless it means that the order ought to be set aside, for the order itself provided the liability to pay maintenance to the wife). However, the substance of the matter really is in the next ground of appeal: " (3) That the justices were wrong in law in failing to discharge " or revoke that part of the said order of November 11, 1954, " which provided for the weekly payment by the appellant of " maintenance for and to the respondent or, alternatively, to " reduce the amount of the said payments to a nominal sum." And finally: " (6) That upon the law and the evidence the justices " should have discharged or revoked that part of the said order of " November 11, 1954, which provided for the weekly payment by " the appellant of maintenance for and to the respondent, or " should have reduced to a nominal sum the said weekly sum." I am not going to refer again to the points about the nominal sum, because, when once it is apparent, as it is apparent beyond the slightest peradventure, that the substance of the husband's defence, to which he was directing his evidence, was that the wife was a deserter and should be deprived of any rights under the order at all, the question of keeping the matter alive, if that view is right, by a nominal order makes nonsense, and I do not propose to refer to it again. Discharge is one thing; dismissal of her complaint for an increase is another. But, in my opinion, there is no practical importance in considering a nominal order.

I have referred to the wife's complaint, and to the absence of any complaint on the part of the husband. In my opinion it is not a mere technical matter that there was no complaint raising the husband's case that this order ought to be discharged because the wife had disentitled herself to have any order for the future. It is of the essence of the justices' jurisdiction. I do not propose to go in very elaborate detail into this matter, because it seems to me that all that is necessary is to refer to the Magistrates' Courts Act, 1952, Part II, relating to civil jurisdiction and procedure, section 43 of which provides: " Subject to the provisions of this Act, " where a complaint is made to a justice of the peace acting for " any petty sessions area upon which a magistrates' court acting " for that area has power to make an order against any person, the " justice may issue a summons directed to that person requiring " him to appear before a magistrates' court acting for that area " to answer to the complaint." I do not think that I need read section 44, which deals with the territorial aspect of the jurisdiction to hear complaints. Section 45 directs what shall be the procedure on hearing, and contains the statement that " The " court, after hearing the evidence and the parties, shall make " the order for which the complaint is made or dismiss the " complaint "; and there are, for this aspect of the jurisdiction, forms prescribed, and in the very first form authorized under the authority of the two sections 43 and 44, and rule 4, which says that in this class of case the complaint need not be made

on oath, the complaint is in this form: "The complaint in" such and such "petty sessional division of" so and so of such an address, "who upon oath or affirmation states that" so and so "on the . . . day of . . ." and so on, stating the ground of complaint, and then it is either sworn or affirmed. On that a summons in the next form, to the same effect, is issued, and there are specific directions about the formal summons, which refers back to the prescribed form; and, finally, rule 75 contains the direction that a summons requiring a person to appear before a magistrates' court to answer to an information or complaint shall state shortly the matter of the information or complaint, and shall state the time and place, and so on; and then there are the provisions as to service, etc., to which I need not refer.

That an application for discharge could have been dealt with on this occasion, had proper steps been taken, is beyond dispute. All that was necessary was for the husband to make a complaint that by reason of the wife's refusal to resume cohabitation with him unreasonably she had become a deserter, and therefore not entitled, and so on. Had that been done, and the matter heard at the same time as this, the form that these proceedings took would have been perfectly in order. As it was, in my opinion, the justices had no jurisdiction whatever to go into the question whether this order should stand or be discharged. They had no jurisdiction, in effect, to do any of the things failure to do which is made the specific subject of complaint in the notice of appeal.

Now, I agree, on the other hand, that on the issue that the amount should be increased or decreased the conduct of the parties is a relevant consideration if it is regularly before the court. To be particular in this case, if the wife had so conducted herself as to justify a reduction in the amount by reason of conduct which was relevant to the amount, there is no doubt, in my mind, that that would have entitled the justices to dismiss her complaint if the conduct was bad enough to justify them in reaching that conclusion. But that was not the point here. If that sort of point had been taken below, instead of being taken now, when it had already been pointed out (in fact, by the court, though Mr. Boydell would have pointed it out quickly enough later on) that the whole thing was misconceived, because there was no application to discharge before the court at all, I would not be disinclined to consider the matter from that point of view. But when I know that the substance of the matter was, as it unquestionably was, an attempt by the husband—but without raising the issue properly and in due form, so as to give the justices jurisdiction—to have the order discharged, I propose to deal with it on that basis, for that is the reality of the matter. With regard to that issue I will read the justices' reasons. On the question of amount they find as a fact that the first order was made when the wife was working, "but as the wife is now "unable to work we considered that the amount of the order "should be increased." That, by itself, is a finding which is not

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really challenged as a finding of fact, and, of course, justifies an increase in the amount. Then they go on—and this is what is complained of: "When the original order was made on "November 11, 1954, the husband had left the matrimonial "home, and the wife left the home sometime in December, "1954, to stay with her mother. During the wife's absence the "husband returned to the home on January 3, 1955. In his "evidence the husband said he was prepared to live with his "wife again. We did not consider that the mere fact that he "had returned to the home was a genuine offer to resume "cohabitation with his wife, or that his conduct had been such "that she might reasonably be expected so to regard it, and "we accordingly refused to discharge the order." It is perfectly plain, therefore, that they were dealing with it on the basis that what they were being asked to do was to discharge the order and nothing else.

I have referred to the statute and the rules, but this matter is not without authority, because, in my opinion, the decision of the Court of Appeal in *Rigby* v. *Rigby* [1] is authority for the proposition that this question of the foundation of jurisdiction in a magistrates' court, upon a complaint properly made, is of the essence of the matter and is not mere form. It was a curious case, and I happened to remember the circumstances, of which we have also been reminded by Mr. Laughton-Scott calling our attention to it. It was a case in which, mistakenly, the complaint actually made before the justices was of persistent cruelty which was only supported by evidence plainly treated both by the Divisional Court and the Court of Appeal as a single instance of sexual intercourse when the husband knew he was suffering from venereal disease, from which it followed that the element of persistence was lacking; but this court said: "Well, there "is at any rate the other section, which appears to deal "with the same subject-matter, namely, that her husband, "while suffering from venereal disease and knowing that he was "so suffering, insisted on having sexual intercourse with her," and we then and there amended the complaint to substitute that charge for one which would not hold water, and in spite of the persuasiveness of my brother judge who is sitting with me now, the Court of Appeal would not have it. I am going to refer to one passage only in the judgment of Goddard L.J. We had acted on the rules, which were the same then as now, I think, in substance, the one then in question being rule 67. The rules have been renumbered, and what was 67 is now 71, but the terms are identical, and, indeed, they are those which govern the Court of Appeal itself—that we might draw all inferences of fact which might have been drawn in the court below, and give any judgment and make any order which ought to have been made, and so on; while subrule 5 gives leave to amend the grounds of appeal or

[1] [1944] P. 33; 60 T.L.R. 238; [1944] 1 All E.R. 336.

make any other order on such terms as the court shall think just, to ensure the determination on the merits of the real question in controversy between the parties. It was with reference to that that Goddard L.J. agreed with our decision that there could not be persistent cruelty, but said [2]: "Thereupon, the Divisional "Court, acting as they said under rule 67, (5) and (6) of the "Matrimonial Causes Rules, 1937, held that they had the power "not only to amend the order of the justices, but also to amend "the proceedings by altering the complaint." I am satisfied in my own mind that when Goddard L.J. used the word "complaint" he meant the word complaint in inverted commas, that is, the "complaint" within the meaning of the Acts governing the magistrates' jurisdiction; and he went on: "I do "not think that the Matrimonial Causes Rules, 1937, gave "power to the Divisional Court to alter the proceedings from "the outset and substitute a complaint which had never been "preferred by the wife."

In this case, if we were to say that the justices went wrong because they ought to have discharged this order on this evidence, we should, in my opinion, be altering the proceedings from the outset, and not substituting but importing a complaint which had never been preferred by the husband, namely, that this order should be discharged, because, since the making of it, the wife, for example, had committed adultery, or deserted her husband, etc., etc.

Mr. Ackner, in a very attractive argument (if he will allow me to say so), yesterday said that this was perfectly in order, because of the terms of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, which enables the magistrates' court concerne to "alter vary or discharge" any such order (which means any of the orders above mentioned, all set out in section 5 of the Act, as amended by subsequent statutes which give additional powers), "and upon any such application from time to time" enables the court to "increase or diminish the amount of any weekly "payment ordered to be made" so that the sum does not in any case exceed what was then the maximum of £2. From this it is argued, in effect, that on a complaint by a wife that on certain specified grounds she is entitled to an increase, it is open to the justices to discharge the order.

As things stand, and have stood since 1935, I think that there is, on any view of the matter, one essential fallacy in that argument, and for this reason. Since the Money Payments (Justices Procedure) Act, 1935, s. 9, which must be read, I think, first with the Married Women (Maintenance) Act, 1949, and now with the Magistrates' Courts Act, 1952, it is unnecessary, in relation to increase or diminution of quantum, to establish the complaint "upon fresh evidence," with all the limitations, which I need not go into, which the use of those words imports.

[2] [1944] P. 33, 37.

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There would, therefore, if the argument of the husband is right, be two quite distinct issues before the justices. They would have to be satisfied that within the strict meaning of the words there was some "fresh evidence," in any given case, which entitled them to discharge the order, whereas in relation to increase or diminution they would not. That, of course, on the argument that was addressed to us about the relevance of this matter in relation to amount, if it could be brought in on that ground, would have this result, that in raising the issue as a ground for discharge the husband would, indeed, be bound by the requirement of fresh evidence, but in raising the same issue, whatever it was, in relation to amount—conduct of the parties, and so forth—he would not, because it would then be directed simply to the question of amount.

However, I do not think that I need pursue that topic any further, because, in my opinion, it is quite plain on the face of section 7 itself that, though these things are all put together in one sentence, they do, in fact, raise quite separate issues, and there must be, in my opinion, under the Magistrates' Courts Act, 1952, as there must have been under the Summary Jurisdiction Act, a complaint which alleges that there should be an alteration and upon what ground; or that there should be a variation and upon what ground; or that there should be a discharge, and again upon what ground, though in that case at least the ground must be based upon "fresh evidence."

The result, in my opinion, is that the whole of this discussion about facts leading to the discharge of the order was wholly beside the point. The justices had no such matter before them, and should have declined to listen to it, unless and until it was properly put before them by a complaint directed to that point, and dealt with upon the terms of the section which apply to that point. But having expressed my view that the whole of the grounds of appeal relating to this aspect of the matter are entirely misconceived, and also that the reasons given by the justices for failing to discharge the order, as it is called in the notice of appeal, in other words, for rejecting the husband's submission that circumstances had arisen which would justify them in discharging it, are all beside the point, I wish to make it clear that, in my opinion, the mere fact that these things were mistakenly discussed before the justices on January 6, 1955, ought not, on the ground that they are stale and therefore cannot be said to be fresh evidence if the matter is brought up again, to preclude the justices from hearing the matter if it is properly brought before them; and Mr. Boydell has expressly disclaimed, as one would expect, that any such point, in his view, would be open to the wife. The whole thing was a nullity—all that part of the case; there was nothing in it at all, for the reasons I have given.

If, therefore, the husband is minded to do either of two things, to try to get a reduction in the order, that is open to him at any time and always was open to him; and there he would not be

bound by any matters of fresh evidence, and he would not be thrown out upon that ground, nor, in turn, would the wife, because this matter has been discussed irrelevantly; and if he wishes to make a timely application (for one has to consider what application the statutory time-limit may have, if any) to discharge the order, well and good. He will not be shut out.

That brings me back to the one remaining point: what we should do about this mistake over the application of the 10s. If I felt that there was any reason, if we put that right, why that would prejudge any issue on the real point which the husband is complaining about, I would leave things alone, and merely correct the error by taking off the 10s., about which there cannot be any doubt, from the £2 awarded for the child. But I do not think that it does make any difference. I think that we can deal with that matter quite independently. We can give effect to what was the wife's complaint, that the weekly payment for her maintenance should be increased and that she wanted £1. The fact that she rather foolishly said: " Split it between me and the " child " is neither here nor there.

I think that we are fully entitled to take the 10s. off the child and put it on to the wife. That cannot do any harm to either party. On the contrary, it may save costs if there is no further application by the husband. The weekly result will be precisely the same so far as her money is concerned. And that is what I propose we should do.

The appeal will necessarily be allowed to that extent, and that variation made in the order.

DAVIES J. I agree. As my Lord has pointed out, of the six grounds of appeal set out in the appellant's notice of appeal, four of them, that is to say Nos. 1, 2, 3 and 6, are really directed to one and the same point, viz., that the justices ought to have discharged the order which the wife had obtained. It is perfectly true that it is suggested in the alternative that the amount of the order should have been reduced to a nominal sum. But that is really the same point; for the suggestion that it should be reduced to a nominal sum was based on the allegation attempted to be made that the wife had refused to resume cohabitation with the husband, and, therefore, was entitled to nothing.

For the reasons which my Lord has given I agree that on an application by a wife for an increase of the amount payable under an order the court has no power, unless proper steps by a cross-summons are taken, to entertain an application to discharge that order. I do not think it is necessary to repeat the reasons that my Lord has given, or to examine the statutes.

I should like to add that I do not think it necessary to decide, for the purposes of this appeal, whether, on an application to increase the amount of an order, the court has power to decrease it. I do not desire to express any view about that, as I do not think it is

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necessary for the purposes of this decision. For we are here concerned with a case where the justices upon an application to increase have purported to entertain an application to discharge, and for the reasons that my Lord has given I am satisfied that that is wrong.

Mr. Boydell's argument was that the justices had no jurisdiction to consider evidence which went to the existence of the order; and, of course, if the court had no jurisdiction to consider the evidence, that evidence has never validly been considered. If, therefore, the husband were to apply again, by taking the proper steps, to discharge the order, even though the evidence that he might seek to adduce in support of that application would be the same as that which he purported to adduce on the previous occasion, in my view, that would not mean that that evidence would not be fresh evidence within the meaning of the statute.

I should also like to add this, that although we must not be thought to be encouraging a further application by anybody to the justices (indeed, we are told that it is thought that there is going to be a petition for dissolution by the wife on the ground of cruelty, and that may affect the practical aspect of further applications to the justices), if such an application is made, then I think that it would be desirable that the summons or summonses should be heard by a bench constituted differently from the bench from whom we are hearing the present appeal. My Lord is in agreement with me on this, I think.

The only other matter that arises from the argument of Mr. Ackner is this: he contended that the justices, as, he says, is plain from their reasons, had failed, on the application to increase, to consider the conduct of the wife. It is perfectly true that in their reasons they put the two matters in separate compartments. They appear, on the face of their reasons in paragraph 1, which concerns the increase of the amount, to be dealing only with figures. They deal with conduct in paragraph 2.

If authority were needed for the purpose of showing that conduct of the parties is material on the question of amount, it is to be found in the decision of this court in *Wharton* v. *Wharton*.[3] But it is difficult to see that that criticism on the facts of the present case really gets the husband anywhere. For when the justices do come to consider the question of conduct, in the wrong context, let it be assumed, in their paragraph 2, they find the facts against the husband; and it is impossible to see, on their findings of fact, how any of the matters alleged by the husband could have induced them to decrease the amount of the wife's order. Therefore, as I say, I do not think that this criticism, that they ignored conduct in coming to the conclusion that there ought to be a small increase in the order, is a valid one.

For these reasons, therefore, I agree with my Lord that,

[3] [1952] 2 All E.R. 939n.

subject to the alteration of the order making the increase for the wife £1, and making no increase for the child, this appeal should be dismissed.

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LORD MERRIMAN P. By what he has just said my brother has reminded me of something I must add to my judgment, with which I promised I would deal, and that is that in the event of the matter coming up again on the same lines it should be dealt with by an entirely fresh panel of justices. I also forgot to mention the possibility of a divorce petition, about which it is said that an application for legal aid is pending. That, of course, will be entirely a matter for consideration by the justices. If this ground for discharging the original order is put forward it will be a matter for their consideration how far, if at all, it raises the same sort of issues as are raised by the divorce petition, and they will no doubt act accordingly.

Appeal allowed to extent of variation of order only.

Solicitors: *Titmuss, Sainer & Webb; Pringle & Co., Redhill.*

J. B. G.

[COURT OF APPEAL.]

* THOMAS BOOKMAN LD. *v.* NATHAN AND ANOTHER.

C. A.

1955 *June* 20.

Denning, Birkett and Romer L.JJ.

[Plaint No. LP.59.]

Landlord and Tenant—Assignment of lease—Consent—Not to be unreasonably withheld—Landlords' refusal of leave to assign last 7½ months of five-year term—Object of assignment to occupy premises and not to obtain statute-protected tenancy—Reasonableness of refusal.

The landlords of rent-controlled premises refused their consent to the assignment by a tenant of the seven-and-a-half-months' unexpired portion of his five-year lease to an assignee of admitted respectability in urgent need of accommodation. The landlords' ground for refusal was that the sole purpose of the assignment was to give the assignee at the end of the term the statutory protection of the Rent Restrictions Acts which the assignor did not want or intend to obtain for himself. The object of the assignment was not to obtain the protection of the Rent Acts for the assignee:—

Held, that the landlords' refusal of consent was unreasonable. An assignment of a period as long as seven and a half months, with the object of enabling the assignee to occupy the premises, was a normal assignment, consent to which could not reasonably be withheld by the landlords, although the result might be to give the assignee a statute-protected tenancy at the end of the term. The object of an assignment, though not necessarily decisive, was a most important element for consideration in determining the

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reasonableness or unreasonableness of the landlords' refusal of consent.

Swanson v. *Forton* [1949] Ch. 143; 65 T.L.R. 178; [1949] 1 All E.R. 135 and *Dollar* v. *Winston* [1950] Ch. 236; 65 T.L.R. 748; [1949] 2 All E.R. 1088n distinguished.

APPEAL from Judge Tudor Rees sitting at Croydon County Court.

The following statement of facts is taken from the judgment of Denning L.J.: In July, 1950, the plaintiffs, Thomas Bookman Ld., let a flat to a tenant, Sydney Nathan, for five years beginning on August 1, 1950, at a rent of £6 14s. 9d. a month, and expiring in the ordinary course of events on August 1, 1955. In September, 1954, the tenant found a house and bought it, because he wanted other accommodation for his family. He decided to assign the remainder of his lease which at that time had 10 months to run. He looked in the newspaper and saw that one Peter Diamond was advertising for rooms. He answered the advertisement and they had an interview at which Diamond agreed to take an assignment of the remainder of the lease, and agreed to buy some of the tenant's furniture for £100. The tenant took up Diamond's references, which were all satisfactory. The lease contained a clause that the tenant was "not to assign, "transfer, underlet or part with possession of the flat without "the consent of the landlord, such consent not to be unreasonably "withheld."

On December 13, 1954, the tenant by his solicitors applied to the landlords for consent to the assignment. The reply on December 16 by the landlords was as follows: "In view of the "fact that your client's tenancy expires in a matter of a few "months, our clients are not prepared to grant their consent to "an assignment, as this would appear to be merely an attempt to "assign the 'fag-end' of a tenancy." On December 20, 1954, they repeated their contention, stating: "The sole purpose of the "assignment is to give to the assignee the statutory protection "which the assignor does not want and does not intend to get for "himself." They therefore refused their consent to the assignment. Notwithstanding the refusal, the tenant did assign to Diamond, taking the view that the landlords were unreasonably withholding their consent.

The landlords thereupon took proceedings in the county court claiming possession against the tenant and the assignee on the ground that there had been a breach of covenant by the tenant, and asking for a declaration that their consent had not been unreasonably withheld.

The county court judge, on March 31, 1955, found that when the tenant assigned to the assignee, there was no intention or object of getting a tenancy protected by the Rent Restrictions Acts, but went on to say that he was not concerned with the object, but with the consequences of the assignment, which would

be that the landlords would be saddled at the end of the five-year term with a tenant who would be protected by the Rent Acts. He accordingly held that the landlords had not unreasonably withheld their consent, and made an order for possession. The assignee appealed.

Philip Panto for the assignee.
J. E. S. Ricardo for the landlords.

The following cases were cited in the argument: *Swanson* v. *Forton* *; *Lee* v. *K. Carter Ld.* †; *Dollar* v. *Winston* ‡; *In re Swanson's Agreement* §; *Regional Properties* v. *Frankenschwerth* ¶; *Darnell* v. *Millwood.* ‖

DENNING L.J. stated the facts and continued: The question for the court is whether the landlord was justified in withholding his consent. The important thing to notice is that at the time when the request was made for consent there were seven and a half months of the lease to run. The judge has found that when the tenant assigned to the assignee, there was no intention or object of getting a Rent Act tenancy. The simple purpose was that the assignee wanted accommodation. He was a young man recently married. He had been living in a furnished room with his wife. He parted with all his savings to get this flat and he paid full value for the furniture. He knew the lease had only seven and a half months to run, but his hope was that at the end of the term he could arrange with the landlords to give him a new tenancy.

The judge, however, said that he was not concerned with the object of the parties to the assignment, but with what the consequences were. He said that having regard to the consequences, which would be that the landlords would be saddled at the end of the term with a tenant who would be protected by the Rent Acts, the landlords did not unreasonably withhold their consent. Accordingly, he made an order for possession.

There are two reported cases which have come before the court in which a landlord has been held to be entitled to withhold his consent. In *Swanson* v. *Forton* [1] there were only 12 days to run. In *Dollar* v. *Winston* [2] there were seven weeks to run. It was held in each of those cases that the landlord was entitled to withhold his consent because the object of the assignee was to get the benefit of a statutory tenancy: and the period was so short that it was not a normal assignment, but an entirely abnormal one.

* [1949] Ch. 143; 65 T.L.R. 178; [1949] 1 All E.R. 135.
† [1949] 1 K.B. 85; 64 T.L.R. 536; [1948] 2 All E.R. 690.
‡ [1950] Ch. 236; 65 T.L.R. 748; [1949] 2 All E.R. 1088n.
§ 62 T.L.R. 719; [1946] 2 All E.R. 628.
¶ [1951] 1 K.B. 631; [1951] 1 All E.R. 178.
‖ [1951] 1 All E.R. 88.
[1] [1949] Ch. 143; 65 T.L.R. 178; [1949] 1 All E.R. 135.
[2] [1950] Ch. 236; 65 T.L.R. 748; [1949] 2 All E.R. 1088n.

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In the present case it seems to me on the judge's finding that there was a normal assignment with seven and a half months to run. The assignee had the simple purpose of entering into occupation for the seven and a half months in the hope thereafter of negotiating a new tenancy, but not with the object of getting a statutory tenancy, though that would indeed be the natural result.

I think the judge misdirected himself by saying he had not to consider the object of the parties. The object of the assignment was a most important element to consider. It may not always be decisive. I can well imagine that, if there were an assignment of the last fortnight or three weeks of a term, a landlord could reasonably withhold his consent, even though the parties had no intention in fact of creating a statutory tenancy.

Here there is a respectable tenant against whom nothing has been said. There is no reason whatsoever, so far as I can see, for withholding consent except that the landlords want to select a new tenant themselves. They did not go into the witness-box to say why they wanted the premises. They did not say that they had a waiting list or that they intended to sell the premises or anything of that kind. For aught that appears, they simply wanted to let the flat to another tenant of their own choosing. They would not be able to get any more rent from such a tenant because they would be limited to the standard rent. There seems to be no reason why they should refuse to have the assignee as tenant when he will pay the same rent as anyone else. In my judgment, the county court judge was wrong in holding that this was an abnormal assignment. I think it was a normal one, and that the landlords were not justified in refusing to assign. I would allow the appeal accordingly.

BIRKETT L.J. I am of the same opinion. The real question was whether the consent of Thomas Bookman Ld. to the assignment was unreasonably withheld? If it was, then the tenant was entitled to make this assignment without their consent. That was the only issue which was fought before the county court judge. It has been a little difficult to appreciate all that must have been in the judge's mind. On the face of it, this was a perfectly binding assignment. In the language which has been adopted in some of the cases, notably in *Swanson* v. *Forton*,[3] it was, on the face of it, a normal assignment as contrasted with an abnormal assignment. There were seven and a half months unexpired of the term to go. The tenant was anxious, having got a house, to go into his house and be rid of the unexpired portion. He had approached the landlords in that matter, though it would appear that he wanted to sell some of his furniture and the landlords were not agreeable to that. Having seen an advertisement in the paper by Diamond, the tenant got into touch with him. Diamond was newly married and particularly wanted

[3] [1949] Ch. 143, 152.

accommodation. He was ready and willing to pay £100 for certain furniture and willing to take over the unexpired portion of the term. He went into possession. The matter was raised with the landlords and their permission asked, but it was refused. It was plain from the correspondence that the landlords were saying: "We refuse because the sole purpose of this assignment is to give "the assignee the statutory protection which the assignor does "not want." That was no doubt based on the passage which was cited in the correspondence from Megarry on the Rent Acts, 7th ed., p. 179. Mr. Megarry there deals with decided cases on the matter and says: "Where a tenancy is subject to a provision "against assignment without the landlord's consent, his refusal "of consent may be reasonable if the assignment would instil into "the contractual tenancy a capacity for producing a statutory "tenancy which did not exist before." Secondly, "A refusal of "consent to an assignment is also reasonable if the tenancy is "nearly at an end (e.g., with but twelve days to run) and it is "plain as a matter of fact, even though not of law, that in the "absence of an assignment no statutory tenancy would arise, "owing to the tenant being out of residence and most unlikely "to return." Finally, on the case decided by Roxburgh J. (*Dollar* v. *Winston* [4]): "Even if the contractual term has some "seven weeks to run when permission to assign is sought, and the "tenant is still in possession when he assigns the tenancy, the "same principle applies if 'the sole purpose of the assignment is "'to give to the assignee statutory protection which the assignor "'does not want and does not intend to get for himself.'" It is fairly plain to me that when this correspondence passed on this matter those passages from Megarry were in the writer's mind. The further note of Megarry following those passages was this: "However, where this is not the object of the assignment, it is "unreasonable to withhold consent (and there may be a with-"holding without an actual refusal) merely because the landlord "wishes the choice of tenants to lie with him and not with the "assignor, or wishes to obtain possession of the house." Then he cites two cases which have been decided on those matters. It is a little difficult to understand quite what was in the judge's mind, because he was manifestly sympathetic to Diamond and said he would like to help if he could. He then went on to say: "This was not done for the deliberate purpose of creating a "statutory tenancy, but it is not a question of intention but what "would be the consequences of such an assignment to the land-"lords and what would be just to them." Then a little later: "Without the Acts, the landlords could have got possession next "July. Is it right to penalize the landlord? How far can it go? "It is impossible for me to say. One must look at all the "circumstances and hardship to the tenant and to the landlord.

[4] [1950] Ch. 236.

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"Look at the *Swanson* case.[5] The facts of this case would "warrant me to say that the landlords' refusal to prevent a "statutory tenancy arising was not unreasonable." What appears to have been in the judge's mind was that because the tenant himself was not anxious at the expiration of his term to continue there, no statutory tenancy would arise in that event, and therefore for the tenant to dispose of the seven and a half months' residue to Diamond, which would mean that at the end of the term a statutory tenancy would arise in Diamond's case, was penalizing the landlord in some way or other. That situation was really dealt with by Evershed L.J. in *Swanson* v. *Forton* when he said[6]: "It could not be suggested to be right that a landlord "may always reasonably refuse his consent to an assignment (or "an underlease) merely because his chances of dominion over his "property at the end of the lease might thereby be enhanced or "the chances of a continued right of personal occupation after "the end of the term might be thereby diminished: for otherwise a landlord would in effect be justified in refusing his "consent at any time to any assignment or any underletting of "'rent restricted' premises." Therefore I agree that the county court judge, in dealing with this matter, has treated this assignment of the seven and a half months' term as being something abnormal, and as though it had as its purpose not the mere assignment, but some further purpose either disclosed or not disclosed. I think it ought to be regarded as a perfectly normal assignment, and that, in all the circumstances, the landlords were not entitled to withhold their consent. It cannot therefore be said that they reasonably withheld their consent as the county court judge seems to have found. I would be in favour of allowing the appeal.

Romer L.J. I also agree. It seems to me that there are two distinct reasons why it cannot be said in the present case that the landlords' refusal of consent to the proposed assignment was reasonable. The first one is that the only ground on which the landlords' solicitors refused to give their consent was that contained in the letter dated December 16, 1954, in which they said that they would not grant their consent because the proposed assignment "would appear to be merely an attempt to assign "the 'fag-end' of a tenancy." That was the only ground they gave by letter, and no further ground was suggested at the trial because no evidence was called on their behalf. That ground was negatived by the judge in express terms, and, accordingly, was not a ground on which the landlords could rely. As they never suggested any other ground it appears to me that their refusal is therefore vitiated. The second ground on which I think it cannot be said that the consent was reasonably withheld was that the

[5] [1949] Ch. 143. [6] Ibid. 153.

proposed assignment was a normal and not an abnormal assignment in the sense in which those phrases were used by Lord Greene M.R., in *Swanson* v. *Forton*,[7] when he said: "Nothing "that I have said must be taken as applying to a case of what "in the argument was sometimes referred to as 'normal' "assignment. If that phraseology be adopted, the whole basis of "fact in the present case is that the assignment proposed was "an 'abnormal' one in that it was an assignment of the tail "end of the term by the lessee not for the purpose of conferring "the right to occupy for the few remaining days of the term, "but in order to enable the assignee to occupy thereafter under "the Rent Restrictions Acts." It follows from the finding of the judge to which I have already referred, namely, that it was not the purpose of the parties to the assignment to attract the operation of the Rent Restrictions Acts, that this suggested assignment was a "normal" one within the purview of what Lord Greene said. I think the judge was in error in failing to appreciate that the assignment was a normal one having regard to the unexpired residue of the term and as to the intention of the parties. As to that, I would respectfully agree with what my Lord has said on the subject of the purpose or object that an assignor and assignee may have in mind. It seems to me that if it is established that the object of the assignment is to enable the assignee to remain in occupation under the Rent Restrictions Acts, then it will almost inevitably follow that the landlord would be justified in withholding his consent because the result of the assignment would be, and intended to be, to bring about what Tucker L.J. described in *Lee* v. *K. Carter Ld.*[8] as "a contractual relationship "pregnant with future possibilities." On the other hand, it does not seem to me that it necessarily follows that a landlord can never reasonably refuse his consent where that object or purpose is not in the mind of the proposed assignor and assignee; because, as my Lord has pointed out, if there are a tenant and a proposed assignee who know nothing about the Rent Acts, and the assignor purports to convey the mere end of a contractual term to that assignee, the result would still be the same as though their object had been to attract the operation of the Acts and the landlord would be subjected again to "a contractual relationship pregnant "with future possibilities." I think in that case the landlord might well be justified in refusing his consent even though the application of the Acts formed no part of the object of the parties to the assignment. It is further to be observed that usually it would be quite impossible for the landlord to find out, with reasonable certainty at all events, what object or purpose the assignor and the intending assignee had in mind. Therefore, it cannot always be said that the question of reasonableness or unreasonableness on the landlords' part depends on what is the object or

[7] [1949] Ch. 143, 152.

[8] [1949] 1 K.B. 85, 96; 64 T.L.R. 536; [1948] 2 All E.R. 690.

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purpose of the proposed assignment. In the present case the question does not really arise for decision, because on the two points to which I have already referred I am well satisfied that the consent here was unreasonably withheld and therefore I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Harry Rose; E. B. V. Christian & Co.*

M. M. H.

[BIRMINGHAM ASSIZES.]

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April 6.
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[1953 B. No. 3595.]

Banking—Cheque—Conversion—Partnership cheques appropriated by one partner, indorsed and paid by third person into his banking account—Whether bank holder in due course—Manager's failure to make sufficient inquiries—Negligence—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 29 (1) (*b*), 30 (2), 82.

Partnership—Partnership property—Conversion—Partner's conversion of partnership property—Cheques payable to partnership indorsed by one partner and paid into third person's banking account—Right of aggrieved partner to sue bank alone without joining guilty partner—R.S.C., Ord. 16, *r.* 11.

Practice—Parties.

The plaintiff carried on a confectionery business in partnership with B. under the name of "Modern Confections." The business had premises both at Hinckley and at Nuneaton. The plaintiff worked at Hinckley while B. was in charge at Nuneaton. Cheques were usually collected by B. and the usual practice was for both the plaintiff and B. to indorse cheques for payment into the partnership account at the Midland Bank at Hinckley; each of them, however, had authority to indorse alone. B. appropriated nine cheques, totalling some £1,160, in respect of invoices sent out from Hinckley. The cheques were drawn in favour of Modern Confections, indorsed by B. "Modern Confections p.p. [G. B.]," and handed over by him to J., a customer of the Nuneaton branch of the defendant bank. At that time J. had three accounts with the defendant bank, namely (i) a current account, generally in credit to £150 to £200; (ii) a No. 2 account, overdrawn to the extent of £980; (iii) a No. 3 account, which had been dormant. J. indorsed and paid into his No. 3 account the cheques handed to him by B., and he also drew large sums out of this account. The manager of the defendant bank, on seeing that the cheques were made payable to "Modern Confections," asked J. for an explanation and was told that B. was the sole partner in Modern Confections, that J. was helping him with the financial side of the business with a view to going into partnership at a later date, and that B. owed J. £450. The manager made no inquiry of B. and accepted J.'s

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[Reported by R. J. TOYN, Esq., Barrister-at-Law.]

explanation. The plaintiff sued the defendant bank for damages for conversion of the cheques:—

Held, (1) that, since a co-owner who does an act in respect of joint property which can be justified only by the right to exclusive possession converts that property, by delivering partnership cheques to J. for payment into the latter's No. 3 account, which was not a partnership account, B. had converted the cheques; and that by collecting the proceeds of the cheques the bank was prima facie guilty of conversion although B., who had indorsed the cheques, had authority so to do.

A. L. Underwood Ld. v. *Bank of Liverpool* [1924] 1 K.B. 775; 40 T.L.R. 302 applied.

(2) That by virtue of R.S.C., Ord. 16, r. 11, the plaintiff was entitled to sue for conversion in respect of his interest in the cheques without joining his partner.

Brewer v. *Westminster Bank Ld.* [1952] 2 T.L.R. 568; [1952] 2 All E.R. 650 distinguished.

(3) That the bank was not a holder in due course within section 29 (1) of the Bills of Exchange Act, 1882, since, as B. had been guilty of fraud, the burden of proving that value had subsequently been given for the cheques lay on the defendant bank by section 30 (2); and the bank had not discharged that burden since J.'s explanation to the manager was quite inconsistent with his having given value for the cheques, and as the manager believed the cheques were B.'s money they could not be applied to reduce J.'s overdraft, and no agreement by the bank to honour cheques drawn before receipt of the proceeds of the partnership cheques had been proved.

(4) That the bank was not protected by section 82 of the Act of 1882, since the bank manager was careless in not making sufficient inquiries; where a bank manager failed to make the inquiries which he should have made a very heavy burden rested on him of showing that such inquiries could not have led to any action which could have protected the interests of the true owner.

Dictum of Lord Wright in *Lloyds Bank Ld.* v. *E. B. Savory & Co.* [1933] A.C. 231; 49 T.L.R. 116 applied.

ACTION.

In October, 1950, the plaintiff, Reginald Baker, started a business in partnership with one Bainbridge and one Tattersall under the name of Modern Confections. There was no written partnership agreement and the name of the firm was not registered under the Registration of Business Names Act, 1916. The manufacture of chocolate biscuits was carried on in premises at Hinckley and Nuneaton, the firm buying biscuits from biscuit manufacturers like the Valvona Biscuit Co., putting chocolate on them and then selling them to wholesalers. The three men shared equally in the profits and the partnership account was kept with the Midland Bank at Hinckley. The plaintiff worked at Hinckley, while the premises at Nuneaton were the responsibility of Bainbridge. The office work for both centres was done at Hinckley, where it was usually the plaintiff who made out invoices for all goods sold. Payment was generally made by cheque, which was usually collected by Bainbridge. The plaintiff and Bainbridge each had authority to indorse the cheques alone, but the usual practice was for both to do so; the cheques then

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being given to the girl employed in the Hinckley office, who paid them into the Midland Bank. Tattersall retired from the partnership early in 1951, and Bainbridge began to carry on the business at the Nuneaton premises separately from that at the Hinckley premises, sending out invoices on his own account without informing the plaintiff. Cheques in respect of these invoices were made out to Bainbridge, who indorsed them and handed them over to one Jeffcott.

Jeffcott, who carried on in Nuneaton the business of an insurance agent, had had since 1938 a current account with the Nuneaton branch of the defendant bank, where one Stanley Jones was manager. In 1946 the defendant bank allowed him to open a No. 2 account on which he was allowed to draw up to an agreed limit, the overdraft being secured by the deeds of his house. The initial overdraft was £150 and by 1951 it had increased to £980. Between 1946 and 1951 his current account was in credit to the extent usually of between £150 and £200, and had an annual turnover of between £5,000 and £6,000. On March 15, 1947, Jeffcott opened a No. 3 account which he sometimes used but which at other times lay dormant. It was in this condition at the beginning of April, 1951, showing a nominal credit of 5s. 6d., and the overdraft on his No. 2 account had increased to over £900; but on April 23 Jeffcott paid £249 6s. 2d. in cash into the No. 3 account. On April 25 he paid in a cheque for £118 19s. 6d. drawn by Thomas Hoyles & Sons Ld. and made payable to G. Bainbridge, which was indorsed both by Bainbridge and by Jeffcott. On the same day Jeffcott drew out £75 in cash from the No. 3 account, and on the next day a further £100 in cash; and on April 27 he drew on the account a cheque for £124 5s. in favour of the Valvona Biscuit Co. During May cheques amounting to £3,000 in value were paid into the account and substantial sums drawn out both in cash and by cheque. Until about the middle of May all the cheques which Jeffcott paid into this account were made payable to Bainbridge and indorsed over to Jeffcott.

In May, 1951, Bainbridge began to appropriate cheques which he had collected in respect of invoices sent out from the Hinckley premises. These cheques, which were drawn by Thomas Hoyles & Son Ld., or by a firm called William Wine, were made payable to Modern Confections and were the cheques in respect of which the plaintiff brought this action against the defendant bank. The first was a cheque dated May 19 for £131 14s., drawn by Thomas Hoyles & Son Ld. It was indorsed "Modern Confec-" tions, p.p. G. Bainbridge," and also by Jeffcott, who paid it into his No. 3 account. A total of nine cheques payable to Modern Confections and amounting in value to £1,160 16s. 6d., were indorsed by Bainbridge in this manner and paid into his No. 3 account by Jeffcott.

None of these operations attracted the bank manager's attention, until the second of the cheques made payable to

Modern Confections, a cheque from William Wine, dated May 23, was paid in. He asked Jeffcott to see him. At this time the bank manager apparently knew that the No. 3 account had become active again, with substantial payments in April, but he had not investigated the matter further than that. At their interview he asked Jeffcott why he was paying into his own account a cheque in favour of Modern Confections. Jeffcott said that Bainbridge was the sole partner in Modern Confections and that, while he was a very good confectioner manufacturing chocolate biscuits, he was of little use in running his business on the financial side, and that he, Jeffcott, was helping him with the financial side, with a view to going into partnership at a later date. Jeffcott also said that Bainbridge owed him £450, and that he hoped, by running the financial side, to reimburse himself that sum. The manager saw Jeffcott from time to time after that and was assured again that Bainbridge was the sole proprietor of Modern Confections. At some interview Jeffcott told him that this confectionery business was carried on at Hinckley. At one or more interviews the manager raised with Jeffcott the point about the large sums going out in cash and Jeffcott said that the money was going to Bainbridge. The manager felt that he had no reason to distrust Jeffcott, who was a good customer and had never given any cause for anxiety before; and he felt satisfied with all these explanations. He did not ask to see Bainbridge, although he told Jeffcott on several occasions that the account should be "put on proper lines"; and in July, 1951, an account was opened in the name of Arbury Confections, on which both Jeffcott and Bainbridge had authority to draw. The bank manager did not realize that anything was wrong until October 9, 1951.

In the meantime, the plaintiff learned that Modern Confections' account with the Midland Bank was overdrawn, as money had been paid out while no cheques were paid in. He thereupon terminated the partnership and brought this action against Barclays Bank Ld. claiming damages for conversion of the nine cheques amounting in value to £1,160 16s. 6d.

R. K. Brown for the plaintiff.

N. N. McKinnon and *A. C. Warshaw* for Barclays Bank Ld.

Cur. adv. vult.

April 6. DEVLIN J. stated the facts and continued: If Jones had been less unsuspecting, I think that the possibility to which his mind might most naturally be expected to turn would be the possibility that Jeffcott might be defrauding Bainbridge. Of course, cheques are indorsed over to third parties, but usually for small sums and only occasionally. When the bank manager sees it happening for large sums and quite regularly, I think that he is put on inquiry. It is not uncommon in the annals of fraud

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to find a clerk or servant or other associate, who has been given an indorsed cheque with instructions to pay it into his principal's bank account, adding his own name on the back and paying it into his own.

The explanation which Jones, the bank manager, received when he asked for one was not, I think, one which should have satisfied a bank manager. I appreciate the manager's confidence in Jeffcott, and I agree that allowance has to be made for what one might call the personal equation in these matters; but all the same, people of apparently complete honesty do commit frauds, and I think it is necessary for bank managers to consider the merits of the story which they are told upon occasions such as these. I do not think that the explanation given to the manager was one which should have satisfied a bank manager and caused him to refrain from making further inquiries. I think, perhaps, the trouble was that the manager had not really made a study of the position. He had not observed, as I think he should have done in the circumstances, the number of cheques that were coming in and the size of them, and he was not really concerning himself with anything more than to find out the nature of Jeffcott's association with Modern Confections. I do not think that he appreciated the significance of a number of indorsed cheques coming in one after the other, or also the significance that the payments out included substantial sums for cash. If he had, I think that he would have found Jeffcott's story less convincing, for within less than a month Bainbridge had received from people who were presumably his customers cheques amounting to £2,000 or £3,000. Surely a man whose business was on that scale and was done in cheques might have been expected to have a bank account of his own? If he had, and if he wanted Jeffcott to run the financial side of the business for him, why did he not let Jeffcott operate the bank account in Hinckley, where the business was carried on? Why cause the earnings of this business to be paid by this method of indorsement into Jeffcott's private account? The result of such an arrangement was that Jeffcott was handling large sums of money on behalf of Bainbridge, Jeffcott being either an agent or trustee, without Bainbridge being able to exercise any control, and that large sums in cash were being drawn out of what was, in effect, turned into an agency or trust account.

[His Lordship reviewed the evidence with regard to the partnership, and to the cheques indorsed by Bainbridge which had been paid by Jeffcott into his No. 3 account, and continued:] The claim is for damages for conversion of the cheques, which is the usual claim in this type of case. There are, however, two features which deserve attention. First, there is the fact that Bainbridge was not converting something in which he had no interest himself; he was converting the joint property of himself and the plaintiff; and, secondly, there is the fact that this is not a case

of a forged or unauthorized indorsement. The cheque is a perfectly good instrument, but Bainbridge had no right or authority to hand it over to Jeffcott and allow it to be paid into the latter's account.

With regard to the first feature, I think it is quite clear that one co-owner can commit an act of conversion in respect of joint property. Of course, the mere fact that he takes possession of it will not be sufficient to amount to a conversion, because he is entitled to the possession of it. Neither party, however, is entitled to exclusive possession, and, if one of the two does an act which can be justified only by the right to exclusive possession, then he converts.

That proposition is illustrated by a number of cases. *Wilkinson* v. *Haygarth* [1] was cited in support of it, and I have looked also at *Morgan* v. *Marquis* [2] and *Farrar* v. *Beswick*,[3] where I think that proposition was made abundantly clear. The point is summarized in Pollock on Partnership, 15th ed., p. 155, in these words: "First, what is a fraudulent conversion of partnership "property to a partner's separate use within the meaning of the "rule? A wilfully dishonest intention, or conduct, which, in the "language of Lord Eldon, adopted by Jessel, M.R., amounts to "*stealing* the partnership property."

That is what I think Bainbridge was doing on the facts of the present case. In all these matters I have to draw what I consider to be the right inference from the facts as they have been proved in the evidence, bearing in mind that neither side has brought Bainbridge or Jeffcott into the witness-box to give any explanation of his conduct. I think there was some evidence that Bainbridge had disappeared.

The other point is whether the fact that this was a good indorsement makes any difference to the claim for conversion. That situation was considered in *A. L. Underwood Ld.* v. *Bank of Liverpool*,[4] which is not dissimilar to the present case. In that case the bank's customer, Underwood, who was the sole director of the plaintiff company, paid into his own private account, instead of into the company's account with another bank, cheques which were drawn on the company, and which he had indorsed on behalf of the company, as he had authority to do.

I start from the point that Underwood had converted the cheques of the company, just as I have already satisfied myself that Bainbridge had converted the cheques of the partnership in the present case. Scrutton L.J. took up the argument at that point in these terms [5]: "If, as appears to be the fact, A. L. "Underwood converted the cheques of the company, I think "the authorities show that the defendant bank by collecting "those cheques and placing the proceeds to A. L. Underwood's

[1] (1846) 12 Q.B. 837.
[2] (1853) 9 Exch. 145.
[3] (1836) 1 M. & W. 682.
[4] [1924] 1 K.B. 775; 40 T.L.R. 302.
[5] [1924] 1 K.B. 775, 790.

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" private account, converted them as against the plaintiff com-
" pany. There is, no doubt, considerable difficulty in defining the
" limits of conversion, where servants or agents do ministerial
" acts in relation to the goods converted in good faith and on
" behalf of the apparent owner. The different statements of the
" law by Blackburn and Brett JJ., in advising the House of
" Lords in *Hollins* v. *Fowler*,[6] are proof of this."

Scrutton L.J. then considered some of the authorities and quoted the statement by Lord Chelmsford in *Hollins* v. *Fowler*,[6] which is, I think, now generally regarded as the true statement of the position. Lord Chelmsford said[7]: " Any person who, however " innocently, obtains possession of the goods of a person who has " been fraudulently deprived of them, and disposes of them, " whether for his own benefit or that of any other person, is guilty " of a conversion." Scrutton L.J. then went on to say: " Now " bankers who collect borrow from their customers the proceeds " when collected, and in collecting exhaust the operation of the " cheque. These operations have been held to be conversion. . . ." After referring to a number of authorities, Scrutton L.J. said: " Unless therefore the defendant bank can show some excuse in " law, they are guilty of conversion. Their first line of defence " was that as Underwood was acting within his apparent authority, " the fact that he was using that authority for his own benefit was " immaterial, ' the apparent authority was the real authority ': " see *per* Lord Macnaghten in *Bryant, Powis & Bryant* v. *Quebec* " *Bank*.[8] " After considering that position Scrutton L.J. said[9]: " So in the present case, if the bank were purchasing the cheques " for value, apart from any question of the Bills of Exchange Act, " on finding from the company's documents that the sole director " had authority to indorse cheques on their behalf, it would be " immaterial whether he was using that power for his own benefit, " and privity would be created between the alleged principal and " the bank, so that the property would pass. But in the present " case A. L. Underwood in asking the bank to collect and pay the " proceeds into his private account was not purporting in this " transaction to act as agent for his company, or to create privity " between them and the bank; he was acting and purporting to " act for himself as principal. Just as you cannot ratify the act " of an agent who did not profess to act for you: *Keighley, Maxsted* " *& Co.* v. *Durant*,[10] so in my view you cannot rely on the apparent " authority of an agent who did not profess in dealing with you to " act as agent. This line of defence, in my opinion, fails." Scrutton L.J. then went on to consider the other line of defence under section 82 of the Bills of Exchange Act, 1882, which protects bankers who in good faith and without negligence collect crossed cheques for a customer who has no title to them.

[6] (1875) L.R. 7 H.L. 757.
[7] Ibid. 795.
[8] [1893] A.C. 170, 180.
[9] [1924] 1 K.B. 775, 792.
[10] [1901] A.C. 240; 17 T.L.R. 527.

That statement of the law, while showing and establishing that, prima facie, the bank in the present case was guilty of a conversion, points also to two of the defences which are open to the bank on a case of this sort, and which Barclays Bank Ld. has in fact relied upon in the present case. The first is an allegation that the bank was a holder for value, or holder in due course. If that were so, since the cheque was properly indorsed—it was not a forgery and it was not a nullity—it would be immaterial that Bainbridge, through the instrumentality of Jeffcott, paid it in for his own benefit and in fraud of the partnership. As Scrutton L.J. said [11]: "in the present case, if "the bank were purchasing the cheques for value, apart from "any question of the Bills of Exchange Act, on finding from "the company's documents that the sole director had authority "to indorse cheques on their behalf, it would be immaterial "whether he was using that power for his own benefit, and "privity would be created between the alleged principal and the "bank, so that the property would pass." If, therefore, the cheques were being taken by the bank as a holder in due course, it could, in my judgment, succeed; and that is one of the three lines of defence upon which the bank relies; but, if that was not the nature of the transaction, if the cheque was being given to the bank, not so that the bank might give value for it, but so that it might collect it as agent, then the actual or apparent authority of Bainbridge to indorse is immaterial. He had no right to deliver the cheque physically to Jeffcott or to the bank. There is, therefore, a conversion, and the bank, unless it can itself set up a good title, must rely upon the defence of section 82. Those are, therefore, two of the defences which are relied upon by the bank in this case.

The third defence (and I think perhaps the one that is most convenient to consider first) is that the plaintiff, as one only of the partners, cannot in this case sue. It is contended on behalf of the bank that it is necessary that both partners should be joined. That is a different point from the one which I have been considering up to now in relation to co-ownership. Let it be assumed, as I have held, that one co-owner can convert the property of another co-owner; nevertheless, it is alleged that, as a matter of procedure, one co-owner cannot sue alone, or that one partner cannot sue alone. Either he must sue in the firm name, if there is a firm name, or, if not, then all the partners must be joined as plaintiffs.

The plaintiff submits that there is no objection to one partner, or one co-owner, suing in respect of his interest in goods—in this case the cheque. The plaintiff concedes that, where the other partner has been fraudulent and where, therefore, the bank would have on any view a good defence against Bainbridge if Bainbridge sued, neither Bainbridge nor any other partner can recover in

[11] [1924] 1 K.B. 775, 792.

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respect of Bainbridge's interest. Therefore, the plaintiff concedes that he can in this action recover only half the value of the cheques, but he submits that there is no objection to his recovering that half interest in which he is concerned, and that the fact that Bainbridge, his partner, has been fraudulent is for that purpose irrelevant.

In my judgment, the plaintiff's submission on this point is the right one. I will take, first, the position in relation to co-owners, for after all, the interest of partners in goods which are the partnership property is simply that it is their joint property. I will then consider whether the fact that the co-owners are also partners makes any difference. It has been settled for a very long time past that one of several co-owners of a chattel can sue for conversion, relying upon his own right to possession, and recovering damages according to his interest in the chattel. Thus, in *Bloxam* v. *Hubbard*,[12] Lord Ellenborough C.J. held that three out of four co-owners of a ship might recover three-fourths of the value of that ship, saying that each might recover according to his own interest. He said[13]: "As to the first of these objections, assuming it to be well "founded, and we think it so, it has only the effect of precluding "the plaintiffs, who are three out of the four assignees in whom "the property of the ship originally was (and until a new assign- "ment is made under the order of the Lord Chancellor, continues "to be) vested, from recovering more than their three-fourth parts "in value of the property in question. For it is now too well "settled to be any longer disputed in a court of law, that the "defendant can only avail himself of an objection of this sort, "viz. that all the several part owners in a chattel have not "joined in an action of trespass, or of tort brought in respect to "it, by plea in abatement. I will only refer to *Addison* v. "*Overend*,[14] in which most of the cases on the subject are "collected; and *Sedgworth* v. *Overend*.[15]"

I was also referred in the course of the argument to a statement by Lord Denman C.J. in *Wilkinson* v. *Haygarth*,[16] where he said: "The plaintiff can recover such damages only as are "proportionate to his interest in the property. . . ."

Bloxam v. *Hubbard*[17] makes it plain that the only objection that can be taken to one of several part-owners suing is the procedural objection taken by means of a plea in abatement.

Plea in abatement was a purely procedural matter which has disappeared under the Judicature Acts and has been replaced, if one can call it a replacement, by R.S.C., Order 16, r. 11, which provides: "No cause or matter shall be defeated by reason of the "misjoinder or nonjoinder of parties, and the court may in every "cause or matter deal with the matter in controversy so far as

[12] (1804) 5 East 407, 419.
[13] Ibid. 420.
[14] (1796) 6 Term Rep. 766.
[15] (1797) 7 Term Rep. 279.
[16] (1847) 12 Q.B. 837, 850.
[17] 5 East 407, 419.

" regards the rights and interests of the parties actually before it." I think that makes it quite plain that, whereas before by plea in abatement one could require as a matter of procedure that all the relevant parties should be brought before the court, now under Order 16, r. 11, it is immaterial to the rights of the parties to the cause or action whether all the proper parties are before the court or not; no cause or matter shall be so defeated, and the court is entitled to deal with the rights and interests of the parties actually before it. The rule goes on to provide, of course, that the court may, at any stage of the proceedings, make such order as might be just with regard to striking out the names of parties who are improperly joined; and then provides that the court may order that " the names of any parties, whether plaintiffs or " defendants, who ought to have been joined, or whose presence " before the court may be necessary in order to enable the court " effectually and completely to adjudicate upon and settle all the " questions involved in the cause or matter, be added." But for this rule, no doubt it would be necessary that Bainbridge should have been joined; and, if he refused to join as plaintiff, he should have been joined as defendant. It is now quite plain, however, that it is only if the court considers that it cannot deal effectually and completely with the questions involved in the matter that the court would make an order requiring Bainbridge to be joined.

Mr. McKinnon relied upon *Brewer* v. *Westminster Bank Ld.*,[18] but that case is, in my judgment, clearly distinguishable. In that case McNair J. was not concerned with an action by one of two co-owners based on a right of property, but with an action by one of two joint contractors based on a breach of contractual duty. He held that the right under the contract was a certain joint right and, therefore, that the inability of one party to enforce it was fatal to the claim. It destroyed the right, which was indivisible. The authorities which he cited for that proposition related entirely to a claim under contract; he was not concerned with a claim based on a right of property, which is governed by the well-established principles in *Bloxam* v. *Hubbard*.[18a]

Mr. McKinnon referred me also to the recent case of *Welch* v. *Bank of England*,[19] because he rightly thought that I ought not to be invited to consider *Brewer* v. *Westminster Bank Ld.*[20] without considering the observations made on it by Harman J. in the later case. It is sufficient for the purposes of this case that I should say that *Welch* v. *Bank of England*[21] appears to be based upon a right of property. It was an action for a declaration that the Bank of England should be required to rectify its register, and it was based, therefore, upon the alleged ownership of the plaintiffs of the stock, and a requisition that the bank

[18] [1952] 2 T.L.R. 568; [1952] 2 All E.R. 650.

[18a] 5 East 407.

[19] [1955] 2 W.L.R. 757; [1955] 1 All E.R. 811.

[20] [1952] 2 T.L.R. 568; [1952] 2 All E.R. 650.

[21] [1955] 2 W.L.R. 757.

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should rectify its register according to the true position as to the ownership of the property. It was, therefore, like the case I am now considering, an action based on a right of property.

Mr. McKinnon went on to contend that, whatever the position might be in the case of co-ownership generally, it was different if the co-owners were also partners. I can see no reason in principle why it should be. In Lindley on Partnership, 11th ed., p. 361, the right of a co-owner to sue is considered, and it is not suggested that any different rule applies in the case of a partnership. It is there stated: "An action for the recovery of goods of "the firm or for damages for their loss or injury ought to be "brought in the name of the firm or by all of its members; but if "one only sues he will be entitled to recover damages in respect of "his interest in the goods. . . ."

Mr. McKinnon relied upon the inconvenience that can be caused if one partner were allowed to sue for his own interest, and submitted that in such a case as this the plaintiff ought to have had the partnership wound up before he could proceed; but these considerations appear to me to be procedural only, and not to go to the question whether the plaintiff has a good cause of action. They are all questions which fall to be determined under Order 16, r. 11. Under that rule, the court has ample power to deal, where necessary, with this sort of action either by staying the action until partnership proceedings have been taken or by requiring the other party to be joined; and, no doubt, in the ordinary case of a flourishing partnership, if one partner suddenly took it into his head to sue in respect of his interest in some particular goods, that is the course which the court would take; but I can see no advantage in taking that course in this case. Indeed, I have not been invited to. I have been invited only to find that there is no good cause of action, but in any event I could see no advantage in taking it. There is nothing to be gained by putting the plaintiff in this case to the expense of taking partnership proceedings against Bainbridge and having the partnership wound up, and there is certainly nothing to be gained by requiring that Bainbridge should be joined as a party, since it is common ground that the bank would have a good defence to any claim in respect of Bainbridge's interest.

[His Lordship referred to an allegation that the plaintiff had failed to prove satisfactorily the dissolution of the partnership between himself, Bainbridge and Tattersall, and was therefore entitled to a one-third share only and not of half, said that he accepted evidence that such partnership had been dissolved, and continued:] That, therefore, disposes of the first line of defence; and, in my judgment, the plaintiff is entitled to sue in respect of his interest in the cheques.

I must consider now the other two contentions which were relied upon under the two sections of the Bills of Exchange Act, 1882. I shall take, first of all, the submission that the bank became a holder in due course. It is based on sections 29 and 30 of the Bills of Exchange Act, 1882. Section 29 (1) defines "a holder in

" due course," and reads: " a holder in due course is a holder who " has taken a bill complete and regular on the face of it under the " following conditions; namely . . . (*b*) That he took the bill in " good faith and for value, and that at the time the bill was " negotiated to him he had no notice of any defect in the title " of the person who negotiated it."

As to the burden of proof on that point, the bank relies upon section 30, which reads: " (1) Every party whose signature " appears on a bill is prima facie deemed to have become a party " thereto for value. (2) Every holder of a bill is prima facie " deemed to be a holder in due course; but if in an action on a " bill it is admitted or proved that the acceptance, issue, or " subsequent negotiation of the bill is affected with fraud, duress, " or force and fear, or illegality, the burden of proof is shifted, " unless and until the holder proves that, subsequent to the " alleged fraud or illegality, value has in good faith been given " for the bill." The bank contends that both Jeffcott and the bank were holders in due course. There is no evidence, apart from his own story to the bank, of how Jeffcott came into possession of the cheques, but it is submitted that, under section 30, he must be presumed to be a holder in due course, until the contrary is proved, and that the contrary has not been proved. I am not prepared, on the evidence that I have, to find that Jeffcott was a party to the fraud. He may or may not have been, and I think that is a point which is left in doubt on the evidence. It is at least possible that he was deceived by Bainbridge as much as the bank were deceived.

I shall consider, therefore, first, the question whether Jeffcott was, on the evidence, a holder in due course. I am not entirely clear how it benefits the bank to establish that he was, but I shall consider the point briefly. I do not think that he was a holder in due course. His story to the bank manager, if it is to be believed, shows that he became a holder merely for the purpose of administering Bainbridge's money, and not in order that he could claim the title to the cheques so that he could deal with the money as he liked. In short, on his own story, he is to be regarded merely as agent or trustee for Bainbridge. If his story is not to be believed, then the proper explanation of any taking by him is that he did not take in good faith. I do not think that the bank can, in the circumstances of this case, successfully rely on section 30 (2). It is, I think, clear, both from the wording of subsection (2) itself and from the authorities that were decided before 1882, that, if fraud is proved at any stage of the transaction, then the burden is shifted. Once I am satisfied, as I am, that the proper inference is that Bainbridge was fraudulent, then the burden is shifted to Jeffcott or to the bank, if it wishes to advance that contention, to prove that Jeffcott took in good faith and for value.

I am certainly not prepared in the state of the evidence to find that he did. As I have said, I do not think there is sufficient

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evidence in the case for me to find one way or the other as to whether Jeffcott was a party to the fraud or not. That interpretation has been given to the section since the Act in *Tatam* v. *Haslar* [22]; but I think it is worth referring to *Fitch* v. *Jones*,[23] which was decided before the Act was passed, because Lord Campbell C.J. shows what is the true position of a man in the position of Jeffcott in the present case. Lord Campbell C.J. said [24]: "The other question is one of general importance. It "is, whether in such a case as this it lies on the plaintiff to "show that there was consideration for the indorsements, or on "the defendant to show that there was none; or in other words "whether the facts proved raised a presumption that there was "no consideration. It is clear that, when there is illegality or "fraud shown in a previous holder, a presumption that there is "no consideration for the indorsements does arise; for the person "who is guilty of illegality or fraud, and knows that he cannot "sue himself, is likely to hand over the instrument to some "other person to sue for him. It is not properly that the burden "of proof as to there being consideration is shifted, but that the "defendant, on whom the burden of proof that there was no "consideration lies, has by proving fraud or illegality in the "former holder raised a prima facie presumption that the plaintiff "is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration." I think it is plain enough that, on Jeffcott's story in this case, he was a holder simply as agent for Bainbridge, and his whole story is quite inconsistent with his having given consideration.

With regard to the position of the bank itself, it is not suggested that the bank did not take in good faith. It is not suggested that they had any notice of the defect in the title of the person who negotiated it, because "notice" in section 29 (1) (*b*) means actual notice—a very different question from that which I shall have to consider when I come to section 82 of the Act, and the question whether the bank was negligent. It is not suggested that the bank had actual notice, but merely that it was put on inquiry. What is suggested is that the bank did not give value, and the question arises whether, when a cheque is given to a bank in these circumstances, it takes the cheque giving value for it, then becoming a holder in due course, or whether the bank takes the cheque merely to collect the amount of the cheque for somebody else.

That is a question of fact. The true relationship has to be inferred from the acts of the parties. In this case the only fact which was relied upon by Mr. McKinnon as making the bank a holder in due course was the fact that there was an overdraft on Jeffcott's No. 2, or loan, account. If the accounts had been combined, Jeffcott would have been indebted to the bank and,

[22] (1889) 23 Q.B.D. 345; 5 T.L.R. 593.

[23] (1855) 5 E. & B. 238.

[24] Ibid. 244.

accordingly, it is said that the bank gave value for it. Mr. McKinnon relied on *M'Lean* v. *Clydesdale Banking Co.*[25] This appears on the facts of the present case to be a misconception; since Jones believed, as he says, Jeffcott's story, he must have appreciated that the cheque represented Bainbridge's money, and as such the bank could not possibly take it in satisfaction of Jeffcott's debt. There can, therefore, have been no agreement on the part of the bank to give value by taking it as against an existing indebtedness.

The point was considered in *A. L. Underwood Ld.* v. *Bank of Liverpool.*[26] Sometimes it has been suggested that, if the bank credit the customer with the amount of the cheque in his account before it has been cleared, by so doing the bank is giving value. I think that the statement of the position which is now accepted is that made by Atkin L.J.[27] in *Underwood's* case, where he said that it was not enough to show merely that the bank had entered the value of the cheques on the credit side of the account on the day on which the bank received the cheques. Atkin L.J. went on to say: "To constitute value there must "be in such a case a contract between banker and customer, "express or implied, that the bank will before receipt of the "proceeds honour cheques of the customer drawn against the "cheques." I did not understand Mr. McKinnon (and I have no doubt that he was wise) to put his case on any ground of that sort. It was not suggested to the bank manager in the box that he had entered into any agreement, express or implied, of that character; and I think, indeed, that the point would necessarily have failed, because an agreement of this sort, whether or not it was made through the agency of Jeffcott, would have been an agreement between Bainbridge and the bank for the bank to give value to Bainbridge, since the bank must have regarded him as the true owner of the cheque. There is no evidence of any such agreement, and what the manager's intentions were in respect of Bainbridge's cheques, which he was allowing to be mixed with what he, presumably, supposed to be Jeffcott's own money must necessarily be obscure. I think, therefore, that that defence fails.

I pass now to the third defence, which is under section 82, which I have already summarized. I have already held that, on the facts, the manager was careless in not making inquiries; and under section 82 the burden is upon the bank to prove that the bank received the cheque without negligence; but I have also held that the natural suspicion that one would have expected to be aroused in the manager's mind was the suspicion that Jeffcott was defrauding Bainbridge. I do not think that the manager had any reason in the first instance to suspect that the true owner, or part-owner, was the plaintiff, and that Bainbridge was

[25] (1883) 9 App.Cas. 95.
[26] [1924] 1 K.B. 775.
[27] Ibid. 805.

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defrauding a partner. Does that matter when section 82 of the Act puts upon the banker the burden of proving that he took in good faith and without negligence? Must he prove that he was not careless in any respect whatsoever, or is it enough for him if he can show that, although he was careless, his carelessness did not affect the matter; in other words, that the inquiries which he might properly have been expected to make would not have unearthed the true position and would not, therefore, have protected the true owner?

Mr. Brown, for the plaintiff, contended that, as soon as it was established that the bank manager was careless in his failure to make inquiries, the bank's defence under section 82 goes, and it is irrelevant to consider whether such inquiries, if made, would have protected the plaintiff's interest in the cheques. This is a point on which there does not seem to be very much authority, and, in fact, none was cited to me; but there are, I think, one or two dicta which assist Mr. Brown's argument. I refer, first, to an old dictum of Lord Romilly, which I take from *A. L. Underwood Ld.* v. *Bank of Liverpool*,[28] where it was quoted by Bankes L.J. Lord Romilly's dictum was made in *Jones* v. *Williams*,[29] where he was concerned with the inquiries that ought to be made in regard to mortgages, but Bankes L.J. took it as a general principle which was equally applicable to section 82. Lord Romilly said: "With respect to the argument, that it was unnecessary "to make any inquiry because it would have led to no result, "I think it impossible to admit the validity of this excuse. I "concur in the doctrine of *Jones* v. *Smith*,[30] that a false answer, "or a reasonable answer given to an inquiry made, may dispense "with the necessity of further inquiry, but I think it impossible, "beforehand, to come to the conclusion, that a false answer "would have been given, which would have precluded the neces- "sity of further inquiry. A more dangerous doctrine could not "be laid down, nor one involving a more unsatisfactory inquiry, "namely, a hypothetical inquiry as to what A would have said if "B had said something other than what he did say."

In *Lloyds Bank Ld.* v. *E. B. Savory & Co.*,[31] which went both to the Court of Appeal and to the House of Lords, there is a dictum by Greer L.J. in the Court of Appeal, and also another relevant dictum by Lord Wright in the House of Lords. In the Court of Appeal Greer L.J. said[32]: "It is, I think, also true to "say that a banker who has not exercised reasonable care cannot "claim the benefit of the section even though it may seem "probable that the exercise of care would not have enabled him "to discover the defective title of his customer. The protection "is given to careful bankers, and any banker who does not "exercise reasonable care is outside the section altogether, even "though he may be able to say: 'If I had exercised care the

[28] [1924] 1 K.B. 775, 789.
[29] (1857) 24 Brew. 47, 62.
[30] (1841) 1 Hare 43, 55.
[31] [1933] A.C. 201.
[32] [1932] 2 K.B. 122, 148.

" ' fraud would not have been discovered.' " Lord Wright in the House of Lords said [33]: " Nor is it any answer to a charge under " section 82 of neglecting a proper precaution, that if it had been " taken it might have been fruitless. Nor does a precaution cease " to be proper for purposes of section 82 merely because, though " generally effective, it may in special circumstances be " ineffectual."

Mr. McKinnon submitted that, accepting (which, of course, he does not do, but on which I have already found against him) that the bank manager was careless in not making inquiries, then all the inquiries which he would have needed to have made would have been those which were necessary to allay suspicion that Jeffcott might be paying Bainbridge's cheques into his own account for the purpose of defrauding Bainbridge. For this purpose, Mr. McKinnon submits that the inquiries could have been limited to verifying that Jeffcott had Bainbridge's authority to act as he did; all that the manager would have needed to have done would have been either to ask for a written authority or to see Bainbridge, and, if he had seen Bainbridge, that is the only point that would have been discussed. It is said that, since Bainbridge himself was fraudulent, then he would obviously have taken part in hoodwinking the manager, and the manager's inquiries would necessarily, therefore, have been fruitless so far as the plaintiff's interests were concerned. But I do not think that, in the light of the dicta which I have quoted, I ought to speculate about what would have happened if the manager had asked to see Bainbridge; and, if I were to speculate, I am not at all sure that the right answer would be that the discussion would have been limited to the points which Mr. McKinnon has, so to speak, put on the agenda. Discussions of this sort may very well roam more widely.

Moreover, I am not satisfied that the only point that the manager ought to have inquired into was whether Jeffcott was acting in fraud of Bainbridge. That was the main point, no doubt, but I think one of the points which he might certainly have been expected to have inquired into, even if it was not his duty to do so (which, I think, perhaps it was), is why Bainbridge wanted to use Jeffcott's account at all. One might have expected the manager to ask whether Bainbridge had a banking account already, and, if not, why he did not create one for himself instead of obtaining his banking facilities by this means, because, after all, the effect of what was being done and what was in fact done later, when, in response to the manager's insistence, the account was put, as he called it, on a proper basis, was that a new account was being created for Bainbridge. Bainbridge was the real customer and it was his money which was being used, through the agency of Jeffcott.

Quite apart from what I should have thought to have been the irregularity of mixing Bainbridge's money with Jeffcott's

[33] [1933] A.C. 201, 233.

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money, on the story that the manager has told the position was in effect that Bainbridge was having a new banking account created for him, and he was not the bank's customer already. There is no doubt that, in such circumstances, it is either the practice or the duty of the bank to make inquiries from a prospective customer; and the manager, therefore, should have inquired into that aspect of the matter.

I observe a passage in Lord Wright's speech in *Lloyds Bank* v. *E. B. Savory & Co.* in which there is a reference to that point. He said [34]: "It is now recognized to be the usual practice of bankers "not to open an account for a customer without obtaining a "reference and without inquiry as to the customer's standing; a "failure to do so at the opening of the account might well prevent "the banker from establishing his defence under section 82 if a "cheque were converted subsequently in the history of the "account." If the manager had made inquiries of that sort about Bainbridge, it is, in my judgment, impossible to say whither they might not have led. I know nothing about Bainbridge. I do not know what his capacity for deceit is and whether he would have succeeded in lulling the manager is a mere matter of speculation. He might have deceived him or he might not.

I do not think that in this case I need go so far as to hold that every failure to make proper inquiries, whether or not they appear to be material, is fatal to a defence under section 82. I do not think it is necessary that I should hold that such carelessness is fatal even if the bank can affirmatively show that the failure was immaterial; but, in my judgment, if a bank manager fails to make inquiries which he should have made, there is at the very least a heavy burden upon him to show that such inquiries could not have led to any action which could have protected the interests of the true owner; and that burden the bank has, in my judgment, failed to discharge in this case.

Accordingly, all three of the defences relied upon by the bank fail, except to the extent, which is conceded, that the amount claimed must be reduced by half. There will be judgment for the plaintiff for half the amount claimed, that is to say, for £580 8s. 3d., with costs.

Judgment for the plaintiff.

Solicitors: *Pilgrim & Webster, Hinckley; Edge & Ellison, Birmingham.*

[34] Ibid. 231.

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Master and Servant — Employment of servant of another — Invitee or employee — Full-time hiring of lorry and driver over prolonged period—Methods of loading and unloading under supervision and control of hirer—Liability of hirer for unsafe system of unloading.

The plaintiff was a lorry driver employed by British Road Services, who paid him his wages and had the sole right of dismissing him. Over a long period of years he had been engaged in carrying loads under the control of the defendants between their various depots. The loading and unloading of his lorry was done under the supervision of the defendants, who supplied the necessary equipment, but the plaintiff had control of the actual stowing of the load upon his lorry. The plaintiff's lorry was marked with the defendants' initials, and there was no indication of its true ownership. On January 1, 1953, while unloading his lorry at one of the defendants' depots, the plaintiff was injured through the obviously unsafe system of work of the defendants:—

Held, that, in the circumstances, the plaintiff was not merely an invitee, but was entitled to the same standard of care as if he had been the defendants' employee; accordingly, the defendants were liable to the plaintiff in negligence.

London Graving Dock Co. Ld. v. *Horton* [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1 distinguished.

ACTION.

The plaintiff was a lorry driver employed by British Road Services at their depot at Kearsley. At this depot British Road Services had continued a practice originated by their predecessors which had been carried on for 12 or 14 years. A certain number of the lorries at Kearsley including the plaintiff's were occupied whole-time upon transport for the defendants, Imperial Chemical Industries Ld. The name upon these particular lorries was "I.C.I." and there was no reference upon them to their ownership by British Road Services. Nevertheless the drivers were in fact the servants of British Road Services. For a considerable time the plaintiff had been employed upon this work. Each morning on the defendants' instructions he drove his lorry from Kearsley to one of their depots where he picked up a load. The stowing of the load upon the lorry was left to the driver's discretion. He then carried the load to another depot of the defendants where he unloaded it. The nature of the load and the methods of loading and unloading were under the supervision and direction of the persons in charge at the defendants' depots.

On January 1, 1953, the plaintiff took a load of 23 drums of a chemical called terylene, manufactured by the defendants, from one of their depots to their terylene plant at Thornton-le-Fylde. Each drum weighed 300 lb. and measured approximately 3 ft.

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

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long by 2 ft. wide. There were no handles or lugs by which to hold the drums. The drums were stowed on the plaintiff's lorry in three tiers, those in the bottom tier standing upright. For 10 years or more it had been the defendants' practice to have such drums delivered at the unloading bay of the Thornton-le-Fylde depot, where there were proper facilities for unloading, but which was nearly a quarter of a mile from the terylene plant, but later the defendants decided to have the drums delivered by British Road Services direct to the plant. On January 1, 1953, the defendants had provided unloading equipment which was rolled up to the tail of the lorry and which consisted of a mechanical platform supported upon a column. The platform could be moved up or down the column to accord with the height of the article to be moved but its maximum height was 6 ft. 2 in. above the ground. This was only a few inches above the deck of the plaintiff's lorry. Since the platform could not be raised higher, the plaintiff had to stand on it to lower drums from the two top tiers down on to himself until they reached the platform. The platform itself was 5 ft. long by 3 ft. wide so that there was insufficient room for another person to stand upon it to assist the plaintiff at this stage of the unloading. The plaintiff had manoeuvred one drum from the top tier on to the platform and was engaged in getting down a drum from the second tier, trying to hold it by the edges and to slide it down upon himself, when it "kicked" as it came down; the plaintiff fell on to the floor and the drum fell on his back and severely injured him. He claimed damages against the defendants for personal injuries arising out of their negligent method of unloading the drums.

H. I. Nelson Q.C. and *C. M. W. Elliott* for the plaintiff.
R. H. Forrest Q.C. and *R. G. Clover* for the defendants.

Cur. adv. vult.

May 9. OLIVER J. stated the facts and continued: I have to decide in the circumstances whether Imperial Chemical Industries Ld., who are the only defendants, are liable for the accident. A number of questions arise. The first is whether this was a reasonably safe or a dangerous method of unloading the heavy drums, dangerous in the sense of involving anyone who was responsible for this method in negligence. Secondly, assuming that it was dangerous in this sense, are the defendants liable? What duty did they owe to the plaintiff in the circumstances? Is he, as was contended for the defendants, only an invitee, so as to come within the decision of the House of Lords in *London Graving Dock Co. Ld.* v. *Horton*,[1] or, on the facts of the present case, do the defendants owe him a larger duty than that owed to an invitee? Do they owe him the duty of an employer? I do

[1] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

not think that it is necessary to enlarge on what *Horton's* case [1] decided. It caused great doubt and difficulty in the various tribunals before which it came. It was eventually decided in that case that the only duty owed to an invitee is that, if an unusual danger exists in and about the work, he is to be warned of it unless it is obvious that he knows of it. Whatever danger there was in this case was obvious and the plaintiff knew of it. The question is whether the circumstances here fall within the principle of *Horton's* case.[1]

The third question is whether, on the assumption that the defendants owed the plaintiff the duty of employers in the circumstances, the plaintiff was guilty of contributory negligence. So far as contributory negligence in the actual performance of this task is concerned, I clearly find that he was not negligent and I do not think it was really suggested that he was. An attempt to handle such a weight as 300 lb. single-handed, upon a narrow platform, without any appliances and without even handles or lugs by which to steady it, could obviously result in an accident to the man involved, in spite of his using the very best endeavours, which I have no doubt this very good workman did.

[His Lordship reviewed the evidence upon the issue whether or not the method adopted by the defendants for unloading the drums was negligent, held that it was, and continued:] The main issue is the extent of the duty owed to the plaintiff in these circumstances by the defendants. The plaintiff was not in the employ of the defendants in so far as they did not pay him, they did not engage him, and could not dismiss him. He was in fact the servant of British Road Services.

There is in this case what seems to me to be a very special set of facts, and I have come to the conclusion that these facts distinguish this case from *Horton's* case.[2] Here was no casual employment of a British Road Services' lorry by the defendants. For 12 or 14 years it had been the practice for a number of lorries at the Kearsley depot, including the plaintiff's lorry, to be hired by the defendants on a whole-time basis. Apparently for years the plaintiff and many other lorry drivers used to come out in the morning from the Kearsley depot and go to a depot of the defendants where they were to pick up some load and, according to the instructions of the defendants given at the time, take it to some other depot of theirs. Even the name on these lorries was "I.C.I." There was no reference upon them to the fact that they belonged to British Road Services. Whoever was in charge at the defendants' loading depot would decide what load was to be taken and the driver would load it under his supervision and direction. The driver, of course, would decide how the load was to be stowed upon his lorry and I suppose if he thought the load was so big as to be dangerous he could have refused to load. The same could be said of his ordinary employers; if they told him

[1] [1951] A.C. 737.

[2] Ibid.

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Oliver J.

to do something which he thought was dangerous he could refuse to do it. Subject to that, however, he was entirely under the direction of whoever was in charge of the defendants' depot.

I come to the particular journey on which the accident took place. The plaintiff loaded the 23 drums of terylene, the ordinary load, and he used the ordinary stow. He went to the Thornton-le-Fylde depot with the load and, following the universal practice, whatever load he took there, he went first to the storeman to get instructions as to the part of the depot in which to deliver the drums.

[His Lordship described the three methods prescribed by the defendants at different times for unloading the drums of terylene, including that in use at the time of the accident, and continued:] Each of the methods of unloading, as Mr. Nelson pointed out, was inaugurated by the defendants. Just as they were in control of the loading, so they were in control of the unloading, except that the plaintiff could have said "I am not going to use that "machine; I am going to take my load back home to Kearsley," which was about 50 miles away. Had he done so the plaintiff would have wasted the day and would probably have been dismissed when he got there for not doing what the defendants had told him to do.

Mr. Forrest, on the other hand, contended that *Horton's* case [3] completely covered this case. He submitted that where a man was engaged, paid and was dismissible by some other employer, then, whatever the circumstances, whatever the history, he was a mere invitee. I use the phrase "mere invitee" because in the present case it seems to me to be appropriate—an invitee is in a much worse position so far as this sort of matter is concerned than an employee. How difficult is this particular tract of legal country is illustrated by *Horton's* case [3] itself. In that case Lynskey J., who tried it, found for the defendants on the ground that the plaintiff knew of the danger and, being an invitee and not in the defendants' employment, could not succeed. All three Lords Justices who heard the appeal [4] reversed the decision of Lynskey J. I have only to mention that the three included Tucker L.J. In the House of Lords,[5] by a majority of three to two, the judgment of Lynskey J. was restored. Thus it happened in that case, as necessarily in others, that the opinion of four judicial authorities triumphed over five, if that is the right expression. Nonetheless, the decision in the House of Lords is the law and, if I thought it applied to these facts, I would of course be bound by it.

With considerable hesitation I have come to the conclusion that the plaintiff is right and that in the present case, by reason of all the circumstances, the defendants owed him the same duty

[3] [1951] A.C. 737.

[4] [1950] 1 K.B. 421; 66 T.L.R. (Pt. 1) 246; [1950] 1 All E.R. 180.

[5] [1951] A.C. 737.

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as regards appliances and system of work as if he had, in fact, been their own employee. They were his employers in every respect except that they did not pay him and could not dismiss him. If that be the true relation, it would be entirely wrong to say he was guilty of contributory negligence if all that he did was to try to work a negligent system devised by his employers or quasi-employers. Therefore, there must be judgment for him.

[His Lordship reviewed the evidence on the question of damage and assessed the general damages at £1,500 and the special damages at £841 10s. 4d.]

Judgment for the plaintiff.

Solicitors: *Fielding & Fernihough, Bolton; J. W. Ridsdale.*

[PROBATE, ETC., DIVISION.]

*BOCK v. BOCK.

1955
June 21.

Karminski J.

Legal Aid — Costs — Divorce — Attendance of petitioner — Petitioner's evidence disbelieved—Meaning of "vexatious"—Medical witness—Direction of area committee as to fee—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 51—*Legal Aid and Advice Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *Sch. III—Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 14 (5).

After hearing the evidence given on behalf of both parties in a contested divorce suit, which lasted several days, in which each charged the other with cruelty, the prayer of the answer was rejected and the petition dismissed. The court found that the wife petitioner, an assisted person, had told a false story and deceived her solicitors. On a taxation of the wife's costs under the provisions of the Legal Aid and Advice Act, 1949, the registrar refused to allow her the expenses of her attendance. On a summons to review the taxation:—

Held, that notwithstanding the view taken of her evidence, her conduct had not been such as to disentitle her to her expenses, for she had not presented her case "vexatiously and improperly" so as to occasion "a wanton and unnecessary increase in the amount of "costs."

Observations in *Allen* v. *Allen and D'Arcy* (1860) 2 Sw. & Tr. 107 distinguished.

Meaning of the word "vexatious" in section 51 of the Supreme Court of Judicature (Consolidation) Act, 1925 applied.

Per curiam: The attention of the registrar or taxing officer should be drawn to any direction made by an area committee which has sanctioned the attendance of medical or other expert witnesses and stipulated the maximum fee to be paid.

SUMMONS for review of a taxation made by a divorce registrar.

The facts are stated in the judgment which was given in open court.

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P. R. Hollins for the petitioner.

R. J. Harvey as amicus curiae for the Law Society.

Argument was in chambers.

Karminski J.:—This is an application by an unsuccessful wife petitioner, for a review of taxation of costs made by Mr. Registrar Townley Miller. There are three items which were queried, of which the first two relate to the doctor's fees for attendance at court and for his medical report. The third matter relates to the expenses of the petitioner herself for attending court in what turned out to be a prolonged hearing of cross-charges of cruelty.

After a long and full hearing, Mr. Commissioner Edgedale found that the parties had both failed to establish cruelty, rejected the prayer in the answer and dismissed the petition. The wife's charges of cruelty were largely though not entirely based on sexual matters. She complained that her husband had against her will indulged in the practice of flagellation and had made a number of attempts to commit sodomy upon her. Those complaints or charges were rejected by the commissioner who pointed out that they were not proved to his satisfaction and that so far as the attempted sodomy was concerned they were in substance largely uncorroborated. There was some corroboration that the husband had in his possession at one time a whip, but the commissioner had the correspondence before him which had a negative importance at least in that it made it clear that the wife at the material times was not in any way complaining of the husband's conduct.

The commissioner seems to have formed a very poor opinion of the credibility of the evidence of both parties. If possible I think that he disbelieved the wife even more than he did the husband; but in the end he came to the conclusion on the evidence that both had failed to establish their charges.

A doctor gave evidence on behalf of the wife and in accordance with the practice under the Legal Aid and Advice Act, 1949, the doctor was called and his fee approved under the regulations made by the area committee. [His Lordship referred to regulation 14 (5) [1] of the Legal Aid (General) Regulations, 1950, and continued:] In this case the area committee sanctioned the

[1] Legal Aid (General) Regulations, 1950, reg. 14 (5): "Where it "appears to an assisted person's solicitor necessary for the proper conduct of the proceedings either— "(*a*) to obtain a report or opinion of "one or more experts or to tender "expert evidence in a case of a class "not included in any general authority under the foregoing paragraph; "or (*b*) in a case of a class so included, to pay a higher fee than that "stated by the Law Society or to "obtain the report or opinion of more "than one expert or to tender the "expert evidence of more than one "person, he may apply to the appropriate Area Committee for authority "so to do and if the Area Committee "give authority they shall state the "maximum number of reports or "opinions that may be obtained, or "the maximum number of persons "who may be tendered to give expert "evidence, and the maximum total "fee to be paid therefor."

payment of 10 guineas to the doctor for his attendance together with 3 guineas for the report.

At first the registrar in taxation found those figures too high, but on objection he allowed the figures claimed, namely 10 guineas and 3 guineas, so that in effect this present appeal is not concerned with the amounts which the registrar has now seen fit to allow in taxation.

When this matter came before me originally I appreciated that it might be one of some importance to the Law Society, who are charged by statute with the administration and carrying out of the Legal Aid scheme, and I therefore adjourned it so that they should have the chance if they so desired to appear here. They have taken advantage of that offer and I would like to say at once that I have had very great assistance from Mr. Harvey, who appeared as amicus curiae on the instructions of the Law Society, and who has called my attention not only to regulations which I have already mentioned but also to provisions dealing with remuneration made under the Third Schedule of the Act itself.

I say no more about this question of the amount of the doctor's fees, because in fact there is now no dispute between the petitioner and her solicitors on the one hand and the registrar on the other. But it is I think desirable, and I say no more than this, that when fees of this kind go for taxation the attention of the registrar or taxing officer should be drawn not only of course to the regulations under the Act with which he is no doubt familiar, but also to any direction made by the area committee concerned in sanctioning the attendance of medical or other expert witnesses and also stipulating the maximum fee to be paid for that professional work. I say that only for this reason: that I do not know in this case when the matter came before the registrar whether or not his attention was drawn to what had been done in pursuance of its duties by the area committee.

I now turn briefly to what I may call the live element of complaint in this summons.

The petitioner attended court throughout the hearing and was of course the most important witness on her own behalf. As the registrar pointed out, the commissioner did not accept at any rate the major part of her story, and he, the registrar, disallowed her expenses for attending the court.

It appears that when the matter was before the registrar on taxation he had not the advantage, which I have now, of being able to study a transcript of the judgment given at the trial by Mr. Commissioner Edgedale. What the commissioner found was that the petitioner had told a false story, that she had deceived her solicitors, though he did not for a moment suggest that the solicitors' conduct was in the slightest degree to be the subject of examination or criticism: nobody has suggested that they have acted throughout otherwise than perfectly properly. The registrar said that the commissioner disbelieved her, and his attention was called to a recent judgment of Havers J. on

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the question of taxation in *Gibbs* v. *Gibbs*.[2] Havers J. made it clear[3] that the petitioner's fee for attendance in court and expenses was a permissible item; and he referred to an older case, *Harbin* v. *Gordon*,[4] in which Buckley L.J. had pointed out[5] that the plaintiff, that being a common law action, "as a party "litigant, was not entitled to any allowance, but as a witness he "was entitled to an allowance like any other witness, and none "the less because he was also a party litigant."

In the course of his judgment in *Gibbs* v. *Gibbs*[6] Havers J. referred to *Allen* v. *Allen and D'Arcy*.[7] That was a case of very different facts from the present one. It was tried in 1859 soon after the creation of the Divorce Court. There the jury had found a wife guilty of adultery in the face of her denials, but had also found that the petitioner had been guilty of connivance, a verdict which I understand the court, consisting of the Judge Ordinary, Sir Creswell Creswell, Watson B., and Hill J. concurred. In dealing with the question of a review of taxation as to whether or not the expenses of the wife could be taxed, the Judge Ordinary pointed out that the court in which he was then presiding had only recently come into existence, and that the question of the principle on which costs are to be taxed in matrimonial suits had not yet been settled, though he apprehended that he must adopt the principles of the Ecclesiastical Courts. He added:[8] "I think that the only limit which can with pro- "priety be put upon the allowance of the costs of the different "issues raised in this court is this: where the taxing officer is "satisfied that an issue has been vexatiously and improperly put "on the record, so as to occasion a wanton and unnecessary "increase in the amount of costs, he is not to allow the costs of "that issue. The party guilty of putting such an issue on the "record must take the consequences and lose his costs; but "that is the only limit."

The registrar in the present case applied those words here, and expressed the view that the petitioner must have known that what she said was false, and thus, he says, her conduct was wanton. He also added with complete accuracy that the case had already cost the public a lot of money. In my view the cost to the public is a separate consideration which should not affect the discretion in deciding whether or not this woman was in the words of the Judge Ordinary in *Allen* v. *Allen and D'Arcy*[8] presenting her case "vexatiously and improperly"—that is, putting on the record an improper charge so as to occasion "a "wanton and unnecessary increase in the amount of costs."

I of course follow entirely that the commissioner who tried this case disbelieved the wife; and having regard to the nature of the charges it is of course quite obvious that this woman was

[2] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.
[3] [1952] P. 332, 367.
[4] [1914] 2 K.B. 577.
[5] *Ibid.* 586.
[6] [1952] P. 332, 342.
[7] (1860) 2 Sw. & Tr. 107.
[8] Ibid. 110.

telling a great deal less than the truth and in some matters was guilty of invention; but that I think is not the same as raising an issue wantonly and vexatiously. As Mr. Harvey pointed out, the word "vexatious" has indeed a statutory meaning: see Supreme Court of Judicature (Consolidation) Act, 1925, section 51, where the word "vexatious" is preceded by the words "has "habitually and persistently and without any reasonable ground "instituted vexatious legal proceedings."

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I have come to the conclusion that the registrar here misdirected himself in expressing his view in those terms of the wife's conduct in raising these matters and in proceeding to trial on them. It is not every unsuccessful litigant in matrimonial suits who is of necessity because of his failure, "a vexatious and "wanton litigant."

I do not in any way desire to be ever thought to be criticizing the expressions which the commissioner used in respect of this woman's unreliability as a witness; I have not the slightest doubt that she was very unsatisfactory, but I do not think that this is a case where because her evidence was disbelieved on these charges she must as it were automatically be deprived of any chance of recovering costs in respect of her attendance as a witness.

I have come to the conclusion that this is a case where the registrar has gone wrong in principle. If this was only a case of an exercise of his judicial discretion I could not, nor indeed would I, interfere with it; but in my view he has misdirected himself on the question of principle and I think that the matter must go back to him or to some other registrar with a direction to review the matter and to allow such sum by way of costs on the issue here as he may think right and proper.

[His Lordship then made an order for taxation under the Legal Aid and Advice Act, 1949, in respect of the summons.]

Order accordingly.

Solicitors: *M. A. Jacobs & Sons*; *The Law Society.*

J. B. G.

[PROBATE, ETC., DIVISION.]

*IN THE ESTATE OF NUTTALL, DECD.

1955
June 29.

KARMINSKI J.

PRACTICE NOTE.

Probate — Practice — Lost will — Proof — Ex parte application — Non-Contentious Probate Rules, 1954 (*S.I.* 1954, *No.* 796), *r.* 53 (1).

PROBATE MOTION.

During the hearing of a motion in which application had been made in respect of a lost will to the judge direct without prior

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reference to the registrar, the question arose as to the practice envisaged by rule 53 (1) of the Non-Contentious Probate Rules, 1954.[1]

Peter Giffard for the executor.

KARMINSKI J. said that the rule should be interpreted as meaning that such ex parte applications should, in the first instance, be made to the registrar unless the matter was clearly one which merited an application to the judge direct.

Should the registrar, on an ex parte application under the rule, consider that the matter was one which should be dealt with by a judge, he had power under rule 60 of the Non-Contentious Probate Rules, 1954, so to direct.

Solicitors: *Bracewell & Leaver for Pollard & Pollard, Bolton.*

E. J.

[1] Non-Contentious Probate Rules, 1954, r. 53 (1) "An application for "an order admitting to proof a nuncupative will, or a will contained in "a copy, a completed draft, a reconstruction or other evidence of its "contents where the original will is "not available, may be made to the "court on motion or to a registrar of "the principal registry:

"Provided that where a will is not "available owing to its being retained in the custody of a foreign "court or official, a duly authenticated copy of the will may be "admitted to proof without any such "order as aforesaid.

r. 60: "A registrar of the principal registry may require any application made to him to be brought "before him by summons, and may "require any application made to "him, whether by summons or otherwise, to be brought before a judge "by summons or before the court on "motion."

[CHESTER ASSIZES.]

*REGINA *v.* MAYWHORT.

1955
June 7, 8.

SELLERS J

Criminal Law—Evidence—Compulsory disclosure by accused—Affidavit sworn after attachment—Written affidavit sworn by accused in consequence of compulsory process—Disclosure of acts alleged to constitute fraudulent conversion—Motion to quash indictment properly made before plea—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 43 (2).

Under the will of their mother the accused man and his brother became executors and trustees of her estate. The will provided that the residuary estate should be held upon trust by the two sons to convert the same and divide the proceeds between themselves. In

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[Reported by H. EIFION ROBERTS, Esq., Barrister-at-Law.]

1949 (when the mother died) the brother was resident abroad and so the accused obtained probate and became responsible for administering the estate.

By 1953 the brother was dissatisfied with the accused's administration. After an earlier abortive proceeding he took out an originating summons in the Chancery Division in January, 1954. An order was made requiring the accused to lodge certain accounts and a statement as to outstanding property verified by affidavit. The accused failed to comply with the order and a writ of attachment was issued. Subsequently the attachment was discharged and a renewal order made. Again the accused failed to comply; a further writ of attachment was issued, and the accused was re-arrested on June 8, 1954.

On September 22, 1954, while still in prison, the accused swore an affidavit in which he disclosed for the first time that he had converted to his own use certain assets comprised in his mother's estate which were due to his brother.

The accused was indicted on three separate charges of fraudulent conversion contrary to section 21 of the Larceny Act, 1916, but before plea counsel on his behalf moved to quash the indictment in reliance upon section 43 (2) of the Larceny Act, 1916:—

Held, (1) that the originating summons taken out by the brother was a proceeding bona fide instituted by a person aggrieved; that the orders requiring the accused to lodge a statement as to outstanding property verified by affidavit were a "compulsory "process" within the meaning of section 43 (2), for section 43 (2) deprived him of his right to object that his evidence would tend to incriminate him; and that as the accused made his incriminating disclosure for the first time in an affidavit sworn in consequence of that compulsory process, section 43 (2) applied and the accused must be discharged.

(2) That the motion to quash the indictment was properly made before plea.

Rex v. *Noel* [1914] 3 K.B. 848 and *Rex* v. *Tuttle* (1929) 28 Cox 610; 21 Cr.App.R. 85 distinguished.

MOTION to quash indictment.

The accused was indicted on three separate charges of fraudulently converting to his own use certain property of which he was trustee, contrary to section 21 of the Larceny Act, 1916. Counsel for the accused moved to quash the indictment before plea in reliance upon section 43 (2) [1] of the Act.

The facts are fully stated in the judgment.

G. G. Lind-Smith for the Crown.

Robin David for the accused.

No cases were cited in argument other than those referred to in the judgment.

[1] Larceny Act, 1916, s. 43 (2): "No person shall be liable to be convicted of any offence against sections 6, 7 (1), 20, 21 and 22 of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved."

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SELLERS J. read section 43 (2) of the Larceny Act, 1916, and continued: The procedure for bringing before the court the reliance on section 43 was discussed by counsel for the prosecution and counsel for the prisoner, and it seemed to me appropriate, although there is no clear precedent to which I have been referred, that a motion to quash could and should be taken before plea and at the outset of the case, because if this submission is correct the court would have no jurisdiction to try the case. If it were tried it would be a nullity if the plea later succeeded.

In regard to the evidence which is to be adduced, and the manner of its presentation on such an application, counsel for the accused in the present case was content to rely on the evidence in the depositions taken before the magistrates and the documents which were exhibited, but it may be, though it is not necessary to decide it in this case, that other evidence might be brought before the court on such a motion to quash because, notwithstanding anything that may have been revealed by the accused person in any proceedings such as those referred to under section 43, the charges in an indictment might well be supported by evidence independent of that, and although that is so, the section itself expressly states that the person, if he comes within the section, shall not be liable to be convicted upon any evidence whatever in respect of any act done by him.

The evidence upon which the submission is made is derived very largely from the documents, and to a minor extent from the depositions. It appears that the accused was, jointly with his brother, appointed to be an executor and trustee of his mother's will. The will was made in 1949, shortly before the testatrix died on April 20, 1949. His brother apparently was abroad and the accused, who was a solicitor, took out probate and made himself liable for administering the estate according to law. The documents showing the extent of the estate were prepared and submitted by him.

The will provided, after a legacy, that the whole of the residue of the estate both real and personal should be devised and bequeathed to the trustees upon the customary trust to call in and convert, and that the proceeds should be divided between the accused and his brother. By 1953 the brother, who was abroad, was dissatisfied with the administration of this estate and consulted a solicitor and, starting with a letter of January 14, 1953, certain correspondence followed. The brother's solicitor on January 14, 1953, wrote to the accused: "We have been instructed "by your brother to take charge of his interest so far as his "mother's estate is concerned, and will you please let us have "at once particulars of the estate and transfers to transfer one half "of the investments." Correspondence continued for some time on a very unsatisfactory basis for the brother, so much so that by August of 1953 the brother was advised to take proceedings, and on October 21, 1953, an originating summons was taken out in the Chancery Division in the customary form.

On December 23, 1953, the summons came for consideration before Upjohn J. in chambers in London, when apparently the defendant did not appear. It was then ordered that the estate of Alice Maywhort, the deceased, should be administered by the court, and some consequential orders were made directing an account to be taken by the district registrar of Manchester. Those proceedings proved unsatisfactory.

On January 14, 1954, a further summons was heard in London before Harman J. in Chancery chambers. Again the defendant did not appear, and an order dated January 19, 1954, required the defendant on or before 4 o'clock on the afternoon of Friday, February 12, to lodge at the district registry in Manchester four different accounts which were specified, and in particular, as far as this case is concerned, under heading No. 5, to lodge a statement showing what parts, if any, of the testatrix's property were outstanding or undisposed of, and where any parts of such property outstanding and undisposed of were subject to any and what encumbrances, and in each case it was ordered that it should be verified by an affidavit and all payments were to be properly vouched.

Notwithstanding that, the district registrar at Manchester had to certify that certain accounts which had been lodged had not been verified by affidavit, and on March 4, 1954, before Harman J. in London, proceedings were taken to enforce the accused to comply with the order of the court. Harman J. ordered that the plaintiff, that is, the brother, should be at liberty to issue a writ of attachment against the accused for his contempt in not having lodged the accounts and statement which he was ordered to do and, as a result of that, on March 8 the accused was arrested and put into prison. That is a step which the court is entitled and empowered to take when a man deliberately flouts his obligations to the court and fails to comply with its order.

When in prison the accused wrote a letter dated March 11, 1954, expressing his extreme regret that he had neglected to comply with the order. He undertook within one month of his release to furnish the accounts and he apologised to the court. The matter was referred back to Harman J. in London, and by an order dated March 23, 1954, the attachment of imprisonment for contempt of court was discharged and the accused was released from prison.

However, notwithstanding that experience the accused still failed to carry out his obligations and, in particular, to make an affidavit in respect of the five matters which have been specified and a renewal order in the same terms was made on April 23, 1954, by Danckwerts J. in Chancery chambers. The accused was again ordered to lodge with the court by a particular date a statement showing what property was outstanding and how it had been disposed of, and in each case to verify what he said by affidavit; and all payments were to be properly vouched. On that,

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Sellers J.

apparently, some further accounts were produced, but again without the affidavit, and by June 3 the matter came back to Danckwerts J. for a second time.

An order was made that the brother should be at liberty to issue a writ of attachment against the accused for his contempt of court in failing to carry out that order, and on June 8 the accused was again arrested. Now that was on similar grounds to those causing his original imprisonment because in contempt of court he had failed to carry out the court's order and, in particular, to state the position of the estate which he was administering with regard to property which was outstanding or undisposed of. If he had made that statement it would have meant that he would have had to reveal what the true position was. He was arrested because he refused to make such a statement, and the arrest was to enforce compliance with the court's order.

The accused remained imprisoned under that order for a considerable time and it was not until well into September that his position was considered by the official solicitor acting on his behalf. It was thought fit to go and see him and a representative of the solicitor went along with another solicitor, who was a commissioner for oaths, with a prepared affidavit, which the accused swore on September 22, 1954. In the course of that affidavit he made what is here said to be the first disclosure of any act done by him which amounted to wrongdoing of the nature which is alleged in the indictment on which he now stands charged.

In the course of that affidavit the accused stated that he had been detained in Strangeways Prison, Manchester, for 14 weeks and upwards by order of the court of June 3; that he was sorry that he had not carried out the order and prepared in proper and suitable form the accounts ordered to be produced; but that he had no money to do that. The vital paragraph is paragraph 4, which reads: "Save that I have paid to the plaintiff sundry small sums "on account of his share in the estate of my mother, the said "Alice Maywhort, deceased, I confess that I have converted to "my own use all other assets comprised in the said estate as "aforesaid, and save the dwelling-house known as No. 10, "Swan Bank, Congleton, in the County of Chester. I am unable "to estimate the value of this dwelling-house, but I do not think "the proceeds of sale of such dwelling-house would satisfy the "share in the estate to which my brother is entitled. There are, "however, no other assets in the said estate remaining over, and "there are no other assets in the said estate to which I could "make good my brother his share."

He craved to be released from prison, saying that it was impossible in the circumstances related to comply with the order, and humbly submitting that, as he had appropriated to his own use such assets as he had, in all the circumstances such accounts

prepared would be needless expense, and that as he was personally unable to meet them he should be released.

That was subsequently brought before the court but the accused remained in prison. He was seen on October 14, still in prison, by a detective sergeant who was then investigating the charges which have given rise to this indictment; and as late as October 21 he was still in prison. On March 29, 1955, he was charged before the magistrates with these offences and he comes before the court on bail.

It has been admitted by counsel for the prosecution that the affidavit of September 22, 1954, did disclose for the first time that the accused had converted to his own use the property which was due to his brother, and the question arises whether section 43 has the effect which it is submitted it has by counsel for the accused. Was this disclosure in that affidavit "in "consequence of any compulsory process of any court of law or "equity in any action, suit, or proceeding, which has been bona "fide instituted by any person aggrieved"? The originating summons to which I have referred was certainly a proceeding which was bona fide instituted by the brother who was a person aggrieved. Was the disclosure in consequence of the orders to which I have referred, particularly the final order, which gave rise to his second term of imprisonment? In those proceedings there was that order in which the accused was required to give information on affidavit. The information which was ordered by the court could, but for the special provisions of section 43 and the fact that he was a trustee, have been refused.

In the ordinary way a party to a cause can refuse to give evidence which would tend to incriminate him if he can satisfy the court that that would be a possible or likely effect of his answer. It is quite clear here that this evidence would have incriminated him, but for section 43 (2) which effectively deprived him of the right to take objection that it would do so. He was, therefore, bound because of section 43 (2) to answer the order made by the court and the judge could not excuse him and say that he was not bound because he was protected by the general rule of law and he himself could make no claim to such protection.

The object of this very special section, which may serve to let a party who has committed a fraud escape criminal punishment, would appear to be to benefit beneficiaries and persons aggrieved.

A trustee cannot hide behind any privilege of non-disclosure of incriminating evidence. The section, in effect, makes it obligatory upon him to disclose the true facts. If he refuses to do that it leaves power in the court to enforce their production by imprisonment, of which this case is a striking example, because on two occasions the court (which only does this when it is forced to by the action of a party) had to invoke its supreme powers of placing the accused in custody. The fact that the court could do so seems to me to be due to this provision that he was bound to disclose that which would, and in the result did, incriminate him.

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Therefore, it seems to me, on the face of it, that this section, having operated in that way so that the accused was compelled to disclose to the court his wrongdoing, can be invoked so as to protect him from being liable to conviction on the matters which he then first disclosed. That is dependent on the interpretation of section 43, which states that the disclosure on oath which is relied on must be in consequence of any compulsory process of any court of law or equity. It was submitted by counsel for the prosecution that the disclosure on the affidavit to which I have referred was not in consequence of any compulsory process. There certainly was a compulsory process. I know of no greater compulsory process which is in the hands of the civil court than to do what was done here. The accused was ordered to comply with the five matters in the order made against him. Because he did not do that he was imprisoned.

It is true that he could have stayed in prison but if he wanted to get out of prison he had to make some submission to the court in order to be released and it is customarily made by affidavit, as was done here. He was imprisoned in order to compel him to comply with the order. His affidavit was in consequence of that compulsory process which was imposed upon him. Its purpose, no doubt its main motive, was that he should be released from prison; but it was in consequence of his imprisonment and the fact that in order to get out he had to show good grounds that he then did reveal for the first time what the true position was.

I think it would be hair-splitting to accept the argument that there was a difference between that affidavit which he put in to escape the burden under which he was suffering and the position which would have obtained if he had at the same time made the same disclosure in an affidavit in strict compliance with the order. I think in either case they should be held to be in consequence of the heavy compulsion which the court found it necessary to impose upon him.

Counsel for the prosecution took a second point that what was disclosed was not " any act done by him " as contemplated by section 43 (2), because it was only a general statement of the accused's wrongdoing and did not show it in particularity. I do not think that is a submission which can stand. It may be that what has been disclosed—which really shows that the whole of the estate has gone to the accused except for those small items at the outset paid to his brother—may not give sufficient evidence for those interested in the brother's share to follow, if they can, the proceeds of the sale of the shares of the estate. That can, perhaps, be ascertained in a different way.

Section 43 (2) was obviously invoked in order to justify the imprisonment for contempt of court (the defendant having no ground for refusing to comply with the court order), and I think its counter-effect is that it can be invoked now to defeat these present charges because it provides that " no person shall be liable

" to be convicted for any offence under section 21," if he has disclosed for the first time the matters which give rise to the charge in circumstances to which the section applies.

[His Lordship discharged the accused.]

I think I ought to make reference to two cases which counsel for the defendant submitted were both distinguishable. I think they clearly are. *Rex* v. *Noel*[1] arose under different circumstances. A trustee who came within the provisions of the section of the Act then existing, which was to the same effect, gave evidence in a civil action brought against him, and in the course of the cross-examination he did, apparently for the first time, reveal criminal conduct, and the similar section was sought to be invoked, both at the trial and in the Court of Criminal Appeal, to make the proceedings ineffective. The headnote of the case reads thus: " When an act done by a person is first disclosed by " him without making any objection during cross-examination in " a civil action, it is not disclosed by him ' in consequence of any " ' compulsory process ' of a court of law, within the meaning of " section 85 of the Larceny Act, 1861, and he is liable to be " convicted. . . ."

The basis of the decision given by Ridley J. on behalf of the whole court is that the accused man was a voluntary witness. " It seems to us " he said,[2] " that the expression ' compulsory " ' process,' in section 85, signifies something more than the mere " putting of a question to a witness which he may not wish to " answer. If there were a compulsory examination, as in bank- " ruptcy, or by interrogatories, or by a bill of equity, that would " be a compulsory process of a court of law or equity." But in the course of his judgment Ridley J. said[2]; " Also, possibly, " if a witness claims the privilege of refusing to answer a question " because his answer may tend to criminate him, and the court " orders him to answer the question, that may be a ' compulsory " ' process ' of the court within the meaning of section 85. We " do not, however, desire to decide that point, as it is not necessary " to do so in the present case. In this case no such privilege " was claimed, and it is not necessary for us to go further than " to say that, where evidence is given voluntarily by a witness in " proceedings in a court of law or equity, it is not given ' in " ' consequence of any compulsory process of a court of law or " ' equity,' within the meaning of section 85." That question was not decided. The decision in the case was on a narrow ground, because it would appear that where the then section 85 and the present section 43 (2) apply, a witness could take no objection that an answer would criminate him. It would not be a valid objection. The appropriate section rules it out. Neither would it be within the compass of the judge, who so often does give a warning, to give a witness any warning that he need not give an answer which would incriminate him.

[1] [1914] 3 K.B. 848.

[2] Ibid. 851.

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In the present case, of course, the accused person did all he could in the proceedings to avoid answering. It was only under the experience of imprisonment that he made any answer at all.

In *Rex* v. *Tuttle*[3] a similar point was taken in a case of fraudulent conversion. The answer in that case, as appears from the judgment of Avory J., who gave the judgment of the court, was that so far from the evidence of the accused person disclosing an act which rendered him liable to be charged with a criminal offence, the matter that was relied on was to the contrary: he sought to justify what he did and suggested that he had invested the money with the approval of his co-trustee and beneficiary. In the second submission it was also put that this was a matter which was not made under any compulsion at all.[4] "Quite apart "from the question whether there was in fact any disclosure "within the meaning of that section, it seems clear also that "it was not a disclosure in consequence of any compulsory "process of any court of law. It was a voluntary statement made "by the accused on affidavit, in answer to the allegation which "was made against him. There was no compulsion upon him to "file any affidavit at all, and no compulsion upon him to make "any statement at that stage, in regard to what had become of "this money."

Counsel for the prosecution in the present case says that there was no compulsion on the accused to make any affidavit, and in a sense he is right. If the accused had wanted to stay in prison for the rest of his life he is right but I do not think that that helps his submission. Those two cases are distinguishable and I have discharged the accused.

Indictment quashed.

Solicitors: *Director of Public Prosecutions; H. P. & H. C. Rigby, Sandbach, Cheshire.*

[3] (1929) 28 Cox 610; 21 Cr.App.R. 85.

[4] 28 Cox 610, 616.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1955
July 4.

Lord Goddard C.J., Devlin and Donovan JJ.

*REGINA *v.* McCARTHY.

Criminal Law—Sentence—Corrective training—Corrective training a form of imprisonment—Petty offence—Breach of probation order—Sentence of three years' corrective training—Term of three years too severe in relation to offence—Sentence of eighteen months' imprisonment substituted.

Corrective training is in substance a form of imprisonment and in passing a sentence of corrective training it is necessary to bear in mind that it is a sentence of imprisonment and to consider whether it is a sentence of the right length.

Where, therefore, an appellant, aged 28, with three previous convictions, stole a shirt and trousers while he was on probation and was sentenced to three years' corrective training:—

Held, that, had a court been considering the sentence before 1948, it would have come to the conclusion that a sentence of 18 months' imprisonment should be imposed, and that the disparity between 18 months and three years made corrective training too severe a sentence, and that, in the circumstances, a sentence of 18 months' imprisonment should be substituted.

APPEAL against sentence.

In March, 1952, the appellant was convicted of larceny and was sentenced to three months' imprisonment. In June, 1954, a fine of £5 or one month's imprisonment was imposed on him for larceny. In February, 1955, he pleaded guilty to stealing a bicycle and was convicted of possessing housebreaking implements by night and the deputy chairman of Middlesex Quarter Sessions made a probation order for three years, telling the appellant that he was being treated with exceptional leniency and that if he broke the probation order he would have to be dealt with severely. Two months later, on May 2, the appellant pleaded guilty before the Uxbridge justices to stealing a shirt and trousers and for that offence was committed to Middlesex Quarter Sessions for sentence. Quarter sessions sentenced the appellant, then aged 28, to three years' corrective training, and he appealed against that sentence.

The appellant did not appear and was not represented.

DEVLIN J. stated the appellant's previous record set out above and continued: The appellant said that he had been sleeping rough for a week and he wanted a clean shirt and trousers to look respectable for a job, and that he went to a bakery where he found the shirt and trousers in a locker and took them. Of course, if he had been endeavouring to take any advantage of the probation which had been given to him he would have asked the probation officer, who would, no doubt, have helped him and put him in touch with someone who would provide him with the clothes, but the probation officer says that he was bad at reporting and was not taking advantage of the opportunity he had been given. He is qualified for corrective training and it is not surprising that the deputy chairman came to the conclusion that corrective training was the right course, because it is quite clear that he deserved a substantial sentence of imprisonment.

What has caused this court to intervene is this: corrective training, although it provides a system of training from which men who are suitable can benefit, and which gives them an advantage in that way over and above the ordinary forms of imprisonment, is in substance a form of imprisonment. It is, therefore, necessary when passing a sentence of three years' corrective training to bear in mind that it is a sentence of three years' imprisonment and to consider whether that is the right

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length. In this particular case the appellant had previously had only three months' imprisonment. It was his third offence and he was a young man. Had a court been considering the matter before 1948, we think that the court would have come to the conclusion that a sentence of 18 months' imprisonment ought to be imposed. That means that with good behaviour the appellant would be in prison for 12 months, which is a substantial period. The court on the whole has come to the conclusion that that is the right sentence in this case, and that where there is a disparity between 18 months and three years, it makes corrective training too severe a sentence. Accordingly, the court will substitute the sentence of 18 months' imprisonment. To mark the fact that the gist of the wrongdoing here was the breach of the probation rather than the comparatively petty offence of stealing the shirt and trousers, that sentence of 18 months will be a sentence imposed for breach of the probation; and in respect of the offence committed in February, 1955, there will be a sentence of three months for stealing, which will run concurrently, so that he will serve 18 months in all.

Sentence varied.

J. F. L.

[QUEEN'S BENCH DIVISION.]

1955
Mar. 9.

* DAVIDSON-HOUSTON *v.* LANNING.

Lord Goddard C.J., Ormerod and Gorman JJ.

Road Traffic—Disqualification—Driving while disqualified—Sentence of imprisonment—Defendant aged 20—Effect of Criminal Justice Act, 1948—*Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 7 (4)—*Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 17 (2)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2), *s.* 107 (2).

Children and Young Persons—Sentence for offence—Imprisonment.

By the Criminal Justice Act, 1948, s. 17 (1) (as replaced by the Magistrates' Courts Act, 1952, s. 107 (2)), a magistrates' court shall not impose imprisonment on any person under 17.

By section 17 (2): "No court shall impose imprisonment on a "person under 21 years of age unless the court is of opinion that "no other method of dealing with him is appropriate; . . ."

A youth aged 20, who had been repeatedly fined for motoring offences, took a motor-car without the consent of the owner, and drove it uninsured while he was disqualified from holding a licence. Imposing sentence of imprisonment on him under section 7 (4) of the Road Traffic Act, 1930 (by which imprisonment must be imposed in the absence of special reasons), justices were of opinion that that section "was not superseded by section 17 of the Criminal "Justice Act, 1948, and further that . . . no method of dealing "with the appellant other than imprisonment was appropriate "having regard to his previous convictions, the circumstances, and "the serious nature" of his offences on the day in question:—

Held, that if the justices meant that they could ignore section 17 of the Act of 1948 they were wrong; but they had applied their minds to the provisions of section 17 (2), and accordingly they were right in sentencing the youth to imprisonment.

CASE STATED by Wareham justices.

On September 13, 1954, the appellant, Geoffrey Ayscough Duncan Davidson-Houston, was charged by the respondent, William Lanning, a police inspector, that he on September 12, 1954, at Bovington Camp, Dorset: (1) took and drove away a Citroen motor-car the property of Michael John Pittock, without the consent of the owner, contrary to section 28 of the Road Traffic Act, 1930; (2) used the motor-car without there being in force in relation to its user a policy of insurance in respect of third party risks, contrary to section 35 of the Act; (3) being disqualified from holding a licence, drove the car on the road contrary to section 7 of the Act.

The following facts were proved or admitted: The appellant reached the age of 20 on July 15, 1954. He was a trooper stationed at Bovington Camp, and on the point of completing his National Service. On October 30, 1953, he was convicted by the Eastbourne magistrates for using a car without insurance, for which he was fined £5 and disqualified from driving for 12 months, and for driving without a road fund licence he was fined £1. On November 12, 1953, he was convicted by the Camberley magistrates for failing to report an accident on August 9, 1953, for which he was fined £1, and for driving without a driving licence he was discharged absolutely. On November 18, 1953, he was convicted by the Cranbrook magistrates for driving without reasonable consideration, for which he was fined £20 and costs and his licence was indorsed. He was also fined £5 for failing to stop when required to do so by the police, and for an offence under section 35 of the Road Traffic Act, 1930, namely, for using a motor-car without insurance, he was fined £10 and disqualified from driving for 12 months. On May 3, 1954, he applied to the Eastbourne magistrates for the removal of the disqualification they had imposed in October, 1953, and they granted the application as from May 19, 1954; and on May 19, 1954, he made a similar application to the Cranbrook magistrates who refused the application.

The motor-car unlawfully driven by the appellant on September 12, 1954, belonged to an acquaintance of the appellant's, one Pittock, at Bovington Camp. The appellant had asked Pittock to take him into Bournemouth, but Pittock, not wanting the appellant's company, had removed the main jet from his car, and had told the appellant that the car was out of order; and, in the appellant's presence, Pittock had locked both the doors of the car and the doors of the garage in which the car was. The appellant had then asked Pittock to leave the keys of the car with him, but Pittock knowing that the appellant was disqualified from

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holding a driving licence, told the appellant that he could have neither the keys nor the car. Pittock then left for Bournemouth in another car. After Pittock's departure the appellant broke into Pittock's garage, succeeding in starting the car, and then drove it, without a main jet, into Bournemouth, where he handed it over to Pittock.

It was contended on behalf of the appellant that section 17 (2) of the Criminal Justice Act, 1948, was an overriding enactment which superseded section 7 (4) of the Road Traffic Act, 1930, and that the justices were not required by law to pass a sentence of imprisonment in respect of the offence under section 7. It was further contended that the justices were not permitted by law to pass a sentence of imprisonment on an offender under the age of 21 unless he had exhibited such unruliness or depravity as rendered any other method of dealing with him inappropriate.

The justices were of opinion that section 7 (4) of the Act of 1930 was not superseded by section 17 (2) of the Act of 1948 and further that, even if it was, no method of dealing with the appellant other than imprisonment was appropriate having regard to his previous convictions, the circumstances and the serious nature of the offences committed by him on September 12, 1954.

J. T. Molony for the appellant.
S. A. Morton for the respondent.

No cases were cited in argument.

LORD GODDARD C.J. This is a case stated by justices for the county of Dorset, before whom the appellant, who is aged 20 and at the material time a trooper stationed at Bovington Camp on the point of completing his National Service, was charged with three offences, taking a vehicle without consent, using the vehicle when uninsured and driving it when disqualified. The justices fined him £3 on the first charge, which was a very moderate fine; sentenced him to one month's imprisonment and disqualified him for 12 months on the second; and sentenced him to three months' imprisonment on the third charge.

The first point to remember is, that under section 7 (4) of the Road Traffic Act, 1930, the offence of driving when disqualified is not an offence in respect of which justices can do anything except send a person to prison, unless they can find special reasons. Section 7 (4) is peremptory, as this court has had to point out. It is also to be regretted that all courts do not understand how serious an offence driving when uninsured can be. A man driving when uninsured may meet with an accident, perhaps killing somebody or injuring them for life, and then that person may have no opportunity of getting any damages because the uninsured person may not have any money. The fact that he only drives a little way ought never to influence justices. I have often quoted a case in which a young man drove a vehicle a few hundred yards and in

that space injured one man for life, another seriously, and broke a plate glass window worth £100.

[His Lordship stated the facts found by the justices and continued:] The point taken on behalf of the appellant was that the justices were debarred from sending him to prison by reason of the provisions with regard to young offenders in the Criminal Justice Act, 1948. The justices said that they were of opinion "that section 7 (4) of the Road Traffic Act, 1930, was not superseded by section 17 (2) of the Criminal Justice Act, 1948, and "further that, even if this were so, no method of dealing with the "appellant other than imprisonment was appropriate having "regard to his previous convictions, the circumstances, and the "serious nature of the offences committed by him on September 12, 1954." If the justices meant that they could in any case ignore the provisions of the Criminal Justice Act, section 17, they were wrong, but I do not think that that is what they meant. I think that they were dealing with it in accordance with this particular case. Section 17 (1), which is now replaced, as regards magistrates' courts, by section 107 (2) of the Magistrates' Courts Act, 1952, prohibits a magistrates' court from imposing imprisonment on a person under 17 years of age. The appellant was not under 17; he was 20. Section 17 (2) of the Act of 1948 provides: "No court shall impose imprisonment on a person under 21 years "of age unless the court is of opinion that no other method of "dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such "person is appropriate the court shall obtain and consider "information about the circumstances, and shall take into "account any information before the court which is relevant to "his character and his physical and mental condition."

That subsection is as binding on a judge as it is on justices sitting in a court of summary jurisdiction. The only difference is that a court of summary jurisdiction or quarter sessions have to state their reasons why they think there is no other method of dealing with him and a judge need not. I do not think that the justices could have thought that section 107 of the Magistrates' Courts Act, 1952, did not supersede the provision in the Road Traffic Act, 1930, so far as it affected a boy under 17, but with regard to a boy over 17, the justices have to apply their minds to the provisions of section 17 (2) of the Act of 1948, and by their finding in the case they show that they have done so. They have said: "That having regard to the fines imposed upon the appellant for the previous convictions, followed by the circumstances "of, and the apparent determination of, the appellant to carry "out his intention of committing the serious offences on September 12, 1954, the only course we could take to enable the "appellant to realize the seriousness of the offences was to "sentence him to imprisonment." I do not see what else the justices could have done unless they sent him to quarter sessions

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with a view to sending him to Borstal. But, of course, this is not a Borstal case at all; it is the case of a young man who will not obey the law. His service in the Army has not instilled discipline in him, and I think the justices were perfectly right in passing a sentence of imprisonment. This appeal is dismissed with costs.

ORMEROD J. I agree.

GORMAN J. I agree.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook for Lock, Reed & Lock, Dorchester; Walters & Hart for C. P. Brutton, Dorchester.*

J. D. P.

[CHANCERY DIVISION]

1955
July 4, 8.

WYNN-PARRY J.

* *In re* WOOL TEXTILE EMPLOYERS MUTUAL INSURANCE CO. LD.

[No. 00362 of 1951.]

Company—Winding up—Costs—Taxation in Companies Winding-Up Department — Whether chief clerk has jurisdiction to conduct taxation—Companies (Winding-up) Rules, 1949 (*S.I.* 1949, *No.* 330 (*L.* 4)), *rr.* 1, 4 (3).

The chief clerk to the registrar of the Companies Winding-Up Department has no jurisdiction to conduct taxations of costs; and a certificate in respect of a taxation so conducted may be taken off the file.

There is no "Companies Court" separate and distinct from the Chancery Division of the High Court; the phrase is only a convenient way of describing the Chancery Division when exercising jurisdiction under the Companies Act, 1948.

ADJOURNED SUMMONS.

The company, a mutual insurance company, purported to go into voluntary liquidation on January 13, 1949. In the course of the liquidation a doubt arose as to whether, having regard to certain provisions in the articles of association, there were any members at the date of the liquidation, and, therefore, whether the company had validly gone into liquidation. On July 11, 1951, Wynn-Parry J. made an order for the compulsory winding-up of the company, and the official receiver became, and remained, liquidator of the company. On May 18, 1953, an originating summons was issued by the official receiver, joining as respondents, in representative capacities, persons who might, according to what should be the true construction of the relevant

articles of association, be properly regarded as shareholders of the company at the date of the voluntary liquidation, and also the Treasury Solicitor, in whose interest it was to contend that there were no shareholders at all and therefore that the Crown was entitled to the available assets, a fund of approximately £20,000, as bona vacantia. On February 11, 1954, Wynn-Parry J. made an order on that summons declaring that the surplus assets were divisible between the persons who were entered on the register of members on January 13, 1949, the date of the voluntary liquidation, in certain proportions. The order directed that the costs of the official receiver, as applicant, and of the respondents should be taxed as between solicitor and client and paid out of the assets of the company.

In due course a bill of costs was lodged with the Companies Winding-Up Department on behalf of the applicants to the present summons, who were the respondents to the originating summons on which the order of February 11, 1954, was made, other than one of the then respondents and the Treasury Solicitor. The taxation was conducted by the chief clerk to the registrar in the Companies Winding-Up Department, and on the occasion of an attendance before him on December 16, 1954, the applicants' solicitors intimated that they proposed to challenge the jurisdiction of the chief clerk to conduct the taxation, having regard to the relevant rules.[1] The chief clerk indicated that such a point should be taken as a preliminary point, but in the event the taxation proceeded de bene esse.

Certain items in the bill of costs were disallowed, either wholly or partially: objections were lodged by the applicants and answered by the registrar, who made his certificate on March 15, 1955, in which he stated: "I have reviewed my taxation with "reference to the said objections and the grounds of my decision "are stated thereon." The matter was, however, argued before Wynn-Parry J. on the basis that the taxation was conducted by the chief clerk, and it was common ground that it had been the practice in the Companies Winding-Up Department for upwards of 60 years for the chief clerk to conduct taxations of costs.

On March 28, 1955, the present summons was issued on behalf

[1] Companies (Winding-up) Rules, 1949, r. 1: "... 'Judge' means "in the High Court the judge who "for the time being exercises the "jurisdiction of the High Court to "wind-up companies, and in any "county court the judge thereof ... "'Registrar' means in the High "Court any of the registrars in bankruptcy of the High Court, and any "person who shall be appointed to "fill the office of registrar under "these rules ... 'Taxing officer' "means the officer of the court whose "duty it is to tax costs in proceedings "of the court under its ordinary "jurisdiction. Unless the context "otherwise requires words or expressions contained in these rules shall "bear the same meaning as in the "Act or any statutory modification "thereof."

Rule 4 (3): "In every cause or "matter within the jurisdiction of "the judge, whether by virtue of the "Act, or by transfer, or otherwise, "the registrar shall, in addition to "his powers and duties under the "rules, have all the powers and duties "of a master, registrar, or taxing "master."

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of the applicants, asking (as amended) (a) that the registrar's certificate be taken off the file as invalid, or alternatively (b) that the objections of the applicants be allowed. At the hearing it was accepted that argument should be heard and judgment given on the question of jurisdiction, and that the rest of the summons should stand over to await that judgment.

J. B. Lindon Q.C. and *Maurice Berkeley* for the applicants.
M. J. Fox for the official receiver.

Case cited in argument not referred to in the judgment: *Fenton* v. *Crickett.*[2]

Cur. adv. vult.

July 8. Wynn-Parry J., reading his judgment, stated the facts and continued: Mr. Fox, for the official receiver (who is the respondent to the present summons) took a preliminary point as to the procedure adopted by the applicants. His point is put thus. If, as the applicants say, there has in fact been no valid taxation, then they should present their bill for taxation to the person who they say is the proper officer, namely, the registrar in the Companies Winding-Up Department. He, says Mr. Fox, would no doubt refuse the request that he should tax. Then the applicants should apply for a writ of mandamus directing him to conduct the taxation. Such a procedure, says Mr. Fox, would have procedural advantages. The official receiver, as respondent, is placed in an embarrassing position in having to conduct an argument on a point involving the practice of the Companies Winding-Up Department. If the suggested procedure had been adopted, the registrar would have been represented by the official solicitor, and thus he could have been adequately heard in defence of the long-established practice of the Companies Winding-Up Department. Further, says Mr. Fox, the result of the present procedure must be that if the applicants succeed on the question of jurisdiction there cannot be an appeal, because, as I understand him, the official receiver could not properly be pressed to appeal on such a question as this.

I think that Mr. Fox's objections are more apparent than real. Although he appeared for the official receiver, I had the advantage of a full argument from him in support of the validity of the present practice, and whatever embarrassment may have been felt by the official receiver because of the procedure adopted, it did not communicate itself to Mr. Fox. Mr. Fox was unable to cite any authority in support of his submission that the wrong procedure was adopted: on the other hand, in my view *Silkstone and Haigh Moor Coal Company* v. *Edey*[1] appears to me to indicate that the applicants are entitled to proceed as they have done. The headnote to that case reads as follows: " Under " an order directing the taxing master to tax the plaintiffs' costs

[2] (1818) 3 Madd. 496. [1] [1901] 2 Ch. 652.

" of an action, including the remuneration of the receivers and " managers appointed in the action, and to certify the balance " after deducting certain costs of the defendants the taxing master " has no power to make a separate certificate for the costs alone." It was argued that that was a case where a person, namely the taxing master, clearly had jurisdiction to conduct the taxation; his fault was merely that he exercised that jurisdiction otherwise than in accordance with the established practice. But the judgment proceeded on the basis that he had no power, which to my mind is the same in the context as jurisdiction, and the court, taking this view, ordered that the certificate be taken off the file. I therefore overrule the preliminary objection and turn to consider the challenge to the jurisdiction.

In his opening, Mr. Lindon, for the applicants, was at pains to say, and I myself desire to emphasize, that no criticism whatever can be levelled at the registrar or his chief clerk for taking the course which they did in this matter. In doing so they were doing no more than following a long-established practice: a practice which, as I have said, has obtained for upwards of 60 years. Indeed, I cannot see that they could have acted otherwise than they have. But as the jurisdiction of the chief clerk to conduct a taxation of costs is challenged I must investigate the challenge. It does not matter that, as was recognised by the Royal Commission on the Civil Service in its 6th Report, published in 1915, " in the Lunacy Masters' Office and " the Companies Department the whole work of taxation is per- " formed by clerks, and, on the information before us, quite satis- " factorily "; nor is it material that the practice has continued for so long. If no authority for the practice can be found in the relevant statute or statutory instrument, then there is no legal basis for it and the applicants must succeed.

As in the case of the jurisdiction in bankruptcy, the jurisdiction in the case of companies is entirely statutory and is to be found either in the relevant Companies Act or the Winding-up Rules made pursuant thereto. For present purposes the relevant provisions are to be found in the Companies (Winding-up) Rules, 1949, made pursuant to the Companies Act, 1948. Rule 1 contains the following definitions: " ' Judge ' means in " the High Court the judge who for the time being exercises the " jurisdiction of the High Court to wind up companies, and in " any county court the judge thereof." " ' Registrar ' means " in the High Court any of the registrars in bankruptcy of the " High Court, and any person who shall be appointed to fill the " office of registrar under these rules." " ' Taxing officer ' " means the officer of the court whose duty it is to tax costs in " the proceedings of the court under its ordinary jurisdiction." These definitions are followed by this paragraph: " Unless the " context otherwise requires words or expressions contained in " these rules shall bear the same meaning as in the Act or any " statutory modification thereof." Rule 4 (3) reads: " In every

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" cause or matter within the jurisdiction of the judge, whether " by virtue of the Act, or by transfer, or otherwise, the registrar " shall, in addition to his powers and duties under the rules, have " all the powers and duties of a master, registrar, or taxing " master." Rules 183 to 193 deal with taxation of costs, and provide in effect that taxation of costs is to be conducted by the taxing officer as defined in rule 1. It may be observed that under rule 188 it is the taxing officer who, on completion of the taxation, is to issue his certificate.

Before proceeding to construe the relevant provisions of the Companies (Winding-up) Rules, 1949, it will be desirable to consider quite shortly the previous history relating to the jurisdiction to conduct a taxation in the winding up of companies. Rule 72 of the General Order and Rules made under the Companies Act, 1862, provides as follows: " Where an order is made in court or " chambers for payment of any costs, the order shall direct the " taxation thereof by the taxing master; except in cases where a " gross sum in lieu of taxed costs is fixed by the order, in accord- " ance with the 37th rule of the 40th of the Consolidated General " Orders." There is no rule corresponding to rule 4 (3) of the Companies (Winding-up) Rules, 1949. It is clear, therefore, that under the General Order and Rules made under the Companies Act, 1862, the taxing masters had exclusive jurisdiction to conduct a taxation of costs in the liquidation of a company. It may be observed in passing that a taxing master has no power to delegate the conduct of a taxation, subject to the provisions of an order of the Lord Chancellor dated April 1, 1930,[2] by which a very limited jurisdiction was conferred on principal clerks of the Supreme Court taxation office.

Rule 1 of the Companies Winding-up Rules, 1890, introduced for the first time the definition " taxing officer," which is in the same terms as in the Companies (Winding-up) Rules, 1949. These rules, however, contained no provision similar to rule 4 (3) of the Companies (Winding-up) Rules, 1949, giving the registrar the same powers as a taxing master: nor did the Companies Winding-up Rules, 1892, so provide. The first mention that the registrar is to have all the powers and duties of a taxing master occurs in the Companies Winding-up Rules of August, 1892, the validity of which may be said to be doubtful, because they were not signed by the President of the Board of Trade.

In December, 1901, a rule of the Supreme Court was introduced, paragraph 1 of which reads as follows: " There shall be " amalgamated with the Central Office the following offices, " namely: the Chancery Taxing Office; the Bankruptcy Taxing " Office; the Taxing Department of the Office of the Masters in " Lunacy; the Taxing Department of the Office of the Registrar " in Companies Winding-Up "; and paragraph 3 says: " The two " preceding rules shall come into operation as regards the

[2] See Annual Practice, Ord. 65, r. 18n.

" Chancery Division on January 11, 1902, and as regards the " other officers mentioned at the dates hereafter prescribed by " rules to be made under the Acts applicable to those officers." The attempted amalgamation was abortive because the necessary rule under paragraph 3 was never made. The Companies (Winding-up) Rules, 1903, however, contain the definitions which I have read from the Companies (Winding-up) Rules, 1949, and Rule 4 (3) of the 1903 and 1949 Rules are the same. Thereafter all the Companies Winding-up Rules which have from time to time been promulgated up to the Companies (Winding-up) Rules, 1949, have contained similar definitions and have expressly conferred on the registrar the powers and duties of a taxing master.

It is against that historical background that I now turn to consider what will be seen to be a comparatively short question of construction, namely, what is the meaning of the phrase " taxing officer " in rule 1 of the Companies (Winding-up) Rules, 1949. He is defined as " the officer of the court whose duty it " is to tax costs in the proceedings of the court under its " ordinary jurisdiction." The word " court " in that definition means, in my view, the Chancery Division of the High Court. This conclusion I think must follow from the provision at the end of the rule the effect of which is that the word " court " in the rule is to have the same meaning as in the Companies Act, 1948. Section 455 defines " the court " as the court having jurisdiction to wind up the company. Section 218 (1) provides that the High Court shall have jurisdiction to wind up any company registered in England; and that jurisdiction is exercisable by the judges of the Chancery Division of the High Court.

It was argued by Mr. Fox that " court " in rule 1 meant the Companies Court. The phrase " Companies Court " is a modern term introduced into the forms made pursuant to the Companies Act, 1929, in place of the phrase in the previous forms " Com- " panies Winding-up," in order to soothe the susceptibilities of those who desired to apply to the court for some relief in the case of entirely solvent companies (as, for instance, confirmation of the reduction of the capital of a company by the return of surplus capital to its members) and who disliked that the title to the necessary proceedings should contain a reference to winding up. There is in fact no Companies Court separate and distinct from the court, namely the High Court, on which jurisdiction in winding-up matters is conferred by the Companies Act, 1948. The phrase is only a convenient way of describing the relevant division of the High Court when exercising a particular jurisdiction, namely, the jurisdiction conferred on it by the Companies Act, 1948. This phrase " the Companies Court " was unknown when the earlier Winding-up Rules were introduced containing the definition of " taxing officer " in the same language as in rule 1 of the Companies (Winding-up) Rules, 1949, and in my view no argument can be founded on it.

There is a further objection to Mr. Fox's argument on this

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point which he himself very fairly realized, and that is created by the qualification "whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction." The words "under its ordinary jurisdiction" point a contrast between that jurisdiction and the jurisdiction conferred by the Companies Act, 1948; but once that is appreciated it must follow that "court" cannot mean "Companies Court" or any court whose sole jurisdiction arises under the Companies Act, 1948.

Now in the case of the High Court the person whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction can only be one of the taxing masters of the taxing office. The registrar is not included in the definition "taxing officer"; but by rule 4 (3) he is given the powers and duties of a taxing master, so that in effect for all purposes of the Companies (Winding-up) Rules, 1949, he is, or is in the position of, a taxing officer. (See *In re Defiant Cycle Co. Ld.*[3]) But I can find no ground for holding that he or any of his clerks have any greater jurisdiction than the taxing masters and their principal clerks in the matter of conducting taxations. It follows, therefore, that no legal basis exists for the practice which has for so long obtained in the Companies Winding-Up Department.

I come to this conclusion with regret. The practice had apparently worked well up to 1915, and so far as I know (and I speak, if I may say so, with considerable experience, both at the Bar and on the Bench, of the working of the department) the practice has worked well ever since: but what is to happen for the future is a matter of policy with which I am not concerned. If it is desired to validate and perpetuate the practice, no doubt that can be done by an appropriate statutory instrument. All I have to do is to decide the dry question of jurisdiction; and for the reasons which I have given I decide in favour of the applicants, and, following the course taken by Byrne J. in *Silkstone and Haigh Moor Coal Company* v. *Edey*,[4] I direct that the certificate of March 15, 1955, be taken off the file.

[An order was made referring the taxation to one of the taxing masters of the taxing office.]

Order accordingly.

Solicitors: *Ward, Bowie & Co., for A. V. Hammond & Co., Bradford, Yorks.; Slaughter & May.*

F. R. D.

[3] [1955] 2 W.L.R. 932; [1955] 2 All E.R. 58.

[4] [1901] 2 Ch. 652.

[QUEEN'S BENCH DIVISION.]

*EISINGER *v.* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LD.

1955 *July* 6.

Lord Goddard C.J.

Insurance—Motor-vehicle—"Loss"—Sale of motor-vehicle induced by fraud of purchaser—Delivery of motor-vehicle in exchange for cheque—Worthless cheque—No intention by purchaser to pay for motor-vehicle—Motor-vehicle obtained by false pretences—Not a "loss" within meaning of insurance policy.

The claimant owned a motor-car which was insured under a policy indemnifying him against "loss of or damage . . . to" the car. He advertised the car for sale and a man came to see it, and having had a trial run in it, persuaded the claimant to let him take it away at once and to accept a cheque in payment. The claimant gave the man the registration book of the car and considered that from that moment he had ceased to be, and the purchaser had become, the owner of the car. The purchaser never had any intention of paying for the car and his cheque proved worthless. The claimant, alleging that he had suffered a "loss" of the car, claimed against the insurers under the policy:—

Held that, since the purchaser had obtained the car by false pretences and the property in it had passed, the claimant had lost, not the car, but the proceeds of sale, accordingly there had not been a "loss" within the meaning of the policy.

CASE STATED by an arbitrator.

By a policy of insurance issued by the General Accident Fire and Life Assurance Corporation Ld. to the claimant, the corporation agreed to indemnify the claimant against, inter alia, the loss of a Ford Zephyr motor-car in the sum of £650 subject to the conditions contained in the policy. The material terms of the insurance policy were as follows: "Section 1. Loss of or damage "to insured motor-car. The corporation will indemnify the policy "holder against loss of or damage to any motor-car described in "the schedule . . . [the Ford Zephyr motor-car] and/or its "accessories and spare parts whilst thereon . . ."

The following were among the facts found by the arbitrator relevant to this report. The claimant and his wife were both Austrian by birth and became British subjects shortly after the last war. In June or July, 1952, he bought the car in question for £730. In July, 1953, the claimant decided to sell the motor-car. He therefore advertised it for sale in an evening newspaper on August 6 and 7, 1953, asking £740 for the car.

On August 7, 1953, a man using the name of Gordon Henson opened an account at the Old Street branch of Barclays Bank by depositing £20 in cash; he gave a false address and obtained a cheque book. On Saturday, August 8, Henson telephoned the claimant and then visited the claimant's premises. He had a trial run in the motor-car and adroitly persuaded the claimant and his wife to allow him to take the motor-car at once and to accept a cheque for £745. He gave persuasive reasons why he needed the

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car before the week-end, and the price included £5 to reimburse the claimant for expenses that he would incur through giving immediate delivery. The claimant's wife had doubts about accepting a cheque, but no reference to the bank could be made at that time on a Saturday, and Henson so impressed the claimant and his wife with his personality, appearance and conversation that they were quite taken in by him. The claimant's wife came to the conclusion that expensive articles were dealt with by cheques and not cash, and the claimant came to the conclusion that Henson's cheque was "as good as money." The claimant gave Henson the registration book of the car; he never expected to see or to have anything to do with it again, and considered that from that moment he had ceased to be, and that Henson had become, the owner of the car. Henson drove the car away, and within one hour had bought another car in a similar manner for a similar price using the same cheque book. Henson never had any intention of paying for the claimant's car. On Monday, August 10, 1953, the claimant learnt from his bank that the cheque was valueless.

Police inquiries revealed that Henson had sold the car to one Smith, who in turn sold it to a firm of car dealers. The police had not been able to obtain any evidence that any of the purchasers were tainted with knowledge of Henson's fraud and to obtain such evidence, if any, would be difficult and costly. The claimant, having been advised by his solicitor and by counsel not to sue any of the purchasers, claimed against the corporation, contending that on the true construction of the policy and on the facts above there had been a loss of the motor-car covered by section 1 of the policy, and that he was not in breach of any condition and that, therefore, the corporation were liable to pay him £650.

The corporation contended, inter alia, that there had been no loss of the motor-car covered by the policy or at all, and that, therefore, they were not liable to pay the claimant any sum.

The arbitrator held that on August 8, 1953, the claimant had parted with possession of the motor-car to Henson, and at the same time transferred to him the property in it in exchange for the cheque; that the transaction was induced by the fraud of Henson (the consent of the claimant being a real consent induced by fraud and not an appearance of consent produced by a trick); that the transaction amounted to the offence by Henson of obtaining the motor-car by false pretences and not that of larceny by a trick; and that, in the result, the loss occasioned to the claimant by Henson was the loss of the value of the cheque, and not the loss of the motor-car (since he considered that the parting with the property as well as the possession in the motor-car distinguished the case from *Webster* v. *General Accident Fire and Life Assurance Corporation*.[1] He awarded that the claimant was not entitled to recover any sum from the corporation.

[1] [1953] 1 Q.B. 520; [1953] 2 W.L.R. 491; [1953] 1 All E.R. 663.

The question for the opinion of the court was whether upon the true construction of the policy and upon the facts found there was a loss of the motor-car within the meaning of the policy.

Felix Denny for the claimant.

Stephen Chapman Q.C. and *Bernard Caulfield* for the corporation.

The following cases were referred to in argument: *Webster* v. *General Accident Fire and Life Assurance Corporation Ld.*[2] and *London and Provincial Leather Processes Ld.* v. *Hudson.*[3]

LORD GODDARD C.J. This is a most unfortunate case for the claimant, and I am very sorry for him. The question here is whether or not there has been a "loss" within the meaning of that word in the policy of insurance under which the claimant insured his motor-car. The policy provides: "The corporation "will indemnify the policy holder against loss of or damage . . . "to any motor-car described in the schedule hereto." Has there been a loss of the motor-car?

The claimant sold this motor-car to a man who did not pay for it. The man was, no doubt, a rogue and a swindler, and having possessed himself of a cheque book, he gave the claimant a cheque for £745. The claimant's wife did not want him to accept it. A woman's intuition in these cases is very often right, and she thought that it might be a worthless cheque, as it turned out to be. Nevertheless, the claimant went on with the transaction and sold the car. It is a clear case of obtaining a car by false pretences. But that passed the property in the car. You cannot say that the claimant has lost the car; what he has lost is the proceeds of sale. He has lost the price which the man promised to pay him, and purported to pay him by a worthless cheque. I cannot hold that that is a "loss" within the meaning of the policy. I think that the arbitrator was right in his judgment, and I must uphold the award.

Judgment accordingly.

Solicitors: *Philip Conway, Thomas & Co.; Bennes & Co.*

J. F. L.

[2] [1953] 1 Q.B. 520.

[3] [1939] 2 K.B. 724; 55 T.L.R. 1047; [1939] 3 All E.R. 857.

[COURT OF APPEAL.]

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June 23.

Denning, Birkett and Romer L.JJ.

*GUINNESS TRUST (LONDON FUND) FOUNDED 1890, REGISTERED 1902 *v.* GREEN.

[Plaint No. L. 327.]

SAME *v.* COPE.

[Plaint No. L. 326.]

Landlord and Tenant—Act of 1954 (*Repairs and rent*)—*Housing trust*—"*Houses for persons . . . in fact members of the working classes*"—*Charitable trust providing houses for lower income group—Modern meaning of "working classes"—Tenancies not controlled—Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 188—*Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 33 (1) (9).
Housing.

A corporation required to devote the whole of its funds to charitable purposes, which was subject to the jurisdiction of the Charity Commissioners, in fact devoted its funds to the provision of houses for persons the majority of whom fell within the lower income group. The corporation, relying on section 33 (1) (*d*) of the Housing Repairs and Rents Act, 1954,[1] claimed possession of premises owned by it:—

Held, that the trust was a "housing trust" within the meaning of section 33 (9), since, though the definition in section 33 (9), incorporating by reference the definition in section 188 of the Housing Act, 1936, required that a housing trust must be a corporation bound to devote its funds to charitable purposes which in fact restricted its purposes wholly or substantially to "the provision of houses for persons the majority of whom are "in fact members of the working classes," the words "working "classes" in an Act of 1954 were properly to be construed as persons in the lower income group; and that accordingly the corporation was entitled to possession.

APPEAL from Judge Sir Gerald Hargreaves sitting at West London County Court.

[1] Housing Repairs and Rents Act, 1954, s. 33: "(1) A tenancy where— "(*a*) the interest of the landlord "... (*d*) ... belongs to any housing "trust which is subject to the jurisdiction of the Charity Commissioners, shall not be a controlled "tenancy ..."

"(9) In this section the expression 'housing trust' means a housing trust as defined by the Housing "Act, 1936, or a corporation or body "of persons which, being required "by the terms of its constituent "instrument to devote the whole or "substantially the whole of its funds "to charitable purposes, would be a "housing trust as so defined if the "purposes to which it is so required "to devote its funds were restricted "to those to which it in fact devotes "the whole or substantially the whole "thereof."

Housing Act, 1936, s. 188: "... "'Housing trust' means a corporation or body of persons which by "the terms of its constituent instrument, is required to devote the "whole of its funds, including any "surplus which may arise from its "operations, to the provision of "houses for persons the majority of "whom are in fact members of the "working classes, and to other purposes incidental thereto."

By a trust deed made on February 4, 1890, it was recited: "Whereas the said Sir Edward Guinness, having long felt the "gravity of the evils which result from the insanitary and insufficient accommodation supplied to large numbers of the poorer "of the working classes, in the dwellings now inhabited by them, "on November 18 last addressed a communication to the trustees "requesting them to undertake the administration of a fund "amounting to £200,000 which he proposed to establish with the "object of endeavouring in those and other respects to ameliorate "the condition of the labouring poor of London and of their modes "and manner of living, by the provision of improved dwellings; "by giving them facilities, should the trustees think it desirable "in any or all cases to do so, for obtaining means of subsistence "and the necessaries and decencies of life; and by such other "means as the trustees may in their uncontrolled discretion think "fit."

In two actions, the plaintiffs, the Guinness Trust (London Fund) Founded 1890, Registered 1902, set up under the trust deed, brought proceedings in the county court claiming as landlords that they were entitled to possession of certain rooms in premises at 32 Cadogan Street, S.W.3, let by the trust to the defendants, Miss A. Green and Mrs. M. H. Cope; that the tenancies were duly determined by notice to quit, but that the defendants wrongfully remained in possession. They claimed further that they were a housing trust as defined by section 33 (9) of the Housing Repairs and Rents Act, 1954, by reason of which the tenancies were not controlled under the Rent and Mortgage Interest (Restriction) Acts, 1920–1939; and they asked for possession of the premises.

By their defences the tenants denied that the plaintiffs were a housing trust as defined by section 33 (9) of the Act of 1954, and claimed that the tenancies were controlled under the Rent Restriction Acts. Section 33 (9) of the Act of 1954 incorporates by reference the definition of "housing trust" contained in section 188 of the Housing Act, 1936.

It was agreed that the trust was subject to the jurisdiction of the Charity Commissioners. The county court judge found that the trust was a housing trust, and that the objects of the trust were in fact carried out, because the dwellings administered by the trust were for the poorer classes of the working population. On the question whether the plaintiffs did in fact devote the whole or substantially the whole of their funds to the objects of the trust, he found in favour of the plaintiffs that they did in fact build houses which were intended for the occupation of the working class. The plaintiffs were accordingly within the terms of section 33 (1) (*d*) and the tenants' tenancies were not controlled. The county court judge made the order for possession asked for.

The tenants appealed and their appeals were heard at the same time.

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Raphael Tuck for the tenant Green.

Mrs. Cope in person.

S. O. Wilberforce Q.C. and *Mark Littman* for the landlords.

The following cases were cited in argument: *London County Council* v. *Davis* [2]; *White* v. *St. Marylebone Borough Council* [3]; *Arlidge* v. *Tottenham Urban District Council* [4]; *Green (H. E.) & Sons* v. *Minister of Health.* [5]

DENNING L.J. The only defence which is raised is that the tenants are protected by the Rent Restriction Acts. So, indeed, they were until 1954, but in that year an Act of Parliament was passed which decontrolled houses where the landlords' interest belongs to a housing trust which is subject to the jurisdiction of the Charity Commissioners. The question which has been raised in this appeal is whether the Guinness Trust is a housing trust within the meaning of the Act. That depends on whether it is a corporation which, being bound to devote its money to charitable purposes, nevertheless in fact restricts its purposes wholly or substantially to housing members of the working classes. That summarizes, I think, section 33 of the Act of 1954, which refers back to section 188 of the Housing Act of 1936.

It is therefore necessary to consider the nature of the Guinness Trust, whether it is a charitable trust or not, and the nature of its operations. We have before us the trust deed under which the trusts were set up some 64 years ago. A fund was set aside by Sir Edward Guinness for "the amelioration of the condition of "the poorer classes of the working population of London and of "their modes and manner of living, by the provision of improved "dwellings; by giving them facilities, should the trustees think "it desirable in any or all cases to do so, for obtaining means of "subsistence and the necessaries and decencies of life; and by "such other means as the trustees may in their uncontrolled dis-"cretion think fit." The trust, beyond doubt, is required by the terms of its constitution to devote the whole or substantially the whole of its funds to charitable purposes. So the first part of the definition is satisfied. The trust is certainly subject to the jurisdiction of the Charity Commissioners. Both those points are common ground. The point which is taken before us is this: Is the trust *in fact* devoting its funds wholly or substantially to the provision of houses for members of the working classes? It is quite clear from the annual reports which we have seen, and from the evidence, that the great majority of the buildings owned by the Guinness Trust are houses for poor people. There is, it is true, also a residential home for old people and a holiday home at Newhaven for tenants, but those homes do not seem to me to

[2] (1897) 77 L.T. 693; 14 T.L.R. 113.

[3] [1915] 3 K.B. 249.

[4] [1922] 2 K.B. 719; 38 T.L.R. 819.

[5] [1948] 1 K.B. 34; [1947] 2 All E.R. 469.

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derogate from the nature of the work as a whole which is providing houses for people who are not well-to-do.

But Mr. Tuck says that the people who are housed are not members of the "working classes" or at any rate that a great many of them are not. Some years ago in *H. E. Green & Sons* v. *Minister of Health*,[1] I said that the phrase "working classes" was quite inappropriate in modern conditions. Fifty years ago the phrase was well understood to mean people who worked with their hands, whether on the land or on the railways or in mines. Such people in those days earned wages which, on the whole, were much less than the rest of the community. But nowadays the phrase is quite inapplicable. People who work on the land or in factories often earn more than people who work in offices or shops. Craftsmen earn as much or more than clergymen or teachers. Yet we still have to apply the test whether a house is provided for the working classes. The only way to do it, I think, is to ask whether the house is provided for people in the lower income range, or, in other words, for people whose circumstances are such that they are deserving of support from a charitable institution in their housing needs. Applying this test, I am quite satisfied that the Guinness Trust does provide houses for such people. The majority of them do fall within the lower income group and they are deserving of support by this charitable institution. The people in the buildings provided by the trust include dockers from Bermondsey, railway workers at Vauxhall, office cleaners and dustmen in Chelsea, and furniture hands in Shoreditch. There can be no doubt to my mind that this trust in fact provides houses for people who, in the old days, would have been called members of the working class, and who, today, are properly described as falling within the lower income group. That being so, in my judgment, the Guinness Trust is a housing trust within the meaning of the Act of 1954, and the judge was quite right in his conclusion.

Mr. Tuck pointed out that some of the statements made by the judge did not precisely cover the matters required by the definition; but I am quite clear, having read the argument, evidence and judgment, that these are mere verbal criticisms. The judge had all the matters before him and intended to find that the facts were such as to render the Guinness Trust a housing trust within the meaning of the Act. It follows that Mrs. Cope and Miss Green are no longer protected by the Act and the Guinness Trust are entitled to possession. I think that the appeal must be dismissed.

BIRKETT L.J. I am of the same opinion. The real difficulty in the case arises from the fact that in the year 1955 we have to consider a trust which was created some 65 years ago. Quite naturally the social revolution which has taken place in our lifetime makes language which was appropriate 65 years ago a little inappropriate now. For example, in the trustee deed which was made on February 4, 1890, it was recited: "Whereas the said Sir

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" Edward Guinness, having long felt the gravity of the evils " which result from the insanitary and insufficient accommodation " supplied to large numbers of the poorer of the working classes, in " the dwellings now inhabited by them, on November 18 last " addressed a communication to the trustees requesting them to " undertake the administration of a fund amounting to £200,000 " which he proposed to establish with the object of endeavouring " in those and other respects to ameliorate the condition of the " labouring poor of London." Since 1890 there has been a long succession of Housing Acts under which local authorities and public authorities in general have done something, at any rate, to deal with that situation described in the language of the deed of 1890.

Mr. Tuck says that when one looks at section 33 (9) of the Act of 1954, it must be remembered that one is still concerned with this phrase " working class," which is introduced by the reference to the Housing Act of 1936. I agree with what my Lord said in *H. E. Green & Sons* v. *Minister of Health*,[1] and what he has said here today. In 1890, when the term " working class " was used it had a fairly well-known significance, but as the years have passed that early significance has altered. The true way to look at this matter is to take this section of the Act and apply it to the work done by this trust to see whether in substance the work which is done complies with the trust deed. The county court judge who heard the evidence on this matter was satisfied on the facts that it did, that the trust was really employed in erecting and repairing houses which were for people of comparatively small incomes. The other day we had in this court the case of an unskilled labourer, who, in 1890, would certainly have qualified as one of the working class, who was working on one of the underground tubes in London and was earning over £20 a week—a thing which was unheard of in 1890. That I mention merely as an illustration of the complete revolution which has taken place since this deed first came into being. The language of the deed must be looked at quite generally to see whether in substance work has been carried out and houses erected and maintained for people of lower income. When one reads the trust report for 1953 and sees the kind of figures there given of the average weekly rent of the rooms, and then turns to the balance sheet and the income and expenditure account and sees how the income is expended, it seems clear that there was abundant evidence on which the judge could find as he did. I would dismiss the appeal.

ROMER L.J. I quite agree, and will only add one word on the question of the meaning of the words " working class." In the old days the expression was probably well understood in the sense which my Lord has indicated. I agree that that test no longer

[1] [1948] 1 K.B. 34, 38; [1947] 2 All E.R. 469.

affords any real assistance in ascertaining what the expression means. The working classes in this country are now generally known as the lower income group of people who earn their living regardless of the social level, whatever it may be, to which they belong. I agree that this appeal should be dismissed.

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GUINNESS TRUST (LONDON FUND) v. GREEN.
SAME v. COPE.

Appeal dismissed.

Solicitors: *Emanuel, Round & Nathan; Travers, Smith, Braithwaite & Co.*

M. M. H.

[PRIVY COUNCIL.]

* ISMAIL MOHAMED CHOGLEY . . . APPELLANT;

AND

JAGAT SINGH BAINS . . . . . RESPONDENT.

J. C.†
1955
July 13.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa (Kenya)—Landlord and Tenant—Rent restriction—Sublease—Claim to possession—Premises sublet without consent of landlord—Landlord's right against "occupier" whether or not a "lawful sub-"tenant"—Increase of Rent (Restriction) Ordinance, 1949, *(Kenya), s.* 16 (1) (i), (2) (6).

Landlord and Tenant—Rent restriction.

By section 16 (1) of the Kenya Increase of Rent (Restriction) Ordinance, 1949, a landlord is entitled to obtain an order for possession if "(i) . . . at any time after the commencement of "this ordinance, [the tenant] has, without the consent in writing of "the landlord, assigned, sublet or parted with the possession of the "premises or any part thereof.

"A landlord who wishes to obtain an ejectment order on this "ground may have the option of obtaining a similar order against "the occupier or having the occupier as his direct tenant."

By section 16 (6): "An order against a tenant for the recovery "of possession of any premises . . . shall not affect the right of "any subtenant, to whom the premises . . . have been lawfully "sublet . . . to retain possession under the provisions of this "section or be in any way operative against any such subtenant."

The respondent, the owner of premises to which the Ordinance applied and which had been sublet by the tenant without the respondent's consent to the appellant, sought the recovery of possession of the premises from the appellant:—

Held, on the assumption, without deciding, that the provisions of section 16 (6) were applicable and that the premises were "lawfully sublet" to the appellant, that the terms of the second paragraph of section 16 (1) (i), which were satisfied in this case, governed the situation and authorized the making of an order for

† *Present*: LORD OAKSEY, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

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possession against the appellant. There was nothing in section 16 (6) which was capable of displacing the ostensible meaning of the option clause; that clause was a specific statutory power annexed only to subhead (i) of the various subheads of section 16 (1), and it would be an impossible method of construction to allow the general saving which subsection (6) made in respect of all orders for possession obtained under any subhead of subsection (1) to overrule the particular and explicit option which the Ordinance conferred on a landlord in a case which fell under subhead (i).

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 24 of 1954) from a judgment of the Court of Appeal for Eastern Africa (May 14, 1953) affirming a judgment of the Supreme Court of Kenya (June 9, 1952) which in turn had affirmed a decision of the Rent Control Board at Nairobi (January 29, 1951).

1955. May 16, 17, 18, 19. *Michael Albery Q.C.* and *Paul V. Baker* for the appellant.

Dingle Foot Q.C., *Ralph Millner* and *J. R. Bisschop* for the respondent.

July 13. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from a judgment dated May 14, 1953, of the Court of Appeal for Eastern Africa arises out of proceedings on the part of the respondent to obtain possession from the appellant of certain premises in Nairobi consisting of a bakery and shop on plot No. 230–3, Race Course Road.

The respondent is the owner of the premises in dispute and it is common ground that at all times material to this appeal they were capable of being within the protection of the Increase of Rent (Restriction) Ordinance, 1949 (hereinafter referred to as "the Ordinance"). The dispute turns on the question whether that Ordinance accords to the appellant, who has been in occupation of the premises since the autumn of 1942, the right to retain possession against the respondent.

The latter has been trying to recover possession since December, 1946. It is convenient at this stage to make a short statement as to the original letting of the premises and the previous proceedings concerned with their recovery. As will be seen later those proceedings had some bearing on the matters to be considered in this appeal.

By a written agreement dated June 10, 1941, the respondent leased the premises to one Sidi Bilal for five years from July 1, 1941, at a monthly rent. There was no restriction upon subletting. Sidi Bilal went into possession and carried on the business of a baker in the premises until September/October, 1942, when he went to India leaving the appellant in occupation and in charge of the business. It appears that some time later the appellant took over the business and ran it on his own account.

In December, 1946, the respondent sued Sidi Bilal and the appellant for possession of the premises on the ground that the lease had expired by effluxion of time. Those proceedings were begun in the Resident Magistrate's Court at Nairobi: the first outcome was that they reached the Court of Appeal for Eastern Africa, which decided that the written agreement was void for want of registration, pursuant to section 107 of the Indian Transfer of Property Act, 1882, and ordered a retrial before the Resident Magistrate. The second outcome was that, after the Magistrate on retrial had made an order for possession, the Supreme Court of Kenya, on appeal, set this order aside by judgment dated November 19, 1948, holding that Sidi Bilal was entitled to a yearly tenancy which had not been lawfully determined and that the appellant was his licensee; and on April 11, 1949, the Court of Appeal dismissed an appeal by the respondent from this judgment.

By a letter dated December 1, 1948, the respondent's solicitors gave notice on his behalf to Sidi Bilal determining the latter's tenancy on July 1, 1949, in the form appropriate to a notice to quit for a tenant from year to year. This notice was thus given after the Supreme Court judgment and before the judgment of the Court of Appeal.

By a sublease in writing dated January 25, 1949, Sidi Bilal sublet the premises to the appellant from January 1, 1949, up to and including July 1, 1949, "determinable thereafter as the "law shall permit." Thus the sublease was granted after the notice to quit had been given, but before the expiry of the period of the notice: after legal proceedings for possession had been taken by the respondent against the appellant, but before the legal proceedings were begun, which are the subject of the present appeal. These legal proceedings were begun on February 4, 1950, by an application in writing by the respondent to the Rent Control Board at Nairobi, asking for an order against Sidi Bilal and the appellant for recovery of possession of the premises and consequential relief. Sidi Bilal did not defend the proceedings and his part in the matter does not require further notice.

To understand the course of the suit up to the present appeal to their Lordships it is necessary at this stage to make some reference to the provisions of the Ordinance upon the true construction and effect of which must turn the questions to be decided in the appeal.

The Ordinance enacts a system of rent control for Kenya upon the general lines that have become familiar in the system of the United Kingdom. The Kenya system did not originate with the Ordinance, which itself repealed an earlier Ordinance of 1940 and seven supplementary and amending Ordinances made since that date. The Ordinance now in question came into operation on September 6, 1949; it has been amended more than once during the currency of the present proceedings, but

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the citations from it are from the text as originally enacted, unless otherwise stated.

The section of which the effect is directly in dispute is section 16, entitled "Restriction on Right to Possession." The purport of subsection (1) of this section is first to impose a general prohibition on the right of a landlord to obtain from the court an order for recovery of possession of any premises to which the Ordinance applies or for the ejectment of a tenant therefrom, and then to define a series of circumstances or occasions the existence of which will nevertheless entitle the landlord to obtain an order.

There is nothing in the section to create rights to resume possession against contractual tenants unless those rights exist at common law; its aim is to prescribe the conditions under which such rights, if they exist, can be enforced. The circumstances or occasions so defined are very various, some depending on a failure of the tenant to observe conditions of the tenancy, some depending on objective facts bearing on the state or user of the premises, some depending on the landlord's own needs or claims. Subsection (1) (i) of section 16 contains the following definition of one of those circumstances:—

"(i) the tenant has, without the consent in writing of the "landlord, at any time between the 1st day of December, 1941, "or the prescribed date, whichever is the later, and the com- "mencement of this Ordinance, assigned or sublet the whole "of the premises, the remainder being already sublet; or, at "any time after the commencement of this Ordinance, has, "without the consent in writing of the landlord, assigned, "sublet or parted with the possession of the premises or any "part thereof.

"A landlord who wishes to obtain an ejectment order on this "ground may have the option of obtaining a similar order "against the occupier or having the occupier as his direct "tenant."

Section 5 of a later Ordinance of 1949 added to this subsection the words "or sublet part of the premises" before the words "the remainder being already sublet," thereby correcting what seems to have been an obvious slip in the original text.

The remainder of section 16, after subsection (1), contains a number of separate provisions bearing upon the circumstances in which or the conditions under which an order for possession can be obtained. Of these it is only necessary to set out two.

"(2) In any case arising under subsection (1) of this section "no order for the recovery of possession of premises shall be "made unless the Central Board, the Coast Board, or the court, "as the case may be, considers it reasonable to make such an "order."

"(6) An order against a tenant for the recovery of possession "of any premises or ejectment therefrom under the provisions "of this section shall not affect the right of any subtenant, to

" whom the premises or any part thereof have been lawfully " sublet before proceedings for recovery of possession or eject- " ment were commenced, to retain possession under the pro- " visions of this section, or be in any way operative against any " such subtenant."

It is in the light of those provisions and of other provisions that will be noticed later that the respective claims of the respondent and the appellant have been dealt with by the courts in Kenya. The course of decision has been, briefly, as follows:—

(1) The Board of Control gave judgment on January 29, 1951, holding the respondent entitled to an order for possession. In their view the appellant was not entitled to any protection under section 16 (6) because (a), the landlord not having given his consent to the subletting, the premises had not been " lawfully sublet " to the appellant within the meaning of the subsection, and (b) the subletting had been made after " proceedings for recovery of possession . . . were commenced," since the notice to quit, which was given before the date of the sublease, ought to be regarded as the commencement of proceedings for this purpose. As the landlord had given no consent to the subletting, section 16 (1) (i) had been satisfied.

(2) The Supreme Court of Kenya gave judgment on June 9, 1952, affirming the board's order for recovery of possession but allowing the appellant an appeal against part of the consequential relief which related to liability for mesne profits. The court (Bourke J.) rested its decision on the ground that the premises had not been lawfully sublet to the appellant in the absence of any consent on the part of the landlord. No decision was given on the issue whether the subletting had been made before proceedings for recovery of possession were commenced, since that question would be of no moment if the subletting were not lawful anyway.

(3) The appellant then appealed to the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Mahon J.). His appeal was dismissed by the judgment of that court delivered on May 14, 1953. The grounds on which the court based its decision were different from those which had supported the decisions in the lower courts. While it was held that the subletting was not unlawful for the purposes of subsection (6), since it was not made in breach of any covenant against subletting or any legal prohibition of such a subletting, and it was further held that the notice to quit of December, 1948, could not be treated as a commencement of proceedings, the court was disposed to favour the view that the subletting was nevertheless made after the commencement of proceedings, because the original proceedings which were begun in 1946 had not been finally disposed of at the date of the sublease. But the main ground on which the judgment rested was that the " occupier " referred to in the second paragraph of section 16 (1) (i) could be a person who was at the same time a lawful subtenant within

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the meaning of section 16 (6) and that there was nothing in the provisions of the latter subsection or in any other of the various sections of the Ordinance which prevented the court from making an order for possession against such a subtenant if the landlord could prove that the conditions of section 16 (1) (i) had been satisfied in the sense that the subletting had taken place without his written consent.

The view of the matter which has been referred to as the main ground of the Court of Appeal's judgment commends itself to their Lordships as being clearly right, and it is the one upon which their own advice to Her Majesty will rest. A decision upon it adverse to the appellant renders it unnecessary to consider the further questions which bear upon the application of the words of section 16 (6) to this situation. Of such questions, one, the meaning of "before proceedings . . . were "commenced," was argued on the appeal, but their Lordships express no view upon it. The other, whether the premises were "lawfully sublet," was not argued on the appeal, because the respondent's counsel did not desire to contest the decision of the Court of Appeal on the point, a decision which is certainly supported by more than one judgment in courts outside Kenya which have had to deal with analogous provisions in other rent control legislation. Upon this, too, their Lordships express no view. For the purpose of this judgment, therefore, they assume, without deciding, that the provisions of section 16 (6) are applicable to the appellant's case and that the premises were "lawfully sublet" to him in January, 1949.

Let them be so. It is still difficult to see why the terms of the second paragraph of section 16 (1) (i), a paragraph which has been spoken of as "the option clause," do not govern the situation and authorize the making of an order against him. This option clause appears to be peculiar to the legislation of Kenya and does not find a counterpart in the legislation of the United Kingdom. But what it envisages is that there has been a subletting or assignment of controlled premises, without the written consent of the landlord, within the dates and under the conditions that are specified: and that the landlord may choose between having an order for possession against the actual occupier at the same time as he obtains one against his own tenant and having the actual occupier remain on in possession as his direct tenant for the future. As there was a subletting of the whole of the premises without the consent, and the premises were in the appellant's occupation, the respondent's right to ask for an order against him would seem to be clearly established, subject to any point arising as to "reasonableness" under section 16 (2).

The argument on which the appellant seeks to rely in resisting this claim consists of two propositions interdependent upon each other. First, he says that there is a conflict between the option clause and subsection (6) of section 16 wherever there

is found to exist a "lawful subtenant" within the meaning of that subsection, and that the conflict can only be reconciled by treating such "lawful subtenants" as a class whose rights to possession are not to be subject to the exercise of any landlord's option under the option clause. Secondly, he says that the true meaning of section 16 (6), when read in conjunction with the meanings attributable by section 2 to such words as "let," "tenant" and "tenancy," and with section 23 (3), a subsection which prescribes that "where the interest of a tenant of any "premises is determined, either as the result of an order for "possession or ejectment or for any other reason, any subtenant "to whom the premises or any part thereof have been lawfully "sublet shall, subject to the provisions of this Ordinance, be "deemed to become the tenant of the landlord on the same "terms as he would have held from the tenant if the tenancy "had continued," is that a landlord cannot rely on a subletting without consent by his tenant as the ground for an order for possession against a "lawful subtenant." If he wishes to get him out under section 16 (1) (i) he must prove against him a separate ground of possession consisting of a new subletting or assignment by him without the required consent.

The second branch of this argument attributes to a provision such as section 16 (6) a very far-reaching effect. It is not a construction which their Lordships are prepared to adopt. This is not the first occasion upon which it has been necessary for courts of law to consider the significance of such a provision when related to the rest of a rent control scheme of legislation, and the current of authority is not in favour of the appellant's argument. If that argument receives some support from *Ward* v. *Larkins*,[1] it is directly in conflict with *Lord Hylton* v. *Heal*,[2] which contains illuminating judgments by Rowlatt and Bailhache JJ. on this point, with *Enniskillen U. D. C.* v. *Bartley*,[3] and with the decision of the Court of Appeal in England in *Regional Properties Co. Ld.* v. *Frankenschwerth & Chapman*.[4] The purport of those latter decisions, in so far as they bear upon the present issue, is to treat a provision such as section 16 (6) as being in essence procedural. It secures to a "lawful subtenant" the certainty that an order for possession or ejectment against his immediate sublessor will not destroy his own right to possession by destroying the tenancy out of which it arises and that, accordingly, a similar order must be made against him directly if he is to be put out; and before such an order can be made against him the court is bound to consider any circumstances which may make it reasonable that he personally should not be deprived of possession. But these authorities are against the view that subsection (6) has any such effect as to give the "lawful subtenant" a right to possession

[1] (1923) 130 L.T. 184.
[2] [1921] 2 K.B. 438.
[3] [1947] N.Ir. 177 (C.A.).
[4] [1951] 1 K.B. 631; [1951] 1 All E.R. 178.

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independent of the circumstances, such as subletting without consent, which have brought about the order for possession against the landlord's direct tenant, so that to get possession against him the landlord must find a new ground of possession.

Their Lordships do not think it necessary for the purposes of this decision to arrive at any final view on the question whether section 16 (6) gives the "lawful subtenant" any further right than that of being heard as to "reasonableness" under section 16 (2). It would be unsatisfactory to do so, in any event, unless it were possible to consider at the same time what is the precise meaning of a "lawful" subletting in this connexion; and that has not been an issue in the present appeal. Even if the subsection does not secure to the subtenant anything more than the assurance that he is not to be bound by an order for possession made against his own lessor, it cannot be said that such an assurance is not worth legislating for if the ground upon which possession is obtained against the direct tenant is also to serve as a good ground of possession against the subtenant once he has been brought before the court. For regard must be paid to the fact that, under English procedure, the writ of possession which issues upon a judgment for possession is a "real" writ and in effect is a court order in favour of the plaintiff which is valid against possessors generally. Their Lordships were rightly reminded that there are significant differences in this respect between English procedure and Kenya procedure (which is derived from the code of British India). But for all that it would be deliberate blindness not to recognize that section 16 (6) of the Ordinance is a reproduction of an English model—see, for instance, Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (5)—and its purport must be understood in the light of its English origin.

However that may be, their Lordships are satisfied that there is nothing in section 16 (6) which is capable of displacing the ostensible meaning of the option clause. And, if that is so, the appellant's case must fail. First, the range of subsection (6), however wide, cannot extend beyond a saving in favour of a subtenant in respect of an order for possession made against a tenant. Such a saving does not bear upon what is in question under the option clause, which is the making of an order against the occupier himself in supplement to any order made against the landlord's direct tenant. Secondly, the option clause is a specific statutory power annexed only to subhead (i) of the various subheads which are listed in section 16 (1). It is obviously intended to deal with the particular situation which arises when the landlord's consent has not been obtained to a subletting, assignment or parting with possession and, whether a subtenant who has got in in those circumstances is truly a "lawful" subtenant or not, it would be an impossible method of construction to allow the general saving which subsection (6) makes in respect of all orders for possession obtained under any

subhead of subsection (1) to overrule the particular and explicit option which the Ordinance confers on a landlord in a case which falls under subhead (i).

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Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; T. L. Wilson & Co.*

C. C.

[COURT OF APPEAL.]

* GORDON *v.* GONDA.

C. A.
1955
May 2, 3.
Evershed M.R., Hodson and Romer L.JJ.

[1952 G. No. 2502.]

Partnership — Dissolution — Partnership property — Conversion — One partner becoming enemy alien — Whether other partner trustee of partnership assets—Exchange of assets—Misappropriation of trust funds—Liability for interest—Rate of interest—Partnership action —Appropriate order.

Trust and trustee—Breach of trust—Rate of interest.

A partnership in equal shares between the plaintiff (who was resident in Hungary) and the defendant (who was resident in the United Kingdom) was dissolved in 1941 by the extension of the provisions of the Trading with the Enemy Act, 1939, to Hungary.

In 1943 the defendant sold the partnership assets, then consisting of 100 shares of £1 each in A. Ld., registered in the name of the defendant, to H. Ld. in consideration of the allotment to the defendant of 13,333 fully paid shares of £1 each in H. Ld. In 1952 the plaintiff brought a partnership action against the defendant, and Danckwerts J. by order declared that the plaintiff was beneficially entitled to one moiety of the 100 shares in A. Ld. "and that the defendant is accountable to the plaintiff for one "moiety of the consideration which was payable to the defendant "upon the sale by him of the said 100 shares" . . . to H. Ld. Inquiries were directed and it emerged from the master's certificate that, following the allotment to the defendant of the 13,333 shares in H. Ld., he had sold 6,667 of such shares for cash at par and had spent the proceeds for his own purposes. The remaining 6,666 shares had been retained by the defendant:—

Held, (1) that the effect of Danckwerts J.'s declaration, on its true construction, was that the defendant was a trustee of one moiety of the 100 shares in A. Ld. for the plaintiff; and that, accordingly, the defendant was accountable to the plaintiff, not only for a moiety of the shares in H. Ld. which the defendant had retained and for a moiety of the cash which he had received, but also for interest on the moiety of the cash from the date of its receipt by the defendant.

Knox v. *Gye* (1871) L.R. 5 H.L. 656; *Featherstonhaugh* v. *Fenwick* (1810–11) 17 Ves. 298; and *Hugh Stevenson & Sons Ld.* v. *Aktiengesellschaft für Carton-nagen-Industrie* [1918] A.C. 239; 34 T.L.R. 206 considered.

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(2) That the appropriate rate of interest was 5 per cent. *Burdick* v. *Garrick* (1870) 5 Ch.App. 233 and *In re Davis* [1902] 2 Ch. 314 applied.

Decision of Roxburgh J. affirmed.

APPEAL from Roxburgh J.

In 1938, the plaintiff and the defendant, both of whom were then resident in Hungary, entered into a partnership in equal shares for the exploitation of inventions in plastics of the defendant.

The defendant came to London to negotiate for the exploitation of the inventions, and continued to reside in the United Kingdom. The plaintiff, apart from a visit to the United Kingdom between January and March, 1939, continued to reside in Hungary.

On November 17, 1939, the defendant made an agreement with an English syndicate for the formation of a company to take over and develop his inventions in plastics on terms (inter alia) that one-third of the capital of such company should be allotted to the defendant.

On February 24, 1940, a company called Aerolectric Mouldings Ld. was formed pursuant to the agreement of the previous November, with a capital of £300 in shares of £1 each, of which 100 were allotted to the defendant credited as fully paid.

On April 8, 1941, the provisions of the Trading with the Enemy Act, 1939, were extended to Hungary,[1] and war was declared against Hungary on December 7, 1941.

In 1942 the defendant assigned certain further inventions which he had made to Aerolectric Mouldings Ld. pursuant to the terms of the agreement of November 17, 1939. One of the further inventions so assigned proved later to be of considerable value.

On September 24, 1943, the defendant and the other shareholders in Aerolectric Mouldings Ld. entered into an agreement to sell all the 300 shares in that company to a company called Holoplast Ld. in consideration of the allotment to the vendors of 40,000 shares of £1 each in Holoplast Ld. credited as fully paid up. Pursuant to this agreement the defendant was allotted 13,333 fully paid shares of £1 each in Holoplast Ld.

After the war the plaintiff requested the defendant to account for the plaintiff's share in the partnership assets, but the defendant denied that anything had come of the inventions in which the plaintiff had an interest.

In August, 1952, the Administrator of Hungarian property released his charge on any interest of the plaintiff in these matters.

In September, 1952, the plaintiff commenced an action in the Chancery Division against the defendant, and by his statement of claim alleged that the partnership extended to all the

[1] S.R. & O., 1941, No. 495.

inventions of the defendant which had been assigned to Aerolectric Mouldings Ld. The defendant contended that the partnership extended only to his inventions in moulded plastics and did not cover his inventions in laminated plastics, which were the only inventions which had proved to be of any value. This was the main issue of fact at the trial of the action which was heard by Danckwerts J., who decided this issue in favour of the plaintiff.[2] Evidence was adduced at the trial of advances to or for the purposes of the partnership by the plaintiff, but there was no evidence of any advances by the defendant, or that there were any other liabilities of the partnership.

The order of Danckwerts J., dated January 26, 1954, contained the usual preliminary paragraph including the words "upon "reading the pleadings," and proceeded to declare that the plaintiff was upon the allotment to the defendant of 100 shares of £1 each in Aerolectric Mouldings Ld. pursuant to the agreement of November 17, 1939, beneficially entitled to one moiety of the said 100 shares, and that the defendant was accountable to the plaintiff for one moiety of the consideration which was payable to or receivable by the defendant upon the sale by him of the said 100 shares to Holoplast Ld. under the agreement of September 24, 1943. The order directed that inquiries should be made what was the consideration so payable to or receivable by the defendant, and what had become of the said consideration and of any moneys, shares or other property of which the same consisted, and what payments or distributions by way of interest, dividend or bonus had been made upon any of the said moneys, shares or other property, and that these inquiries were to be conducted on the footing that all the material inventions of the defendant fell within the ambit of the partnership agreement. The order also directed that the plaintiff was to be at liberty to apply for such further inquiries or accounts and for such order for payment or transfer by the defendant to the plaintiff, or as the plaintiff might direct, as might be necessary or proper to give effect to the aforesaid declaration and to the findings on the aforesaid inquiries.

When the inquiries directed by the order of Danckwerts J. were made, it transpired that the defendant had, immediately after the allotment to him of 13,333 fully paid shares of £1 each in Holoplast Ld. pursuant to the agreement of September 24, 1943, sold 6,667 of such shares for cash at par and had spent the proceeds. The remaining 6,666 shares had been retained by the defendant, who had received one dividend on them.

On further inquiries directed on November 16, 1954, by Roxburgh J., it was certified that no part of the £6,667 cash received by the defendant had been expended in discharging debts or liabilities of the partnership. After these further inquiries had been made, Roxburgh J. on February 23, 1955, ordered that the

[2] (1954) 71 R.P.C. 121.

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defendant should pay £1,871 6s. 6d., being interest at the rate of 5 per cent. per annum on £3,333 10s. (one moiety of the £6,667 cash proceeds received by the defendant) from the date of receipt by the defendant until payment to the plaintiff. He had previously ordered that the defendant should transfer and pay to the plaintiff one moiety of (a) the 6,666 retained shares in Holoplast Ld., (b) the dividend on those shares which had been received by the defendant and (c) the £6,667 cash.

The defendant appealed against the order of Roxburgh J. directing payment of £1,871 6s. 6d. interest.

K. E. Shelley Q.C. and *D. W. Falconer* for the defendant. This was a partnership action. The pleadings were read into Danckwerts J.'s order, and that order should, therefore, be construed by reference to the pleadings. A partner is not a trustee for his co-partner, nor is he a trustee for the firm. See Halsbury's Laws of England, 2nd ed., vol. 24, p. 396, Pollock's Law of Partnership, 14th ed., p. 119, *Piddocke* v. *Burt*,[3] *Knox* v. *Gye*.[4]

The order of Danckwerts J. made no provision for payment of interest as ordered by Roxburgh J., though it did direct an inquiry "what payments or distributions by way of interest dividend or "bonus have been made"—upon any of the moneys, shares or property of which the consideration received by the defendant from Holoplast Ld. consisted. There was no such payment of interest, and in view of that express reference to interest in the order, there is no room for implying a right in the plaintiff to any other interest.

In any event 5 per cent. is too high a rate. It should be 4 per cent.

J. G. Strangman Q.C. and *G. B. H. Dillon* for the plaintiff. The order of Dankwerts J. is plain and unambiguous. The declaration in this order that the plaintiff was beneficially entitled to a moiety of the "Aerolectric" shares allotted to the defendant meant, of necessity, that the defendant held one moiety of those shares as trustee for the plaintiff.

This order was proper and appropriate to the facts of the case since (a) it was never suggested at any time during the trial that any advances had been made by the defendant to the partnership, or that there were any debts of the partnership outstanding at the time of the allotment to the defendant of the "Aerolectric" shares, or at any other material time, and (b) on the other hand there was evidence of substantial advances by the plaintiff for which he would have been entitled to credit on the taking of full partnership accounts. Such accounts could, therefore, only have enured to the benefit of the plaintiff, and he was prepared to forgo this benefit by limiting his claim to a beneficial interest in a moiety of the 100 "Aerolectric" shares and to accounts and relief on this footing.

[3] [1894] 1 Ch. 343.

[4] (1871) L.R. 5 H.L. 656.

On any view the defendant received and held the 100 "Aerolectric" shares as trustee for the partnership: *Clegg* v. *Edmondson*[5]; *Featherstonhaugh* v. *Fenwick*[6]; *Hugh Stevenson & Sons Ltd.* v. *Aktiengesellschaft für Carton-nagen-Industrie.*[7]

The master in answering the inquiries directed by the order of Danckwerts J. and the further inquiries directed by the order of Roxburgh J. has found, in effect, that the defendant converted to his own use the £6,667 cash which he received on the sale by him of 6,667 "Holoplast" shares. This conversion and breach of trust having been revealed only in the course of the inquiries, it is competent for the court to charge the defendant with interest on the moiety of the £6,667 for which he is accountable to the plaintiff: see *In re Barclay.*[8]

It is still the rule that 5 per cent. is the appropriate rate of interest to charge against a trustee who borrows trust moneys or converts them to his own use in circumstances where he will only be charged with simple interest. *In re Davis*[9] applies today as it did in 1902. See also *Burdick* v. *Garrick.*[10]

Shelley Q.C. replied.

[The following cases also were referred to in argument: *In re Beech*[11]; *Naamlooze Vennootschap Handels-en-Transport Maatschappij Vulcan* v. *A/S J. Ludwig Mowinckels Rederi*[12]; *Fawcett* v. *Whitehouse*[13]; *Vokes* v. *Heather*[14]; *Patchett* v. *Sterling Engineering Co. Ltd.*[15]]

EVERSHED M.R.. This is an appeal from an order of Roxburgh J. made on further hearing of an application, which was in turn made in pursuance of the directions given by an earlier order at the trial of the action. [His Lordship referred to the terms of the order of February 23, 1955, and continued:]

As Mr. Shelley has stated in the course of his argument, and particularly in his reply, the whole question undoubtedly turns on the true meaning and effect of the first order dated January 26, 1954, and made by Danckwerts J. [His Lordship read the terms of that order and continued:] The order which Roxburgh J. made arose out of the exercise by the plaintiff of the liberty to apply contained in the order of Danckwerts J., the summons which I have mentioned being a summons in exercise of that liberty, following upon the results of the earlier inquiries. It will be necessary for me to expand and explain the judgment, but, reverting again to the main question as formulated by Mr. Shelley: What does the order of Danckwerts J. mean?

5 (1857) 8 De G.M. & G. 787.
6 (1810–11) 17 Ves. 298.
7 [1918] A.C. 239.
8 [1899] 1 Ch. 674.
9 [1902] 2 Ch. 314.
10 (1870) 5 Ch.App. 233.
11 [1920] 1 Ch. 40.
12 (1937) 42 Com.Cas. 200.
13 (1829) 1 Russ. & M. 132.
14 (1945) 62 R.P.C. 135.
15 (1953) 71 R.P.C. 61.

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At first sight it would appear to me plain that the effect of that order was to declare the defendant to have been a trustee for the plaintiff of a moiety of the 100 shares, in Aerolectric Mouldings Ld. which were issued to or allotted to the defendant pursuant to the agreement mentioned in the order. To state, as the order states, that the plaintiff was upon the allotment of those shares beneficially entitled to a moiety of them is to my mind exactly the same thing as to say that the defendant, upon the shares being allotted to him, was a trustee as to a moiety of them for the plaintiff, the beneficial owner. If that view is right (as I shall, I hope, show), everything else seems to me to follow; but, as Roxburgh J. observed, the form of the order of Danckwerts J. is, in a sense, an unexpected form of order when regard is had to the pleadings in the action which are themselves read into the order. As Roxburgh J. observed at the very opening of the judgment appealed from: "I looked at "a transcript of the judgment of Danckwerts J. . . . Having "done so I am quite unable to ascertain the precise circum- "stances under which this partnership action became converted "into something else, but converted into something else it "certainly was, and the order [of Danckwerts J.] certainly is "not such an order as would normally be made in a partnership "action." From that circumstance, with which I concur, I think have flowed the present tears. I turn, therefore, to the pleadings. The statement of claim, which was considerably amended, I think may be sufficiently summarized as amounting to an allegation that at a date in August, 1938, the plaintiff and the defendant, who were both Hungarian nationals, entered into a partnership agreement in the Hungarian language, the purpose of the partnership being that the firm, the two of them, should exploit and turn to account certain inventions with which the defendant had been busying himself and for which the plaintiff was willing to provide finance. The partnership agreement, or a translation of it, is set out in full in the judgment of Danckwerts J.[1] I do not propose to refer further to it, because for present purposes I think my summary will suffice; but the statement of claim goes on to set out a considerable subsequent history to the effect that the defendant added further inventions to those with which he had originally been concerned and to relate also the circumstances of the war which had caused the plaintiff and the defendant to be separated from each other. At the end of the body of the claim the prayer was thus expressed by amendment: first, "A declaration that the defendant is accountable "to the plaintiff for one-half of all shares or other property or "assets moneys or other benefits obtained by the defendant "under or as a result of or in any way arising out of the . . . "agreement of November 17, 1939," that being the agreement which resulted in the allotment of the "Aerolectric" shares;

[1] (1954) 71 R.P.C. 123.

then, alternatively, a declaration that there had been a partnership, for dissolution of the partnership, and accounts and inquiries and so forth.

I think it is quite true to say that, notwithstanding the first form of declaration prayed for, the whole substance of the statement of claim was an allegation that there had been a partnership between the plaintiff and the defendant and, moreover, that certain later inventions or developments of the original invention made by the defendant had been the subject of or comprehended within the partnership agreement; and, indeed, as Mr. Strangman agreed at the trial before Danckwerts J., the only real matter of fact which fell to be determined, and which was determined in favour of the plaintiff, was: Did the partnership agreement, did the joint venture (as Mr. Strangman preferred to call it) comprise, or did it not comprise, the later and, as it turned out, successful inventions of the defendant? On that issue the judge, who took plainly a somewhat strong adverse view of the defendant as a witness, found in the plaintiff's favour.

[His Lordship referred to the history of the case down to the incorporation of Aerolectric Mouldings Ld. on February 24, 1940, and continued:]

Assuming that the statement of claim is established (as I think it was), these two persons are at this date in 1940 still partners together, the partnership agreement comprehending the exploitation of the defendant's inventions. The defendant has, acting within the scope (as I assume) of his authority as a partner, transferred to Aerolectric Mouldings Ld. the existing patents in consideration of 100 "Aerolectric" shares, which would be at this stage partnership assets. Then occurs an important event, namely, that on April 8, 1941, the Trading with the Enemy Act, 1939, was extended to Hungary, which became an enemy country, war being declared between Great Britain and Hungary later in the same year. The effect of the extension of the Trading with the Enemy Act was that the partnership thereupon came to an end; but, of course, the defendant remained in possession at this stage of the 100 shares which had been partnership assets. Then the defendant, having made further inventions, proceeded to assign to Aerolectric Mouldings Ld., under the terms of the agreement he had previously made with that company, these later inventions, and one of them turned out indeed to be of great value. As I have said, the real question of fact at the trial was: Were those later inventions (whatever may have been the position between the defendant and Aerolectric Mouldings Ld.) comprehended by the original partnership agreement between the plaintiff and the defendant?—and that question Danckwerts J. answered affirmatively.

The next date is September 24, 1943, being the date of an agreement between Aerolectric Mouldings Ld. and Holoplast Ld.

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The effect of it was that the "Aerolectric" shares were transferred to Holoplast Ld., and Holoplast Ld. issued, in consideration for them, 40,000 of its own shares, of which the defendant, as holder of one-third of the "Aerolectric" shares, received a third, namely, 13,333. It will follow that if, as the order of Danckwerts J. appears to have declared, the defendant was a trustee for the plaintiff (for I have so construed the order upon its face), if that is the effect of it, then the defendant will equally hold the 13,333 "Holoplast" shares which he received in exchange, as to one moiety, for the plaintiff. What happened was, though this did not emerge until a later date, that on the allotment the defendant sold half the "Holoplast" shares at par and received therefor £6,667, retaining the remaining 6,666. The great value of the last of the defendant's inventions may be assessed from the circumstance that, whereas originally the defendant had held 100 shares in Aerolectric Mouldings Ld., which may have been of very doubtful value, he had now been able to sell at par 6,667 "Holoplast" shares and to retain another 6,666 like shares.

Hostilities in due course determined, and in 1947 the plaintiff and the defendant (who had been separated owing to the state of affairs on the continent of Europe) came together again. As Mr. Shelley observed, the plaintiff's claim to know what had happened about these inventions and what the defendant had done with the plaintiff's interest in them was not at first put forward with any great resolution or despatch, but in 1952 the plaintiff did start the proceedings, the statement of claim in which I have already mentioned.

The claim on the face of it was a claim for relief on the ground that the plaintiff and defendant had been partners, and since, as I have also pointed out, the effect of the extension of the Trading with the Enemy legislation to Hungary was to determine that partnership, the form of order which one would have expected would, I think, have been somewhat to this effect (notwithstanding the form of the first declaration in the prayer of the statement of claim): It would have contained a declaration that the plaintiff and defendant had been partners in respect of the inventions and would no doubt have gone on to make clear that the partnership covered the later and valuable invention; it would have declared that the partnership was dissolved on April 8, 1941, and would then have directed accounts and inquiries in order to show of what the partnership assets consisted at that date and what, if any, were its liabilities, and also an inquiry of what had become of the assets of the former partnership since that date. As I shall show, I hope, I am by no means satisfied that if the order had taken that form it would, in the end of all, have made any difference; but the order did take a different form. In the language of Roxburgh J. the action appears to have been converted from an ordinary partnership action, which would have resulted in relief in the common form I have indicated, into something else. The question is: When

regard is had to the pleadings and to the history which I have stated and to the fact that the pleadings were read in this order and the evidence was referred to, does the declaration in the order assume some different aspect? Is what I have called its prima facie meaning thereby altered? I cannot think that it is. I cannot myself think that the fact that one is entitled to look at the pleadings and entitled to have regard to the circumstances that I have mentioned can in any way qualify the plain meaning of the words which follow: "This court doth declare "that the plaintiff was . . . beneficially entitled to one moiety "of the 100 shares" allotted to the defendant; and (as I have said earlier) that is, to my way of thinking, necessarily the same thing as saying, if it had been put the other way round, that the defendant was a trustee for the plaintiff in respect of one moiety of the 100 shares.

Before I come back to make good what I said a little time ago (namely, that I doubt whether it would have made any difference in the end if the order had been in the form strictly appropriate to a partnership action), I will continue the story since the order of January 26, because inaccuracy in one of the later documents [2] has perhaps added still further to the feeling which I confess formed itself in my mind as Mr. Shelley opened the case, that the result to the plaintiff is perhaps unduly fortunate for him.

[Having referred to the further stages in the proceedings, his Lordship continued:] The argument for the defendant, shortly, was, both before Roxburgh J. and in this court, that, notwithstanding the form of the order, the true substance and intent of it was a decree appropriate in a partnership action; and Mr. Shelley said that, as between partners in the ordinary way, when accounts are taken, no question of the one being regarded as a trustee for the other properly arises. For that proposition, Mr. Shelley has referred us to textbooks, Halsbury's Laws of England, 2nd ed., vol. 24, p. 396, Pollock's Law of Partnership, which passage in the 14th edition (1944) is at p. 119, but the passage reproduces exactly what was said in the earlier edition edited by Sir Frederick Pollock himself, and to certain cases, notably *Piddocke* v. *Burt* [3] and *Knox* v. *Gye*.[4]

As to *Knox* v. *Gye*,[4] I will say something in a moment, but the passage in Pollock is to this effect: "A surviving partner "has sometimes been said to be a trustee for the deceased "partner's representatives in respect of his interest in the part-"nership; but this is a metaphorical and inaccurate expression. "The claim of the representatives against the surviving partner "is in the nature of a simple contract debt, and is subject to the "Statute of Limitations." In Halsbury it is said, at p. 396: "The relation between partners is not that of debtor and creditor,

[2] This was a reference to an inaccuracy in the master's first certificate.

[3] [1894] 1 Ch. 343.

[4] (1871) L.R. 5 H.L. 656.

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"unless and until the partnership accounts have been finally "taken after dissolution and a balance has been ascertained to "be owing from one to another. Nor are the partners, as such, "trustees for each other or for their firm."

Knox v. *Gye* [4] was a case of great complication, in which the matter arose between the representatives of a deceased partner and a surviving partner, the business having ceased. According to the majority opinion of the House of Lords, it was held that the claim of the representatives of the deceased partner was barred by the Statute of Limitations, and that depended upon the view that, on the facts of that case, the surviving partner could not be treated as having been a trustee for the representatives of the deceased partner, not in respect of some particular asset, but in respect of his (the deceased partner's) share in the partnership assets. Of course, so long certainly as a partnership continues and until it has been wound up, one partner has no specific interest in any particular asset; but it seems to me that where, as in the present case, the partnership has been dissolved by the impact of the Trading with the Enemy legislation and where, as it appears, the active partner in this country has used partnership assets in this way, that he has exchanged them for some other asset which had been vested in his name, it would be going very much too far to say that the partner who so acts is not a trustee for the partnership of the asset which has come into his hands in exchange for the assets of the partnership which he gave for it. One could well imagine examples when it would (I should have thought) be impossible to resist the view that a partner who, by using partnership moneys or partnership assets, acquired some asset in his name, would not be held to be a trustee for the firm—that is, for himself and his co-partner —of the asset which he had thus obtained. Indeed, the case referred to by Mr. Strangman of *Featherstonhaugh* v. *Fenwick* [5] is an example of such a result, a case which has been followed consistently since and, particularly, was referred to by Lord Atkinson in his speech in *Hugh Stevenson & Sons Ld.* v. *Aktiengesellschaft für Carton-nagen-Industrie*.[6] Mr. Strangman referred particularly to the passage in Lord Atkinson's opinion,[7] where it is to be noted that the noble Lord referred, when mentioning *Knox* v. *Gye* [8] to the dissenting opinion of Lord Hatherley without, indeed, observing that it was a dissenting opinion and without further reference to any of the other opinions.

However that may be, it is quite unnecessary in this case for the court to express any view as to the limitations or scope of the decisions in such cases as *Knox* v. *Gye* [8] on the one hand and *Featherstonhaugh* v. *Fenwick* [9] on the other. I have only made such reference to them as I have in order to make good a point which I earlier indicated. In my judgment, even though

[4] L.R. 5 H.L. 656.
[5] (1810–11) 17 Ves. 298.
[6] [1918] A.C. 239.
[7] Ibid. 250.
[8] L.R. 5 H.L. 656.
[9] 17 Ves. 298.

the form of the order of Danckwerts J. had been one appropriate strictly to a partnership action, declaring that the partnership had been dissolved and directing the usual inquiries, it is by no means clear to me that it would not have inevitably followed, either on the first inquiry or at least at some other stage, that the asset which the defendant had obtained when he disposed of the partnership assets (to wit, the patents) was held by him as trustee for the partnership; and in the events (namely, that the partnership had ceased operations and had no debts or liabilities to discharge) that the defendant thereupon held that asset as a trustee as to one half for himself and as to the other half for the plaintiff. So the result would have been in the end the same. But, however that may be, I return to the order we are called upon to construe, that is, Danckwerts J.'s order of January 26, 1954. I repeat that, bearing all the relevant matters in mind and paying regard to the cases to which we have been referred, it still remains clear to me that the effect of the declaration was (as I have many times said) that the defendant was held to be a trustee as to one half of the 100 "Aerolectric" shares for the plaintiff. The defendant did not appeal from the order which is, accordingly, not now capable of challenge by him. And in my judgment it follows from the terms of the order and the declaration which it contained that the defendant was a trustee for the plaintiff as to one half of what the defendant got in exchange for the "Aerolectric" shares, namely, 13,333 "Holoplast" shares; and, being a trustee of one half of those shares for the plaintiff, it equally follows that he was a trustee for the plaintiff of the money he received upon a sale by him of half the "Holoplast" shares.

What, then, is the right conclusion? The master certified that the £6,667 was wholly spent by the defendant. Roxburgh J. required further investigation into that matter, and it may now be taken that in fact the defendant put that money (stating the matter in popular language) in his pocket. He used it for his own purposes, in discharging his own liabilities, or otherwise for his own requirements. Seeing that, as to one half, it was trust money, it follows that the defendant must be regarded as having converted one half of the cash consideration to his own use. What, then, is the result? It is true that the thought of this interest claim may have dawned somewhat late upon the plaintiff or his advisers, but none the less it was, in my judgment, as a consequence and a necessary consequence of the premises I have stated, a just claim which they could make. The trustee, having converted part of the cash consideration he received for trust property to his own use, must be accountable to the beneficiary, not only for the sum he received, but for interest on it.

No point was taken, and I assume it never could have been taken, that there was here any possible limitation of the period during which interest would run from the date when the money

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was received and spent in September, 1943, to the date when the principal figure of £3,333 10s. was paid over in December, 1954; nor does it appear that any great point was taken as to the rate of interest. It did appear to me, when I first looked at the matter, that 5 per cent. was, in these days, a somewhat high figure, and I was further troubled in this matter because Roxburgh J. seemed to reject the alternative of 4 per cent. on grounds which I could not, for my part, entirely understand. He said: "If it were so applied . . ."—that is, if the principal sum were applied in payment or the discharge of partnership liabilities—"I should not charge the defendant with more than "4 per cent. It is a very special case . . ."; but if that had been what had happened, "I should not charge him more than "4 per cent. On the other hand, if he has spent it on purchases "wholly unconnected with the partnership, . . . I cannot see "why he should not pay 5 per cent." I cannot help thinking that the judge, with all respect, must have made a slip, because if he had in fact spent the £3,000 odd in the discharge of partnership debts or liabilities, he would not appear to have been chargeable with any interest at all, or indeed with the capital. But since he is to be treated as having, as I say, converted it to his own use, then I think that it is too late now, in the circumstances certainly of this case, in which the question never really was gone into below, for us to depart from the ordinary rule which has undoubtedly been applicable for a great many years—the rule that where a trustee is chargeable with interest as for breach of trust, the rate of interest with which he is charged is 5 per cent., unless his conduct is such (as is not the case here) that he is made to pay compound interest. That rule as to interest dates back to cases like *Burdick* v. *Garrick* [10] and *In re Davis*,[11] and it may be said to be supported in the present case by the circumstance that in certain sections of the Partnership Act itself (see section 24 (3) and section 42) a partner is liable to pay interest at 5 per cent. in respect of that for which he may be found accountable to a co-partner. Whether, having regard to the change in money rates, at some stage it may have to be considered whether that rate ought to be varied, is not, I think, a question for us to decide in this case. The ruling is well established; and, in all the circumstances, therefore, I can see no grounds which would justify us departing from the rule, given the premises which I have stated.

The result, therefore, is that the defendant ought, in my judgment, on the face of the order which was made in January, 1954, to pay interest and to pay it at the rate as stated by Roxburgh J. of 5 per cent. In other words, in my judgment, this appeal fails and must be dismissed.

HODSON L.J. I entirely agree and have nothing to add.

[10] (1870) 5 Ch.App. 233.

[11] [1902] 2 Ch. 314.

ROMER L.J. I agree and have very little to add.

Inasmuch as the defendant never appealed against the order of Danckwerts J. which was made on January 26, 1954, it is clear that he is bound by the provisions of that order, whatever those provisions might be. For the reasons which the Master of the Rolls has stated, it appears to me to be clear that the order proceeded upon the footing of a trusteeship of the defendant of the original 100 shares which were allotted to him and on the corresponding footing that the plaintiff was the cestui que trust of one half of those shares. If that is the meaning of the order, then cadit quaestio, because the defendant never appealed against it. It is only if the order is open to some other construction, that it is ambiguous in its terms, that it appears to me to admit of the argument which Mr. Shelley addressed to us, that in the circumstances which existed, namely, the pleadings in the action and the acceptance by the judge of the view that there was a partnership and in view also of the general law which is applicable as between partners, the judge cannot have intended to hold that the defendant was a trustee of the shares which were allotted to him. In my opinion, there is no such ambiguity as to render that argument permissible, because this order, as I have already said, proceeds (and, in my opinion, proceeds only) upon the footing of a trusteeship. But even if there was such an ambiguity as Mr. Shelley suggested and upon which he founded his attempt to show that the conception of a trusteeship was not one which ought to be accepted, nevertheless it seems to me that if one looks to the observations that Sir William Grant made in *Featherstonhaugh* v. *Fenwick* [12] and to Lord Atkinson's judgment in the *Hugh Stevenson* case [13] to which the Master of the Rolls has referred, there was material—one need say no more—upon which Danckwerts J. could find, as in my opinion he did find, that there was a trusteeship.

There is only one other point I should like to mention; that is, that Mr. Shelley said that this order only intended to effect what it expressed and one looks to the order in vain for any indication that the defendant was to be held liable for interest on any part of the money which came into his hands in respect of the sale of these shares. That, of course, is true, but at the time when this order was made, although the defendant knew or presumably knew what he received as consideration for the shares and what he did with it, the plaintiff did not know. Accordingly, all the plaintiff could ask for is what he did ask for, namely, an order for a common account against a person who was in the position of a trustee. When, in the course of working that order out, or any order such as that, it transpires that the trustee has converted trust property to his own use, or applied it to purposes that he had no right to apply it to, the mere fact that the original order was an order for a common account

[12] 17 Ves. 298.

[13] [1918] A.C. 239.

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does not and cannot preclude a cestui que trust from subsequently saying: "Now we know what the facts are, we are "entitled to what the court has always allowed to a beneficiary "as a remedy against a trustee who has wrongfully applied trust "property, namely, not only restoration of the property, but "interest at the appropriate rate." Therefore, it seems to me that that point which Mr. Shelley took is no answer to the summons which the plaintiff issued after the certificate, asking for interest on the footing of a trusteeship.

In my judgment, Roxburgh J. was quite right in ordering interest, having regard to the construction of the order and the common practice; and I agree with the Master of the Rolls that there is no ground shown for altering the rate of such interest which has prevailed for many years, namely, 5 per cent. I, accordingly, agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Halsey, Lightly & Hemsley; Hardman, Phillips & Mann.*

E. D.

[PROBATE, ETC., DIVISION.]

1955
Mar. 2, 3, 4, 7, 8.
Willmer J.

* THE BRIXTON (OWNERS) *v.* THE PLANTER (OWNERS).

THE PLANTER.

Practice and Procedure—Summons for directions—Expert evidence—Liberty to call surveyors on term that statements be exchanged 14 *days before trial—Plans and documents used in connexion with statements also to be exchanged — Shipping — Collision — R.S.C., Ord.* 30.

Where, on a summons for directions under R.S.C., Ord. 30, it is ordered, as a term of giving liberty to call a surveyor, that the statements of the proposed evidence be exchanged, this includes the exchange of any plans or documents to be used in connexion with the statement.

ACTION.

The plaintiffs' vessel, the *Brixton*, was in collision with the defendants' vessel, the *Planter*, in the River Thames on February 6, 1954. The plaintiffs commenced an action against the defendants, who put in a defence and counterclaim. There was a dispute as to the angle of blow and at the summons under R.S.C., Ord. XXX, before the action came on for hearing, it was ordered that each side be at liberty to call one surveyor on terms that statements of proposed evidence be exchanged 14 days before trial. Statements of the proposed evidence of the

surveyors for each side were exchanged, but not the plans and documents in connexion therewith. These plans and documents were produced at the trial and, as a result of their not having been exchanged with the statements, the court was occupied for a substantial time with the evidence of the surveyors.

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J. V. Naisby Q.C. and *Derek H. Hene* for the plaintiffs.
R. F. Hayward Q.C. and *G. N. W. Boyes* for the defendants.

WILLMER J. stated the facts and found the *Planter* alone to blame for the collision. After dealing with the question of costs he continued: When I ordered, as a term of giving liberty to call surveyors, that statements of their proposed evidence should be exchanged, I had in mind that the exchange should include the exchange of any plans or documents to be used in connexion with the statements. I think we would have saved possibly quite an appreciable part of the time occupied in taking the surveyors' evidence, if they had exchanged their plans as well as their statements beforehand. I merely make that remark so that it may be noted for future reference; similar orders, if made in the future, should be regarded as including any plans and documents that go with the statements.

Solicitors: *Botterell & Roche; Simpson, North Harley & Co.*

A. S.-R.

[QUEEN'S BENCH DIVISION.]

*HILL *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE.

1955
July 6.

Lord Goddard C.J.

Family Allowance—Entitlement—Absence at school—Children received into care of local authority—Sent to residential schools—Whether "included in the family" for family allowances purposes—"Temporary absence . . . at any school"—Family Allowances Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 41), *ss.* 1, 3 (2), 21 (7)—*Children Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *s.* 1—*Family Allowances and National Insurance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 29), *s.* 52.

By the Family Allowances Act, 1945, s. 1, "... there shall be "paid ... for every family which includes two or more children "and for the benefit of the family as a whole, an allowance in "respect of each child in the family other than the ... eldest ..." By section 3 (2), "It shall be a condition of the child's being "treated as included in the family ... that the child is living "with" his parents or one of them "... or, if not, that the cost "of providing for the child is contributed to by them ... at the "rate of" eight shillings a week or more. By section 21 (7): "A "child shall not be deemed ... to have ceased to live with a "person by reason of any temporary absence, and in particular by "reason of absence at any school ..."

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In December, 1952, a mother, who had been deserted by her husband, and her three children were admitted by the London County Council into residential accommodation under Part III of the National Assistance Act, 1948. In April, 1953, after they had lived in the accommodation as a family for some months the county council received the two eldest children into its care under the provisions of section 1 of the Children Act, 1948, transferring them to residential schools. In May, 1953, the mother and the youngest child, who had remained with her, were discharged by the London County Council to private accommodation. The Minister of Pensions and National Insurance decided that the mother was not entitled to include the two eldest children in her family for the purposes of family allowances in respect of any period after May, 1953, on the ground that they were neither living with her, nor was she contributing to the cost of providing for them at the rate of at least eight shillings a week in cash or in kind. The mother appealed:—

Held, that the Act contemplated the payment of family allowance to a family living together or being maintained as a family, and section 21 (7), on its true construction, made provision for the case of a child who was at a boarding school but who would return home for the holidays or if ill, not that of a child living at a school which had taken it over altogether. It followed that the two eldest children could not be said to be living with the mother in any sense contemplated by the Act, nor could they be deemed under section 21 (7) not to have ceased to live with her, for their absence was not due to the fact that they were at school, but because the county council, exercising their powers under section 1 of the Children Act, 1945, had taken over the care and maintenance of them themselves. Accordingly the mother was not entitled to receive family allowance.

CASE STATED by a referee.

The appellant, Mabel Jane Hill, was in receipt of a family allowance in respect of a family which included three children, Alan Charles, born on April 1, 1947; Jean Margaret, born on January 1, 1949; and Leslie Arthur, born on February 9, 1952. On December 18, 1953, the Minister of Pensions and National Insurance decided that the appellant was not entitled to include the two children Alan Charles and Jean Margaret in her family for family allowance purposes in respect of any period after May 4, 1953, on the ground that they had neither been living with her nor had she been contributing towards the cost of providing for them at the rate of at least 8s. weekly for each of them in cash or kind. The appellant was dissatisfied with the Minister's decision and the question was referred to a referee under section 5 (2) of the Family Allowances Act, 1945.

The following facts were admitted or proved before the referee. On December 10, 1952, the appellant and her three children were admitted by the London County Council into residential accommodation at Newington Lodge under Part III of the National Assistance Act, 1948, where they lived together as a family until April 2, 1953. On April 2, 1953, the girl, Jean Margaret, was transferred to Oakdale Nursery, a residential nursery and a school within the meaning of section 114 of the Education Act, 1944,

and on the same date she was taken into care by the London County Council under the provisions of section 1 of the Children Act, 1948. From April 3, 1953, until April 20, 1953, the appellant and the remaining two children continued to live together at Newington Lodge as a family. On April 20 the boy, Alan Charles, was transferred to Ashford Residential School, a school within the meaning of section 114 of the Education Act, 1944, and on the same date he was taken into care by the London County Council under section 1 of the Children Act, 1948. On May 6, 1953, the appellant and the remaining child, Leslie Arthur, who had never been parted from her, were discharged by the London County Council from Newington Lodge to private accommodation. On June 6, the girl, Jean Margaret, was discharged by the London County Council from Oakdale Nursery to the appellant, whom she joined in private accommodation. At the date of the hearing before the referee, July 7, 1954, the boy, Alan Charles, was still at the Ashford Residential School. Such contributions as had been made by the appellant towards the cost of providing for either of the two children, Jean Margaret and Alan Charles, while at the nursery and residential school respectively, had not at any time amounted to as much as 8s. weekly in cash or in kind.

On behalf of the Minister it was argued (1) that as the appellant had not contributed towards the cost of providing for the children at the rate of at least 8s. weekly since April 2, 1953, the children could only be included in her family for family allowances purposes after that date for such time as they could be said to be living with her; (2) that while Jean Margaret was in the nursery and Alan Charles in the residential school they were not living with the appellant in fact, and their absence from her ought not to be treated as absence at a school for the purposes of section 21 (7) of the Family Allowances Act, 1945,[1] so as to

[1] Family Allowances Act, 1945 (as amended by the Family Allowances Act, 1952, s. 52), s. 1: "Subject to the provisions of this Act, there shall be paid by the Minister, out of moneys provided by Parliament, for every family which includes two or more children and for the benefit of the family as a whole, an allowance in respect of each child in the family other than the elder or eldest at the rate of [eight shillings] a week."

S. 3: "(1) . . . each of the following shall be treated for the purposes of this Act as constituting a family, that is to say—(*a*) a man and his wife living together, any child or children being issue of theirs, his or hers, and any child or children being maintained by them; (*b*) a man not having a wife or not living together with his wife, any child or children being issue of his, and any child or children being maintained by him; and (*c*) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her . . . (2) It shall be a condition of the child's being treated as included in a family . . . of the man and his wife or one of them, of the man, or of the woman . . . that the child is living with them, with him or with her, as the case may be, or, if not, that the cost of providing for the child is contributed to by them . . . by him, or by her . . . at the rate of [eight shillings] a week or more."

S. 21 (7): "A child shall not be deemed for the purposes of this Act to have ceased to live with a person by reason of any temporary absence, and in particular by reason of

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entitle them not to be deemed for the purposes of the Act to have ceased to live with her during that absence, because (a) for the duration of that absence they were taken into care by the London County Council under section 1 of the Children Act, 1948, and the act of taking them into care involved the assumption by the London County Council of the duty, which would otherwise have remained with the appellant, of providing for their proper accommodation, maintenance and upbringing, and it was not the appellant but the London County Council who sent them to school so that while they were at school their absence at school was an absence from the London County Council and not from the appellant; and (b) the words "absence at school" in section 21 (7) must mean something more than mere lack of presence with the parent and must be an absence from a parent for the purposes of education, and not predominantly for some other purpose such as relieving the parent of the duty of maintenance or the provision of accommodation, and the absence must be temporary so that the absence of a child who had gone away from his parent to live in an institution was excluded; (3) that the general intention of the Family Allowances Act, 1945, was not to maintain payments of allowances where the child concerned had in fact been removed from the parent and the parent did not retain his or her duties and liabilities in respect of the child.

On behalf of the appellant it was argued (1) that the language of sections 3 (2) and 21 (7) of the Family Allowances Act, 1945, was perfectly clear and the word "temporary" in section 27 (7) did not in any way qualify the expression "absence at any "school," and, since absence at school was expressly excluded from the provision in section 21 (7) for the making of rules to determine what absences from a parent might be treated as temporary for the purposes of the Act, it was an absence from a parent of a kind which was not limited by any of the rules made under that subsection contained in Part IV of the Family Allowances (Qualifications) Regulations, 1946 (S.R. & O., 1946, No. 138); (2) that section 21 (7) in no way qualified the type of school nor the circumstances in which a child might be sent to school and once it was established that the child was absent from the parent at a school such absence must be disregarded and the child must not be deemed to have ceased to live with the parent; (3) that there was nothing in the Family Allowances Act, 1945, which prevented a child who had been taken into care under section 1 of the Children Act, 1948, from being included in the family of his parent for family allowances purposes; section 11 of the Act was amended by section 52 of the Children Act, 1948, so as to exclude from any family for family allowances purposes a child in respect of whom a resolution of a local authority had

"absence at any school . . . and "the question whether any such "absence (other than at a school) . . . "is or is not to be treated as temporary . . . shall be determined by "reference to such rules as may be "prescribed."

been passed under section 2 of the Children Act, 1948, vesting in themselves all the rights and powers of the parents of that child, but no restriction had been placed on the inclusion in a family of a child who had been merely taken into care under section 1 of the Children Act, 1948.

The referee considered that the children could only be included in the family of the appellant during the time in which she and they were in fact separated if they could then be deemed to be living with her, and that the children could not be deemed to be living with her during their absence at the residential schools, but could be included in her family as follows: Jean Margaret up to April 2, 1953, and after June 6, 1954, and Alan Charles up to April 20, 1953, and that to that extent the appeal should succeed.

The question for the opinion of the court was whether the effect of sections 3 and 21 (7) of the Family Allowances Act, 1945, precluded the Minister from deeming that the children had ceased to live with the appellant during their absence from her.

Duncan Wallace for the appellant.
Rodger Winn for the Minister.

No cases were cited in argument.

LORD GODDARD C.J. This is a special case stated by a referee appointed by the Minister of Pensions under section 5 (2) of the Family Allowances Act, 1945, which provides that "If any "person is dissatisfied by the award or decision of the Minister "in respect of an allowance . . . the question shall, on applica- "tion being made in such manner and within such time as "may be prescribed, be referred to one or more referees selected "from a panel, and the decision of the referee or referees shall "be final." Provision is made for the referee to state an award in the form of a special case for the opinion of the court, as the referee has done in this case, and the effect of his award is in favour of the Minister and against the appellant. The court has had the advantage of a very clear and careful argument from Mr. Wallace, on behalf of the appellant, but I have come to the conclusion, without any hesitation, except upon one point, that the award of the referee is clearly right.

The appellant, Mrs. Hill, through no fault of her own, but having been deserted by her husband and left with three small children, was for the time being taken into one of the homes which the London County Council provide for what I may call destitute or homeless people who would not be properly sent to what used to be called the Poor Law Institution. While they were there two of the children, the little girl then about four years old, and one of the boys who was about six years old, were taken from the home by the county council, and the little girl was put into a nursery school and the boy into another school

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appropriate to his case. The smallest child remained with the mother.

Section 1 of the Children Act, 1948, provides: "(1) Where "it appears to a local authority with respect to a child in their "area appearing to them to be under the age of seventeen— . . . "(*b*) that his parents or guardian are, for the time being . . . "prevented by reason of . . . infirmity or other incapacity or any "other circumstances from providing for his proper accommoda- "tion, maintenance and upbringing; and (*c*) in either case, that "the intervention of the local authority under this section is "necessary in the interests of the welfare of the child, it shall "be the duty of the local authority to receive the child into their "care under this section." There can be no question but that the local authority, the London County Council, having placed the mother and the children in the home, and thinking that it was right that the two eldest children should be put to a school, were acting pursuant to their powers under that section when they put the two children into appropriate schools. But it is perfectly true, as Mr. Wallace has pointed out, that under that section the mother does not lose parental rights, and that she can require the local authority to return the children to her unless the local authority, for good reasons (which are set out in section 2), pass a resolution under which they will assume parental rights over the child. That, generally speaking, apart from illness or mental or physical incapacity, is where the parent has shown himself or herself to be incapable or improper to look after the child.

The result of the children having been sent to the schools by the local authority is that the appellant is relieved, so long as they are in the care of the local authority, of the obligation of maintaining and supporting them. The maintenance has to be done by the local authority. They may be able to recover something from the appellant, but the case discloses that they have not recovered anything like 8s. a week, which is what I may call the zero figure under the Family Allowances Act, 1945, for a person who is paying somebody else for the maintenance of one of his or her children. But there is no question here whether the appellant has paid or been required by the county council to pay as much as 8s. a week, so we may take it that it is as though she has paid nothing. She contends, however, that, although the maintenance is entirely in the hands of the county council, she is still entitled to claim family allowance for these two children, although they were being maintained in the schools by the county council.

I do not think that any court would be astute to construe the Act to produce that result, which one could say was certainly extravagant so far as the taxpayers (who have to find the money for the family allowances) are concerned, and would seem to be contrary to the intention of the Act.

[His Lordship read the Family Allowances Act, 1945, ss. 1 and 3 (1) and (2) and continued:] Section 2 provides that a person is to be treated as a child who is "under the upper limit of the "compulsory school age. . ." Obviously those sections are considering what is, in common parlance, a family living together or being maintained as a family. When we come to section 21 (7), we find that Parliament has dealt with certain absences, because it is realized that children are not always living at home. As I mentioned in the course of the argument, this Act is one of which every person can take advantage. There is no means test. It is not what I may call a Poor Law provision. It is a provision which gives anybody, whatever their means, whether they are millionaires or whether they are paupers, provided that they have more than one child, the right to receive 8s. a week in respect of each child other than the first. Section 21 (7) provides: "A "child shall not be deemed for the purposes of this Act to have "ceased to live with a person by reason of any temporary "absence, and in particular by reason of absence at any school, "and a person who has been contributing at any rate to the cost "of providing for a child, or has been maintaining a child shall "not be treated as having ceased so to contribute, or to maintain "the child, by reason of any temporary interruption or reduction "of his contribution to the cost of providing for the child, and "the question whether any such absence (other than at school), "interruption or reduction is or is not to be treated as temporary "for the said purposes shall be determined by reference to such "rules as may be prescribed." The rules that have been prescribed under the Act provide that any interruption shall be treated as temporary for the first four weeks. In other words, a child can be away from its parents for four weeks and the allowance will continue to be paid. Absence at school, however, is a different matter. There is no need to prescribe rules for that because any absence at school is not to be regarded as a break. But it seems to me that section 21 (7) (on its plain construction) does not mean that, when a child has gone to live away from its parents and has ceased to be a member of the family, so to speak, and, so far as residence is concerned has ceased to live with its parent (which is the effect of living at a school which has taken it over altogether), that does not amount to a break and that the parent is entitled to draw the money just the same. The subsection provides: "A child shall not be deemed for the purposes "of this Act to cease to live with a person by reason . . . in "particular . . . of absence at any school"; it does not say that when the child is at school it is still in any circumstances deemed to be living with the parents. The plain meaning of the section is that if the child is at school in the sense that it will always go home for its holidays, or if the child is ill, the schoolmaster may send it home then the child is still living with its parents although its physical residence for certain periods of the year is at the school. I think that it is simply dealing with the case of

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a child who is sent to a boarding school. As I say, the people who are entitled to receive these allowances are people of any means, great or small. The child may be sent to boarding school because people of enough means do send their children to boarding school, and for a child under the age of 16 years the parent can still draw the allowances.

I hold, as a matter of interpretation of that section, that these two children were not living with their mother in any sense whatever. The London County Council have taken over their care and maintenance, and I do not see how I can say that they were living with their mother. That they were not living with the mother is not due to the fact that they were children at a school, but because the county council deemed it their duty to exercise the powers which the Children Act, 1948, has placed upon them in respect of these children, and have undertaken the care and maintenance of them themselves.

The only doubt that I have had in this case is that under section 11 (1) of the Family Allowances Act, 1945, special provision is made for children at an approved school under the Children and Young Persons Act, 1933. Section 11 (2) of the Act of 1945 provides: "A child shall not, for the purposes of this Act, be "treated as included in any family as respects any period during "which there is in force an order under the Children and Young "Persons Act, 1933, committing him or her to the care of a "local authority." Section 11 (3) dealt with a child in respect of whom there was in force a resolution under section 52 (1) of the Poor Law Act, 1930; that was amended by section 52 of the Children Act, 1948, and subsection (3) now reads: "A child in "respect of whom there is in force a resolution of a local "authority passed under subsection (1) of section 2 of the "Children Act, 1948, shall not, for the purposes of this Act, be "treated as included in any family: Provided that this subsection "shall not have effect as respects any period during which under "the provisions of section 3 or section 4 of the said Act of 1948 "the child is allowed by the local authority to be, either for a "fixed period or otherwise, under the control of a parent, "guardian, relative or friend of the child." That is a reference to a child in respect of whom, by a resolution, the local authority, having taken the child under their care, have resolved to stand in loco parentis to the child and deprive the parents of parental rights over the child, at any rate for the time being, and themselves to exercise parental rights over the child. It may be said that, since special provision has been made by section 11 with regard to a child in respect of whom a resolution under section 2 of the Children Act, 1948, has been passed it is curious that some construction other than that which I have made should not be placed on section 21 (7) with regard to a child coming under the care of the local authority under section 1 of the Children Act, 1948. But I cannot bring myself to think that section 11 in any way destroys what seems to me to be the

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main intention of the Act, that is, that before family allowances may be obtained the child must be living with its parents, and that absence at school is not to count as living at the school rather than living with the parents. I think it may be that section 11 was put in ex abundanti cautela. It may have been put in because in the two cases which are expressly mentioned in the Act a child can be taken out of the care of its parents against their wishes and a parent might be able to say "Why should I "be deprived of my family allowance because the child has been "taken away from me? I am perfectly prepared to go on looking "after the child, but I am not allowed to do it by the court or by "the local authority." Whatever the reason, I do not think that the presence of those two provisions in section 11 is enough to destroy what I think is the clear meaning of subsection (7) of section 21.

For that reason, I uphold the award of the referee and answer the question submitted in the negative.

Judgment accordingly.

Solicitors: *Bell, Brodrick & Gray; Solicitor, Ministry of Pensions and National Insurance.*

J. F. L.

[COURT OF APPEAL.]

* O'SULLIVAN (VALUATION OFFICER) *v.* ENGLISH FOLK DANCE AND SONG SOCIETY.

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1955 *June* 21, 23, 24, 27.

Evershed M.R., Jenkins and Parker L.JJ.

Rates and Rating—Science or fine art—Exemption—Society to promote folk dancing, folk songs and other folk music—Whether instituted for purposes of the fine arts exclusively—Whether supported wholly or in part by voluntary contributions—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The memorandum of association of a society showed its objects to be, inter alia, the preservation, propagation and encouragement of the practice in their traditional forms of English folk dancing, folk songs and music, including singing games. The society claimed that a hereditament which it owned and occupied for such purposes should be exempt from rates under section 1[1] of the Scientific Societies Act, 1843, as premises belonging to a society "instituted "for the purposes of science . . . or the fine arts exclusively" and "supported wholly or in part by annual voluntary contribu-"tions":—

Held, that although the expression "fine arts" was not now confined to the plastic arts alone, any addition would have to be an activity showing a true analogy to the primary instances of painting, sculpture and architecture; that music was included, and some forms of drama and of dancing, such as ballet, might be regarded as analogous to the primary instances, but it did not follow that all dancing was a fine art; and that the performance of the old traditional folk dances, which were recreational dances and

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not ones involving an artistic exhibition of skill, was not a fine art, and, accordingly, that the objects of the society were not exclusively those of the fine arts within the meaning of section 1 of the Act.

Royal College of Music v. *Vestry of Saint Margaret's and Saint John's Westminster* [1898] 1 Q.B. 809; 14 T.L.R. 351, and *Nonentities Society* v. *Linley and Kidderminster Borough Council* (1954) 47 R. & I.T. 426 considered.

Quaere whether the privileges accorded to members and associates were such as to make the annual subscriptions other than "voluntary" for the purpose of section 1.

Overseers of the Poor and Chapel Warden of the Royal Precinct of the Savoy in the County of London v. *Art Union of London* [1896] A.C. 296; 12 T.L.R. 377 considered.

Appeal by case stated from a decision of the Lands Tribunal affirming a decision of the local valuation court for North-East London.

The respondents, the English Folk Dance and Song Society, owned and occupied a hereditament described in the valuation list as hall, offices, library, rooms, caretaker's lower ground floor flat, premises and appurtenances known as Cecil Sharp House, situated at 2, Regent's Park Road in the Metropolitan Borough of St. Pancras rating area. On September 29, 1952, the valuation officer made a proposal that the hereditament should not be exempt under the Scientific Societies Act, 1843,[1] but that it should be assessed at gross value £1,300, rateable value £1,080. On October 3, 1952, the society gave notice of objection to that proposal, and notice of appeal to the local valuation court was given by the valuation officer on October 8, 1952. The local valuation court heard and dismissed the appeal on January 27, 1953. The valuation officer appealed to the Lands Tribunal which on July 16 and 17, heard and dismissed his appeal. The valuation officer appealed.

The case stated set out the facts which were proved or admitted before the Lands Tribunal thus: By paragraph 9 (ii) The objects of the society as set out in its memorandum of association . . . are (inter alia): (a) To preserve English folk dances and songs and other folk music (including singing games), to make them known and to encourage the practice of them in their traditional forms. (b) To promote the knowledge and practice of English folk dances, songs and music by means of schools, classes, examinations, lectures, demonstrations, festivals and other like methods. (c) To promote and encourage research into and study of the origins, development and traditional practice of English folk dances, songs and music and their relationship with those of other countries. (d) In furtherance of the above objects to promote, and co-operate in, demonstrations, festivals, and other

[1] Scientific Societies Act, 1843, s. 1: "No person or persons shall be "assessed or rated . . . in respect of "any land, houses, or buildings . . . "belonging to any society instituted "for purposes of science, literature, "or the fine arts exclusively, either "as tenant or as owner . . . provided "that such society shall be supported "wholly or in part by annual voluntary contributions. . . ."

like performance of folk dances, songs and music of other countries, whether held in England or elsewhere. (e) Also in furtherance of the above objects to prepare and publish, issue and make use of, for sale, performance or otherwise, such books, journals, records, reports, and other literature, and means and apparatus for the visual and mechanical reproduction of folk dances, songs and music as may seem desirable. (f) To make, obtain and distribute, by sale or otherwise, instruments and other articles of whatever description requisite for the practice of folk dances, songs and music in accordance with the above objects. (g) To solicit and receive subscriptions and gifts of all kinds, whether absolute or conditional, for the purposes of the society. (iii) The said hereditament is occupied by the society for the transaction of its business and for carrying into effect its purposes. (iv) The society does not and by its laws may not make any dividend gift division or bonus unto or between any of its members. (v) The society was at all material times in possession of a certificate of the registrar of Friendly Societies as required by section 1 of the Scientific Societies Act, 1843.

10. At March 31, 1953, the society had 3,600 full members, 7,350 associates and about 95 donor members or contributors, of whom rather over one-third are also full members. Each year a full member or a donor member subscribes 25s., and an associate 7s. 6d. The privileges . . . to which members are entitled are:—

Full members. 1. Free copies of the annual journal and bi-monthly magazine which together cost 5s. per annum to produce and distribute; sales to non-members are negligible. 2. The opportunity to obtain back numbers of the journal at 5s.; non-members are charged 10s. 6d. 3. Participation in certain functions organized by the society at favourable rates. . . . The oral evidence showed that for all functions where members and non-members pay different rates the rates are calculated so as to show a profit if the event is fully attended, even on the assumption that tickets are bought only by members. The extra amount charged to non-members is thus additional profit and these functions in fact are run at a profit, but if for all these events members paid the same amount as guests or non-members the profit would be very much larger. As to events restricted to members or to members and their guests, the accounts up to March 31, 1952, show a loss of £55 in London and a profit of £80 in the provinces. Thus the subscriptions and donations are not devoted in any way to subsidizing members' events. . . .

Associates. Associate members are entitled to some, but not all, of the advantages of full members. Distribution of the magazine to them costs approximately 2s. 3d. per annum.

Donor members . . . They have none of the rights, privileges or facilities of full members or associates.

11. The society's activities include the following: (a) Examinations are held and certificates awarded by the society

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to members and others for proficiency in folk song and dance. (b) Publications, records and films about folk song and dance are made, and sold and hired by the society to members and others at a net profit of approximately 33⅓ per cent. The amount of net income received in respect of these items is shown in the society's accounts for the year ended March 31, 1952, as: Sales of books, music, records, etc. (less cost), £1,481. Hire of music, costumes, films and properties (less expenses), £89. Royalties, £173. [Total] £1,743. The society owns the copyright in respect of some of these items, but makes no charge for reproduction except where commercial concerns are interested. . . . (c) The society employs teachers who hold classes at which folk dance and songs are taught; these teachers also adjudicate at competitions organized by the society. . . . (d) At Cecil Sharp House and elsewhere the following events are promoted and organized. . . . (1) Dances of various sorts (some of which are open to members and non-members and others only to members and their guests), namely country dances (Playford and traditional), men's Morris and sword dances, community dances, square dances. (2) "At homes." These are open only to full members (or in some cases also to associate members) and their guests and are occasions on which members can meet the director and each other and practise rather more advanced and complicated dances, such as Playford, under the instruction of the director or some other expert; there are one or more interludes in the dancing during which performances of dance or song are given by experts, or one of the society's films is shown, and there is a short interval for refreshments. (3) Holiday courses in folk dancing and song. (4) Exhibitions of films of English and foreign folk dancing. (5) Lectures and classes in folk dancing, folk song and music and folk lore. (6) Demonstrations of folk dancing, including demonstrations by folk dancers from abroad. (7) Recitals of folk songs and folk music. (8) Festivals promoted by the society alone or in conjunction with local authorities and others.

Events organized by the society in the provinces are similar to those at Cecil Sharp House but not nearly so numerous. Cecil Sharp House accommodates only 250 dancers, and members attending the dances there almost invariably bring guests. (e) The society keeps a library at Cecil Sharp House. . . . There is no other comparable library in England and evidence was given that there was not such another in Europe. (f) The society has rescued from oblivion many ancient folk songs and dances and through its journal and magazine encourages research into their origins. It has published the index of English songs. . . . The Royal Anthropological Society has had papers read to it on comparative music, while on one or two occasions anthropologists have contributed articles to the society's journal. (g) Members of the society have competed in folk dancing events at the Eisteddfod. The society has promoted and encouraged

international conferences of folk song and dances, and was largely responsible for the formation of the International Folk Music council which now meets every year and at which different countries are represented by teams of national folk dancers.

12. The following is a summary of the events which were advertised to be held at Cecil Sharp House (unless otherwise stated) in the Autumn and Summer sessions of the year 1952–53.

(a) Autumn

. . . (i) *Members only and a guest.* "At home." Monthly. Members free. Guests 3s. 6d. Country dances. Twice monthly. Playford dances. Monthly. (Members 4s. Double, 2s. 6d. single. Guests 3s. 6d. single. Members' children's Christmas party. Price of tickets did not appear for the evidence.

(ii) *Members, associates and guests.* "At homes." Twice monthly. Members 2s. Associates 2s. 6d. Guests 3s. 6d. Festivals "At homes." Two. Members and associates free. Guests 3s. 6d. December 21, 1952, carol evening. Free, silver collection. December 5, Lecture by the director and a film. Members 2s. 6d. Associates 3s. Guests 3s. 6d.

(iii) *Members and non-members.* Men's Morris and sword. Monthly. Members 2s. 6d., Non-members 3s. 6d. Square dances. Five times monthly except Christmas week and January 9 and 10. Members 4s. double, 2s. 6d. single. Others 6s., double, 3s. 6d. single. Square dances at Albany Street drill hall. Monthly. 3s. 6d., double; 2s. 6d., single for all.

(iv) *Miscellaneous.* December 31, 1952. January 6, 1953. Two Christmas holiday courses, one for callers, leaders, and players of folk dance and music, and one for students. January 8. Festival ball. January 9 and 10. Folk dance festival (Royal Albert Hall). Square dances were held at the Lyceum, Strand, London; these were to be discontinued because of lack of public support.

(b) Summer (April to July except where otherwise stated). . . .

(i) *Members only and a guest.* Two "At homes." May and July, members free; guests 3s. 6d. Six country dances. Members 4s. double, 2s. 6d. single, guests 3s. 6d. *Members and non-members.* 19 square dances, 4 country dances; members 4s. double, 2s. 6d. single. Others 6s. double, 3s. 6d. single. (August) 4 community dances 4s. double, 2s. 6d. single for all.

(ii) *Coronation Week* . . . Community dances. Folk song recitals and demonstrations by visiting Morris teams. Members and associates free, guests 3s. 6d. Anglo-Scottish ball, organized jointly with the Royal Scottish country dance society. Members only 4s. double, 2s. 6d. single. In addition the society organized four children's and four adults' dances at the Geffrye Museum, London, E.2.

(iii) *Courses* . . . 11 ten-week courses were held in country, Morris and sword dancing of varying grades; folk songs; square dancing and callers' practice. Charges were variously £1 10s., £1 5s. and £1 for non-members and for the same classes

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£1 5s., £1 or £1 1s. and 15s. for members. In some courses there was a reduced price for a double entry which was the same for members as for non-members.

(iv) *Miscellaneous* . . . April 15. Evening of folk songs. Members free. Others 2s. 6d. May 15. Folk song recital. Members and associates free. Others 2s. 6d. May 18. Illustrated talk on Indian stick dances. Members 1s., associates 1s. 6d. Others 2s. June 8. Display by South African folk dancers. Tickets 3s. 6d. for all. June 15. Films of Mexican Pole and Californian square dances. Members 2s. Others 3s. June 20 and 27. In conjunction with the London County Council public performances were given in two public parks. Members and non-members paid the same rates. July 25, to August 1. Summer holiday course at Bangor. Members £2. Others £2 5s. Bookings were about 30 members and 90 to 100 non-members. August 1 to 15. Stratford-upon-Avon festival under the society's direction, August 15 to 29 Anglo-American folk dance course at Barford, Warwickshire; members and non-members paid the same rates.

13. The provincial events appear to be the same in principle as those listed in paragraph 12 though they were not held so frequently.

14. Folk dancing has its origin either in the spontaneous expression of emotion on the part of the folk—that is, the whole population in a primitive community—or in some sort of ritual or religious act, or in both. In Europe it is mainly of religious pre-Christian origin and ritualistic in character, but most of it has changed gradually through the ages from a religious meaning into an art form. Its performance in its traditional form ought to be unselfconscious. Its technique is best acquired by repetition over a long period until in the words of Mr. Douglas Kennedy "the mind as it were, is knocked silly and the body assumes its "own status and responsibility for its actual behaviour." The reason for this is that, again in Mr. Kennedy's words, folk dancing "depends for its finest expression on a bodily capacity to "express, and one of the factors which operates most directly "against this freedom of bodily expression is a conscious "knowledge, or a conscious attempt at knowledge, of what the "body is doing." Folk dancing differs from ballet dancing in that the latter is almost impossible without a conscious technical appreciation of what is to be done, so that the ballet dancer does not depend on spontaneity but on disciplined capacity.

15. Folk dances include Morris dances, sword dances and country dances (Playford and traditional). The term "square "dance" is the American equivalent of the English "country "dance." The round country dance is thought to derive either from the maypole round or (in the form of a chain dance) from the pre-Christian carol, and the square dance has grown out of the round or chain. The founder of the society, Cecil Sharp,

first encountered the American square dance in 1917 as a traditional dance of the mountains of Kentucky. Its origin is believed to be British though its precise provenance has been the subject of controversy in the society's magazine. . . . The society includes, and has for some time included, American square dances in the subject-matter of its activities, and before the war of 1939–1945 used to add to its repertoire by annual visits to the United States. As a result of the attendance of Her Majesty the Queen (then Princess Elizabeth) at a square dance party in Canada in 1951, square dances became immediately popular in England and in many cases were commercialized. The society does its best to stick to the traditional forms, but is not always completely successful, because to some extent there is an overlap. The square dances practised by the society can, however, be quite recognizably distinguished from the rather more flashy square dances which have appeared on television, and which have been mainly of the variety danced (for example) at holiday camps. The society could not persuade the B.B.C. to show its variety on television, as the latter considered the society "stuffy." For some years the society co-operated with the B.B.C. on sound programmes connected with folk dancing, but recently the society has refused to continue this co-operation since in its view the broadcast programmes have concentrated too much on the purely entertainment value of folk dancing. Among the general public there has been a certain amount of confusion as to what is meant by the square dance, and the society's square dances are not what the ordinary person in the street would expect as a square dance. Since the recent popular fashion referred to above the society's dances have been attended by a large mass of the public that is ephemeral. Such visitors are a little disappointed when they find that the dances performed differ from the commercialized versions of square dances and how staid the society's dances are. A few go off in haste, but most of them stay and have their money's worth, and have an evening when they can enjoy and learn something. A proportion (estimated as between 10 per cent. and 50 per cent. in London) become permanently interested in the society. Occasionally the society has had to refund money to people who have come to its square dances, and complained that the dancing was not "square dancing at all." Community dances are country dances similar to square dances. Better known examples of square or country or community dances, some of which have appeared in the ballroom in a commercialized form, are the Virginia Reel, "Strip the willow" (which is the Scottish version of the English country dance "Drops of Brandy"), "Sir Roger de Coverley," "The Dashing White Sergeant" and certain versions of the quadrille and "The Lancers."

16. Singing games originated from the pre-Christian carol and usually contained a mixture of the drama, the mime, the playing of a game and a certain amount of dancing. They are part of

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folk tradition and were originally performed by grown-up people; but only fragments have survived, mainly preserved by children, of which fragments "Roman soldiers," "Gathering nuts in "May" and "Here we go round the mulberry bush" are examples. The society regards singing games as being of great interest as representing survivals of old rituals; in its early days it did a great deal of work in collecting them, and included them in its courses of instruction, particularly for school teachers at primary schools. It does not now itself teach singing games, but it has records of them and its teachers advise and help school teachers in connexion with their teaching.

17. The only method of preserving folk dances is by demonstration and teaching; for there is no simple method of notation of dances comparable to a musical score. No doubt those who attend the society's dances enjoy them, but the instructional element is always present, although the society naturally endeavours to make it as unobtrusive as possible and its events are most successful when this is done. Although the words "social events" are used in the accounts the evidence showed that this description was used as a generic term to cover all the dances and similar functions held at Cecil Sharp House and that the only one of the society's activities which can properly be described as a purely social event was the members' children's Christmas party.

18. Folk song and folk dancing are very closely inter-related. Evidence was given that folk song and folk dance airs form one of the principal sources of all music and have served as an inspiration to many composers past and present. Reference was made in particular to the music of Dr. Vaughan Williams, the president of the society. This would not apply to folk dancing, but one or two choreographers have used folk dance forms in ballet. Massine was cited as an example.

19. The society's total income as shown by the accounts for the year ending March 31, 1952 . . . was £32,667. This figure included a grant of £750 from the Arts Council of Great Britain to cover the cost of performance of "Folk Dances of the British "Isles" given by the society in the Royal Albert Hall during the Festival of Britain. The Arts Council was incorporated in or about 1946. According to its charter, it was founded "for the "purpose of developing a greater knowledge, understanding and "practice of the fine arts exclusively," and the deputy secretary of the council, who conceded that he was not an artistic expert, expressed the view that this precluded it from helping any society that practised anything other than the fine arts. During the years 1940–1941 to 1945–1946 inclusive the council's predecessor, the council for the encouragement of music and the arts (which in 1945 changed its name to "the Arts Council of "Great Britain," but was not then incorporated), made annual grants of £500 to the general funds of the society. In 1946 the society received its first direct government grant, from the

Ministry of Education; as a result of financial help to the society being taken over by the Ministry, the council's predecessor made no further grants to the general funds of the society, and the council has made no such grants since its incorporation. It has, however, made three grants for specific purposes; besides the grant of £750 referred to above, there was a grant of £850 in 1950 towards the cost of a mural painting at Cecil Sharp House and a grant of £500 in 1952 towards the expenses of an international conference on folk music for which the society acted as hosts in this country.

The conclusions of the Lands Tribunal were stated as follows: 23. On the evidence before us we came to the conclusion that there was no reason why dancing, which is a form of expression similar to music, drama and painting, could not qualify for inclusion within the term "fine art," and we were of opinion that the activities of the society as enjoined by the memorandum of association and as carried out by them were devoted to the purposes of the "fine arts" exclusively.

24. We were further of the opinion that although the members of the society had certain privileges vis-à-vis non-members, this can be said of most learned societies. We considered that these privileges were only incidental to the main purposes of the society and did not debar it from claiming exemption under the section.

25. Finally we came to the conclusion that the amount of £7,000 odd out of total income of £32,000 odd in 1952 was represented by subscriptions and donations of members and that this was sufficient to enable us to come to the conclusion that the society conformed to the requirements of the provisions of section 1 of the aforesaid Act in that it was in part supported by annual voluntary contributions.

The tribunal accordingly dismissed the appeal.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

Cyril Harvey Q.C. and *A. C. Goodall* for the society.

In addition to the cases referred to in the judgments, the following were cited in argument: *Reg* v. *Brandt* [2]; *St. Marylebone Vestry* v. *London Zoological Society* [3]; *British Launderers' Research Association* v. *Hendon Rating Authority* [4]; *Reg.* v. *Institution of Civil Engineers* [5]; *Royal Choral Society* v. *Inland Revenue Commissioners* [6]; *Webber* v. *Norfolk Naturalists' Trust*,[7] and *Linnean Society* v. *St. Anne (Churchwardens)*.[8]

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[2] (1851) 16 Q.B. 462.
[3] (1854) 3 E. & B. 807.
[4] [1949] 1 K.B. 434, 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.
[5] (1879) 5 Q.B.D. 48.
[6] [1943] 2 All E.R. 101; 169 L.T. 100.
[7] (1952) 45 R. & I.T. 6.
[8] (1854) 3 E. & B. 793.

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the Lands Tribunal and the local valuation court, entitled to exemption from rates in respect of the premises known as Cecil Sharp House in Regent's Park Road, London, which the society owns and occupies. The claim to exemption is based on section 1 of the Scientific Societies Act, 1843, which, so far as is relevant, reads: "No person or persons shall be assessed or rated . . . in "respect of any land, houses or buildings . . . belonging to any "society instituted for purposes of science, literature, or the fine "arts exclusively, either as tenant or as owner . . . provided that "such society shall be supported wholly or in part by annual "voluntary contributions. . . ."

The case comes before us on a case stated in which all the facts found, or given in evidence, are set forth and to which full reference can, if necessary, be made. Out of respect for the arguments, and so as to make this judgment intelligible, I will, however, refer to certain of the paragraphs in the case. Paragraph 9 sets out the objects of the society, which are taken from its memorandum of association. [His Lordship read paragraph 9 (ii) (a) to (e) and continued:] Sub-paragraph (f) relates to the making of instruments; and an argument was based upon the proposition that, assuming a particular instrument in general use is requisite for use also in folk dancing, the memorandum authorized (and it was, therefore, one of the purposes of the society) the making and selling of those musical instruments. But in the event I think nothing turns on that particular matter.

Paragraph 11 of the case sets out the society's activities and shows that they include such matters as examinations, publications, records and films, the employment of teachers, and the holding, at Cecil Sharp House and elsewhere, of dances, "At "Homes," courses, exhibitions, demonstrations, recitals and festivals. There is also a reference made to the very extensive, and I think valuable, library kept at Cecil Sharp House; and, finally, there is a reference to the competing by members of the society in such events as the annual Eisteddfod.

Paragraph 12 amplifies by way of example the previous paragraph, for it sets out a summary of the events of the year 1952–53, which shows that there were a number of "At Homes" and dances at which members, their guests, and other persons were present, and that there were courses held. Also, since the year was Coronation Year, there were particular festivities arranged for Coronation Week.

Paragraph 14 is of considerable importance. [His Lordship read the paragraph, and continued:] In paragraph 15 reference is made to the character of the dances comprehended by the term "folk dances." Particularly the phrase includes square dances, which appear to have been discovered as existing in the mountains of Kentucky. Reference is also made to a notable event, namely, the attendance of Her present Majesty (then Princess Elizabeth) at a square dance party in Canada in 1951, an event which gave enormous stimulus to the activities of the society. The paragraph

goes on: "The square dances practised by the society can, however, be quite recognizably distinguished from the rather more "flashy square dances which have appeared on television, and "which have been mainly of the variety danced (for example) at "holiday camps. The society could not persuade the B.B.C. to "show its variety on television, as the latter considered the "society 'stuffy.' For some years the society co-operated with "the B.B.C. on sound programmes connected with folk dancing, "but recently the society has refused to continue this co-operation since in its view the broadcast programmes have concentrated too much on the purely entertainment element of folk "dancing. Among the general public there has been a certain "amount of confusion as to what is meant by the square dance, "and the society's square dances are not what the ordinary "person in the street would expect as a square dance. Since the "recent popular fashion referred to above, the society's dances "have been attended by a large mass of the public that is "ephemeral. Such visitors are a little disappointed when they "find that the dances performed differ from the commercialized "versions of square dances and how staid the society's dances "are. A few go off in haste, but most of them stay and have "their money's worth, and have an evening when they can enjoy "and learn something."

In paragraph 16 there is a reference to singing games. [His Lordship read the paragraph and continued:] Paragraph 17 sets out the fact that the only method of preserving folk dances is by demonstration and teaching, as they are not susceptible of the ordinary notation of a musical score. The conclusion of the Lands Tribunal upon this point is expressed in paragraph 23. [His Lordship read paragraph 23 and continued:] From the evidence given and recorded in the case it is possible to state, at least in negative form, certain characteristics of the society and its activities. Thus: (1) The activity or "art" (if it is properly so called) of folk dancing and singing is not in any sense creative. The painter creates a picture which remains to be seen, appreciated and judged. In the case of music there is the presentation by an orchestra or individual players of the composer's composition. In the case of folk dancing and singing the purposes of the society are not to create anything and then present it for appreciation; but rather to encourage the performance by as many persons as possible of the old and traditional dances and songs in the old and traditional manner. (2) The society does not claim to appeal to the mind, or even, as I understand, to the faculty of taste. The passages which I have read from the evidence show the society's ideas to be that the dancer is so taught that he executes with his body, as far as is possible, spontaneous movements said to be expressive of natural or ritualistic physical impulses. The result may be pleasing or picturesque to the beholder but no claim is made to exhibit the beauties or graces of the human form. Artistic performances cannot be said to be the aim, still

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less the raison d'etre, of folk dancing. The controversy with the British Broadcasting Corporation seems to show a repudiation on the part of the society of any claim to please or attract the aesthetic sense of an audience.

In the circumstances, I have been conscious of an essential difficulty of formulation, namely, what is it in regard to folk dancing or singing which is said to be "a fine art"? To that question the only possible answer seems to me to be the actual performance by the dancers or singers of the old traditional songs and dances, the characteristics and requisites of the execution of which being those I have already recited. I have referred to the fine arts as one of the trilogy in section 1 of the Act, science, literature and the fine arts. Literature has no relevance in the present case, but the society has contended that it was in part instituted for the purpose of science, as that word should be understood in the Act. In support of this contention, counsel has pointed to the considerable research undertaken into the origins of folk songs and dances and to the learning devoted thereto, and to the propagation of public interest therein. I myself feel grave doubt whether any activities of the society could be classified as scientific within the meaning of the section. It is not, of course, suggested that all such activities are scientific; and in any event it must be shown that the residue falls within the category of "a fine art"; for it is not to be forgotten that to obtain the exemption provided by the Act the society must be shown to be instituted for the purposes of science and the fine arts exclusively. Therefore, the remainder—the non-scientific part—of the society's activities must in any event be comprehended by the term "the "fine arts"; or, to adopt the expansion of the language of the section used by A. L. Smith L.J. in *Royal College of Music* v. *Vestry of St. Margaret's and St. John's, Westminster*,[1] all such activities must be shown to constitute the advancement, dissemination or propagation of the fine arts, including the actual performance of the dances and songs themselves.

The real question in the case, therefore, in my judgment, is whether the society's purposes, in so far as they are not, if indeed they are at all, scientific, can be said to be for the purposes of the fine arts. The expression "the fine arts" is one well known to, and recognized by, all users of our language. Treating the question as one of the impression made by such words upon my own mind, and without the assistance of any dictionary definitions or of decided cases in the courts, I would say unhesitatingly that the society is not, according to my understanding of the language, instituted for the purposes of the fine arts. To take but one example (and if it be thought extreme it is to be remembered that the society must show itself "exclusively" so instituted), I cannot persuade myself that the performance, however faithful to tradition, by members of the society of the singing game

[1] [1898] 1 Q.B. 809, 817; 14 T.L.R. 351.

"Here we go round the mulberry bush" can sensibly be regarded as an exhibition of the fine arts. Having taken that example, I wish to make it quite plain that I am not to be taken to be casting any doubt whatever on the seriousness of the society's activities or the genuineness of its members' devotion to the society's pursuits, or, indeed, on the social value and utility of what the society does. No such denigration of its work can fairly be made of a society having so well-established a reputation as this society has, and having as its president so distinguished a musician as Dr. Vaughan Williams. But the court is not concerned with social uses or values, but only with the narrow question whether the society is instituted for the purposes exclusively of the fine arts, or of science and the fine arts within the meaning of the Act of 1843.

I am not restricted to my own understanding of the term because we were referred to the definitions found in well-known dictionaries. Thus, according to the Oxford English Dictionary, the term "fine arts," which appears originally to have been a translation from the French "beaux arts," is "arts which are "concerned with 'the beautiful,' or which appeal to the faculty "of taste . . . Often . . . restricted . . . to the arts of design, "painting, sculpture, and architecture." Under the word "art" in the same dictionary is found: "fine arts: Those in "which the mind and imagination are chiefly concerned." We were also referred to the following passage in the seventh edition of the Encyclopaedia Britannica. "The fine arts. The "term fine arts may be viewed as embracing all those arts "in which the powers of imitation or invention are exercised "chiefly with a view to the production of pleasure by the "immediate impression they make on the mind. But the "phrase has of late we think been restricted to a narrower and "more technical signification, viz., to painting, sculpture, archi-"tecture and engraving which appear to the eye as the medium "of pleasure, and, by way of eminence, to the two first of these "arts." It appears that the entry which I have just quoted was from the edition published in the years 1830 to 1842 and was contributed by no less a master of our tongue than Mr. William Hazlitt. Having regard to the characteristics of the activities cultivated by the society as I have taken them from the evidence, they fall, in my judgment, outside even the broad definitions which I have cited. I do not forget Mr. Harvey's argument that whatever may have been intended by Parliament by its language in 1843 the terms used may fairly be shown to have been since expanded. I do not dissent from that view or say that the doors of the pavilion of fine arts were finally closed in 1843. Thus, there are many subjects of technique and research which can now be regarded as applied science, though they were not dreamed of in the philosophy of 1843. Similarly, it may be (though I do not so decide) that the art of photography, which in 1843 would have been at most a scientific curiosity, would in 1955, at least

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in some of its aspects, lay claim to be regarded as a fine art. But there is no finding here that at any time since 1843 folk dancing and singing have been accepted as among the company of the fine arts by the community generally or by the more educated and cultivated section of the community.

It is clear that there is no authority directly bearing upon the present question in the books. The cases may, I think, fairly be said to show that the fine arts are not now interpreted according to the more restricted definition of the plastic arts alone. Thus, music must now be taken as among the fine arts since the *Royal College of Music* case,[2] which I have already quoted. This court in *Nonentities Society* v. *Linley and Kidderminster Borough Council*[3] had before it the claim to exemption of a society instituted for purposes of the drama and dramatic performance. In the event it was not necessary for this court to decide whether a society so constituted was instituted for the purposes of fine arts, for the court held that in any case the Nonentities Society failed to satisfy the later requirement as to voluntary contribution; but the majority of the court were undoubtedly inclined to favour the view that the presentation of acknowledged masterpieces in drama would be within the term "fine arts." Thus Somervell L.J. said[4]: "Having come to that conclusion"—that is, in regard to voluntary contributions—"it is unnecessary to "decide the other points, some of them very interesting points, "which were raised. It was submitted, on behalf of the valuation "officer, in the first instance, that drama and dramatic art and "the art of acting ought not to be regarded as a matter of law "as within the words. It is quite true that the expression 'fine "'arts' is sometimes used to mean painting, sculpture, and, "perhaps, architecture, but it is plain from the decisions that "it cannot be regarded as so limited in this section. In a case "which is referred to in Jenkins J.'s judgment, music has been "held to be within the words. I was not satisfied that it could "possibly be said that drama and acting as a matter of law must "be excluded from the ambit of the words in the section." Birkett L.J., in like manner, said[5]: "I am not ready to accept "the contention of counsel for the valuation officer that dramatic "art cannot be included in the fine arts or that the presentation "of plays at a theatre may not qualify under the heading of "literature. If, for example, a theatre produced plays like "*Twelfth Night*, I think that there might be a considerable "argument on the matter." Romer L.J.,[6] on the other hand, indicated a contrary opinion.

The effect of the case to my mind is, however, to show that any addition to the class of fine arts which might otherwise be restricted to the plastic arts would have to be of activities showing a true analogy to the primary instances. At least, it

[2] [1898] 1 Q.B. 809.
[3] (1954) 47 R. & I.T. 426.
[4] Ibid. 428.
[5] Ibid. 429.
[6] Ibid. 430.

is clear that there has been no case before the courts concerned with dancing. In the case of ballet dancing there would, as it seems to me (though I do not so decide), be substantial claims for inclusion in the class of fine arts which would not be available to folk dancing. On the other hand, to my mind it would, prima facie, offend the sense of propriety of language that a society formed for the purpose of cultivating the practice of modern ballroom dancing could bring itself within the section. Yet the society's argument seems inevitably to involve that result when regard is had to the evidence I have cited—or certainly to involve that result if, instead of modern ballroom dancing, there were substituted, say, the more graceful ballroom dances of the eighteenth or nineteenth century. Mr. Harvey, indeed, contended that a society for cultivating (amongst other things) what should be appreciated as good or bad in ballroom dancing would be within the section as a society constituted for the purposes of fine arts. I am not myself clear by what standard goodness or badness, in the example given, would be judged. But I assume that Mr. Harvey intended an appeal to cultivated taste. As I have said, any such appeal seems to me to be expressly excluded and repudiated by much of the evidence given in the present case, unless it be assumed that the standards of taste are necessarily satisfied by the mere antiquity of folk songs and folk dances. In any case, even if such a claim could possibly be justified in the case of the more austere aspects of the society's activities, it must, as I have already more than once stated, be established that the society's purposes are exclusively those of the fine arts.

Finally, the view of the Lands Tribunal, which I have read, and which was expressed by them in paragraph 23 of the case, seems to me to involve the acceptance of the claim, prima facie, that dancing is to be considered as one of the fine arts. If I may repeat the reference, it is: "On the evidence before us "we came to the conclusion that there was no reason why "dancing, which is a form of expression similar to music, drama "and painting, could not qualify for inclusion within the term "'fine art' and we were of opinion that the activities of the "society as enjoined by the memorandum of association and as "carried out by them were devoted to the purposes of the 'fine "'arts' exclusively." If the premise is accepted there is, no doubt, much to be said for the conclusion; but, with all respect to the Lands Tribunal, I am not prepared for my part to accept the premise. I do not think it possible to say that all dancing is, prima facie, within the term "fine art": nor can I agree with the correctness of the analogy in the sentence ". . . "dancing, which is a form of expression similar to music, drama "and painting, . . ." In my judgment the references I have made to the dictionaries and authorities confirm the impression of my own unaided mind, and I conclude accordingly that the society fails to satisfy the requirements of the statute to the

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effect that it is instituted exclusively for the purposes of the fine arts or of science and the fine arts.

In the result it is unnecessary to express any view on the second point, raised by Mr. Lyell in the appeal, namely, whether, even if the society be treated as one instituted exclusively for the purposes of the fine arts, or of science and the fine arts, it is still not shown to be wholly or partly—that is, to any appreciable, relevant extent—supported by annual voluntary contributions. I must return to the case to make some further references to the facts. Paragraph 10 of the case shows that in March, 1953, the society had 3,600 full members, 7,350 associates, and 95 donor members or contributors, of whom (referring to the donor members) rather over one-third are also full members. Each year a full member or a donor member subscribes 25s., and an associate 7s. 6d. There follow the privileges to which members are entitled; for example, free copies of the annual journal and a participation, at favourable rates, in certain of the functions organised by the society—dances, "At Homes," etc. In paragraph 12, to which I earlier referred, containing a summary of the events in the year 1952–1953, there is shown in the case of the various activities, "At "Homes," dances, and so forth, what a member paid to participate as compared with the charges made for non-members and, as indicated, these members' charges were smaller than those made to strangers. It is said that in fixing the charges the society goes upon the view that the dances, "At Homes," and so forth, should pay their way upon the footing that only members are present, assuming they are well attended, and the result of making the additional charges to non-members is merely to increase accordingly, for the general purposes of the society, the profits that are made. The conclusion of the tribunal upon those facts [as stated in paragraphs 24 and 25 of the case] was: "We were further of the opinion that although the members "of the society had certain privileges vis-à-vis non-members, "this can be said of most learned societies. We considered "that these privileges were only incidental to the main purposes "of the society and did not debar it from claiming exemption "under the section. Finally we came to the conclusion that "the amount of £7,000 odd out of a total income of £32,000 odd "in 1952 was represented by subscriptions and donations of "members"—that, of course, meant annual subscriptions and donations—"and that this was sufficient to enable us to come "to the conclusion that the society conformed to the require-"ments of the provisions of section 1 of the aforesaid Act in that "it was in part supported by annual voluntary contributions."

Mr Lyell's point in opening the case was that the ordinary subscribers could not be said to be voluntary contributors because they got some material advantages from their membership, particularly the right to attendance at the dances and other festivals of the society at prices appreciably below the prices charged to

outside members and the public. Mr. Lyell accordingly referred to and relied upon *Overseers of the Poor and Chapel Warden of the Royal Precinct of the Savoy in the County of London* v. *Art Union of London*,[7] the headnote of which reads: "A society is "not 'supported by voluntary contributions' within the meaning "of 6 & 7 Vict. c. 36, section 1, when it returns to every contri- "butor the equivalent of his contributions in money's worth. "'Voluntary' as there used does not mean compulsory; it means "gratuitous, without any money or other merely material con- "sideration." It will be seen that the second sentence of the head- note appears to go considerably further than the first sentence. The two questions, namely, whether the society is one instituted exclusively for the purposes of the fine arts, and, second, whether it is supported in part by annual voluntary contributions, are necessarily somewhat interdependent in that, on the one hand, the facts as regards the prices charged for the various functions tend in themselves somewhat to support the view that the cultiva- tion of folk dances and singing is not as such a fine art. On the other hand, if the society is properly regarded as one instituted for the purposes of the fine arts, I am not, as at present advised (although, again, I do not so decide), prepared to say that they would be disqualified from exemption on the ground that the subscribers could not be said, on the grounds already stated, to be annual voluntary contributors. The basis, as I understand it, of the decision of the House of Lords in the *Art Union* case [7] was that the subscribers were there in effect making an investment. That is most clearly shown from the final paragraph in the speech of Lord Halsbury.[8] "It hardly admits of debate that the Art "Union gives to every subscriber full value for his money. The "document published by the art union itself appears to establish "very clearly that the subscriber obtains as an equivalent for his "contribution money's worth at least equal to if not beyond "the amount he has subscribed. I cannot therefore regard this "as a voluntary contribution; it is a prudent and well-rewarded "investment."

Every member of a learned and scientific society gets in the ordinary course, as Mr. Lyell conceded, some privileges: for example, the receipt of the publications of the society. In truth, to my mind, the question is one of substance and degree, and for this purpose I am content to adopt the language of my brother Jenkins in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association*.[9] Jenkins L.J. said [10]: "This does "not, however, mean that a subscription is prevented from being "a voluntary contribution merely because it carries with it mem- "bership of the society and certain incidental advantages are "conferred by membership. The substance of each case must "be looked at to see whether the payments claimed to be

[7] [1896] A.C. 296; 12 T.L.R. 377.
[8] [1896] A.C. 306.
[9] [1949] 1 K.B. 434; 65 T.L.R. 183.
[10] [1949] 1 K.B. 457.

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" voluntary contributions are, in substance, made as a matter of " business, or as a matter of bounty."

Being a matter of degree, the question, then, is prima facie one of fact. The difficulty here is that, in the paragraph which I have already read, I do not find any such finding. But I do not in the circumstances, for reasons already indicated, propose to express any opinion of my own. I say only that as at present advised I am not prepared to accept the view that a subscription ceases to be a voluntary contribution merely because, as part of the rights of membership, the subscriber may obtain some privilege which could be said to have a monetary value, or the deprivation of which entitles him to claim compensation expressed as a monetary loss or as damages.

For the reasons I have expressed on the first question, I think that this appeal must be allowed.

JENKINS L.J.: The issue in this appeal is whether, as the Lands Tribunal has held, the society is entitled, in respect of its premises, Cecil Sharp House, 2 Regent's Park Road, London, to the exemption from rates afforded by section 1 of the Scientific Societies Act, 1843, to the premises of " any society instituted for " purposes of science, literature, or the fine arts exclusively . . . " provided that such society shall " (amongst other conditions as to which no question arises) " be supported wholly or in part by " annual voluntary contributions."

It is contended on the part of the valuation officer (i) that the society is not instituted for purposes of science, literature, or the fine arts exclusively within the meaning of the section; and (ii) that, even if contrary to his contention the society is so instituted, it is not supported wholly or in part by annual voluntary contributions within the meaning of the section. If either of these contentions is well founded the appeal must succeed, for in order to qualify for the exemption the society must satisfy both conditions.

The society was incorporated under the Companies Act, 1929, as a company limited by guarantee, with the licence of the Board of Trade to dispense with the addition of the word " limited " to its name under section 19 of that Act. The objects of the society as set out in its memorandum of association include those to which the Master of the Rolls has already referred. The facts as to membership of the society are summarized in paragraph 10 of the case stated by the Lands Tribunal.

The society's activities are described in paragraph 11 of the case, and although my Lord has already referred to that paragraph, I may, perhaps, mention some of those activities. Paragraph 11 states: " The society's activities include the follow- " ing," and then reference is made to examinations for proficiency in folk song and dancing and the award of certificates. There are publications, records and films, which are sold at a profit, although that profit is but an insignificant proportion of

the total income of the society, a matter of £1,700 out of a total income of £32,000 odd. It appears that the society employs teachers who hold classes at which folk dances and songs are taught, and they also adjudicate at competitions. Reference is made at considerable length to the events promoted and organized by the society at Cecil Sharp House and elsewhere. I think it is noteworthy that the list includes events such as dances of various sorts, some of which are open to members and non-members while others are open only to members and their guests, namely, country dances, men's Morris and sword dances, community dances, and square dances. There are also " At " Homes " which are open only to full members or in some cases also to associate members, and their guests, and there are occasions on which members can meet the director and each other and practise rather more advanced and complicated dances. Then there are holiday courses in folk dancing and song; exhibitions of films of folk dancing; lectures and classes; demonstrations of folk dancing; recitals of folk songs and folk music; and folk dancing festivals, which the society promotes alone or in conjunction with others. It is mentioned that Cecil Sharp House only accommodates 250 dancers, and that members attending the dances there almost invariably bring guests. Sub-paragraph (e) of paragraph 11 says that the society keeps a library at Cecil Sharp House, details of which are set out in one of the attached documents. There is apparently no other comparable library in England and Mr. Howes did not know of any other in Europe. [His Lordship read sub-paragraphs (f) and (g) and continued:]

This information is amplified in great detail in paragraph 12 of the case, which gives particulars of events held by the society in the autumn and summer seasons in the year 1952/1953. Reference in made in paragraph 13 of the case to provincial events which are described as the same in principle as those listed in paragraph 12. In paragraph 14 of the case there is a description of folk dancing to which my Lord has already adverted.

Paragraph 15 explains that folk dances include Morris dances, sword dances, country dances and square dances, the latter being described as the American equivalent of the English country dance. In paragraph 16 of the case singing games are mentioned, and such things as " Roman soldiers," " Gathering nuts in May," and " Here we go round the mulberry bush " are given as examples. The paragraph says that the society regards singing games as being of great interest as representing survivals of old rituals. Apparently, it does not now itself teach singing games, though it formerly did so; but it has records of them and its teachers advise and help school teachers in connexion with the teaching of such games. I should also refer to paragraphs 17 and 18 of the case. [His Lordship read the paragraphs and continued:]

Paragraph 19 of the case refers to certain grants made to the society by the Arts Council of Great Britain and its predecessor

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the Council for the Encouragement of Music and the Arts, apparently as implying recognition of those two bodies by the society as having for its exclusive object the furtherance of fine arts, or some or one of them. That, however, is a question for the court to decide on the facts found, and not by reference to any opinion upon it which may have been expressed or implied by the Arts Council of Great Britain or the predecessor of that body.

In paragraphs 24 to 26 of the case, the Lands Tribunal expresses its conclusions and the question of law for the opinion of the court. [His Lordship read those paragraphs and continued:]

The society claims that on the facts as found in the case it was rightly held by the Lands Tribunal to be instituted for purposes of the fine arts exclusively within the meaning of the exempting section; and further or alternatively, that if and so far as any of its purposes are not purposes of the fine arts they are, within the meaning of the section, purposes of science exclusively, so that the society is entitled to the exemption as being, within the meaning of the section, either a society instituted for purposes of the fine arts exclusively or a society instituted for purposes of science and the fine arts exclusively. It is clear from the case that before the Lands Tribunal (although the decision did not deal with this alternative basis of exemption) the society based its claim on purposes of science as well as purposes of the fine arts; but the argument based on purposes of science took, at all events before us, a secondary and subordinate place. The scientific element in the society's purposes is said to consist in the historical and anthropological or ethnological study and research, the promotion and encouragement of which form part of its objects. These activities might, I suppose, be described as being in a broad sense scientific; but even if they are purposes of science within the meaning of the section there remain other and leading objects which to my mind are clearly not purposes of science and can only qualify for the exemption (if they are to qualify at all) on the ground that they are exclusively purposes of the fine arts.

I pass, therefore, from the claim based on the purposes of science and address myself to the crucial question whether those objects of the society which cannot be classed as scientific are purposes of the fine arts exclusively within the meaning of the section. Excluding from consideration as possibly scientific in content paragraph 3 (c) of the memorandum [paragraph 9 (ii) (c) of the case], which is "to promote and encourage research and "study of the origins, development and traditional practice of "English folk dances songs and music and their relationship with "those of other countries," one is left, so far as leading objects are concerned, with paragraph 3 (a) and (b) of the memorandum [paragraphs 9 (ii) (a) and (b) of the case], namely: "(a) to "preserve English folk dances and songs and other folk music

" (including singing games), to make them known and to encourage " the practice of them in their traditional forms. (b) to promote " the knowledge and practice of English folk dances, songs and " music by means of schools, classes, examinations, lectures, " demonstrations, festivals and other like methods." These objects must be read in the light of the facts found in the case, which show (see paragraph 15) that folk dances include Morris dances, sword dances and country dances, of which " Sir Roger " de Coverley " is an example, and that country dances include square dances, of which " The Lancers " is an example. They show further (see paragraph 16) that singing games include such old favourites as " Gathering nuts in May " and " Here we go " round the mulberry bush."

Object (a) must thus be read as directed (inter alia) to the preservation and making known and encouraging the practice in their traditional forms of folk dances, including country dances such as " Sir Roger de Coverley " and " The Lancers," and of folk music including singing games such as " Gathering nuts in " May " and " Here we go round the mulberry bush." Similarly, object (b) must be read as directed to the promotion of the knowledge and practice of folk dances (including as above) and folk music (including as above) by means of schools, classes, examinations, lectures, demonstrations, and other like methods. Are these objects, which are clearly not purposes of science, and none of which has been claimed to be purposes of literature, purposes of the fine arts exclusively within the meaning of the section?

By way of approach to that question we were referred to various definitions of the terms " art," " fine art " and " the fine " arts " in the Oxford English Dictionary and in the 7th and 8th eds. of the Encyclopaedia Britannica, covering the period from 1830 to 1860 and thus spanning the date of the Scientific Societies Act, 1843. The Oxford English Dictionary has under " Art ": " 10. A pursuit or occupation in which skill is directed towards " the gratification of taste or production of what is beautiful. " Hence ' the arts ' (specifically)—' The fine arts.' . . . 11 (a) " . . . ' Industrial, mechanical, useful arts: those in which the " hands and body are more concerned than the mind. ' Fine " ' arts ': Those in which the mind and imagination are chiefly " concerned." The Oxford English Dictionary has under " Fine ": " Fine art, in plur. the arts which are concerned with ' the " ' beautiful ' or which appeal to the faculty of taste; in the " widest use including poetry, eloquence, music etc., but often " applied in a more restricted sense to the arts of design, as " painting, sculpture, and architecture."

The 7th and 8th editions of the Encyclopaedia Britannica have under " The fine arts " the following introductory passage: " The fine arts. The term fine arts may be viewed as embracing " all those arts in which the powers of imitation or invention are " exercised chiefly with a view to the production of pleasure by

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" the immediate impression they make on the mind. But the " phrase has of late we think been restricted to a narrower and " more technical signification, viz., to painting, sculpture, archi- " tecture and engraving which appear to the eye as the medium " of pleasure, and, by way of eminence, to the two first of these " arts."

I am prepared to accept the wider meaning assigned to " the " fine arts " in the above definitions and to treat them as including, for example, poetry, eloquence, and music as well as such " arts of design " as painting, sculpture, and architecture. We are indeed bound for the present purpose to include music amongst them. (See the case in this court of *Royal College of Music* v. *Westminster Vestry*.[11]) It is possible that dramatic art should also be included. (See the *Nonentities Society's* case,[12] where the question was discussed but not decided, as the society's claim to exemption under the Act of 1843 failed on the ground that it was not supported wholly or in part by annual voluntary contributions.) If music and drama rank as fine arts, I see no justification for holding, as a general proposition, that dancing, which in some of its forms is closely allied to music and the drama, can never do so. I observe that the Oxford English Dictionary under the word " ballet " says that it is " now for the " most part regarded as an artistic exhibition of skill in dancing," and this perhaps affords an example of a form of dancing fit to be recognized as one of the fine arts. But it by no means follows that all dancing is in itself fine art, or that everybody who dances any form of dance on any occasion is practising the fine art of dancing. An artistic exhibition of skill in dancing may be fine art, but I cannot bring myself to hold that dancing of the sort in which the assembled company take part for their own amusement at a ball or similar function can properly or reasonably be so described. Dancing of that sort is to my mind no more than a recreation or pastime—dancing as a social amusement as distinct from dancing as a fine art.

Applying these considerations to the present case and restating the two leading objects of the society in summary form, I find that so far as dancing is concerned the purposes of the society include making known English folk dances, encouraging people to dance them in their traditional forms, and teaching people how to do so. Bearing in mind the inclusion in English folk dances of country dances such as " Sir Roger de Coverley," and square dances such as " The Lancers," I find more specifically that the society's leading objects include making known country dances such as " Sir Roger de Coverley " and " The Lancers," encouraging people to dance them in their traditional forms, and teaching people how to do so. Quite clearly these objects extend to the reintroduction or perpetuation in recreational dancing of old-fashioned country or square dances such as " Sir Roger de

[11] [1898] 1 Q.B. 809. [12] 47 R. & I.T. 426.

"Coverley" and "The Lancers," done as they used to be done in olden times, and giving people who enjoy dancing of this kind facilities for taking part in it. I cannot hold these to be purposes of the fine arts within the meaning of the section.

So far as folk songs and other folk music are concerned, apart from the inclusion of singing games, no point is made for the valuation officer against the society's claim to exemption in view of *Royal College of Music* v. *Westminster Vestry*.[13]

Restating the two leading objects in summary form in relation to singing games, I find that the purposes of the society include making known singing games, encouraging people to play them in their traditional forms, and teaching people how to do so. As appears from the case, and as I have already mentioned, singing games include such things as "Gathering nuts in May" and "Here we go round the mulberry bush." The question therefore arises whether teaching people (in this instance, no doubt, children) how to play, and encouraging them to play such games as "Gathering nuts in May" and "Here we go round "the mulberry bush," are purposes of the fine arts. I cannot bring myself so to hold. To my mind a person teaching children to play these games cannot reasonably be held to be instructing them in a fine art any more than children playing these games can reasonably be held to be practising a fine art. The children are simply being shown how to play a traditional game, or, having been shown how, are amusing themselves by playing it, and no question of fine art enters into the matter.

For these reasons I am of opinion that the society's claim to exemption fails on the first of the two grounds above stated, namely, that it is not instituted for the purposes of science or the fine arts exclusively within the meaning of the exempting section. I should add that in reaching this view I have, as the authorities enjoin (see *British Iron and Steel Research Association's* case [14]), guided myself by reference to the purposes of the society as defined by its constitution rather than by the purposes it has actually pursued in practice, but that the facts as to its actual activities as found in the case seem to me on the whole to confirm my conclusion.

I trust that nothing I have said will be taken as belittling the work of the society, which I have no doubt is valuable work, not only for the pleasure which it gives to many people but also for the additions it has made, and is making, to our knowledge of the traditional dances and songs of our ancestors, and for its success in preserving and reviving for our instruction and enjoyment these old dances and songs. Nor am I suggesting that the society is incapable of presenting, or may not from time to time present, exhibitions of skill in dancing for which the status of fine art might well be claimed. I am concerned only with the question whether the society is, within the narrow terms of the

[13] [1898] 1 Q.B. 809.

[14] [1949] 1 K.B. 434.

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section, instituted for purposes of science or the fine arts exclusively, and for the reasons I have endeavoured to state I have come to the conclusion that it is not.

This makes it unnecessary to decide whether the society complies with the second condition of exemption, namely, that it should be supported wholly or in part by annual voluntary contributions. The valuation officer's argument on this point turns largely on the facts found in paragraphs 11 and 12 of the case, from which it appears that full members, and to a lesser degree associates, are accorded certain privileges and, in particular, admission to some of the society's functions at rates lower than those charged to non-members. The question is whether these privileges are such as to make the annual subscriptions of full members and associates other than "voluntary," according to the meaning of that expression in section 1 of the Act of 1843, as interpreted by the House of Lords in *Overseers of the Savoy* v. *Art Union of London*,[15] where it was held to mean, in effect, "made without equivalent consideration" as distinct from "made without obligation." That seems to me to be a question of some nicety; and as it is immaterial to the result in the present case, whereas a comparable case in which the corresponding question is decisive of the claim to exemption may well arise at some future date, I prefer for the present to leave it unanswered.

I should add, in conclusion, that in the course of the argument for the society it was suggested that the question whether the society was instituted for purposes of the fine arts exclusively was a question of fact which, having been decided by the Lands Tribunal as the proper tribunal of fact, was not open to this court. I cannot agree. The question is whether the society was instituted for purposes of the fine arts exclusively within the meaning of the section. That is a question concerning the true construction of the section, and, as such, plainly a question of law open to this court.

For the reasons which I have endeavoured to state I think this appeal should be allowed.

Parker L.J. I have come to the same conclusion. From a perusal of the leading objects of the society it is clear that, to use the words of A. L. Smith L.J. in the *Royal College of Music* case,[16] the society is "instituted for the purpose of advancing" or disseminating or propagating" (inter alia) the practice of English folk dancing. Assuming, as I do, that folk dancing is an art in the wide sense of the word, the question is whether it is also a fine art. The finding by the Lands Tribunal on this point is to be found in paragraph 23 of the case, to which the Master of the Rolls has already referred. Its conclusion, it

[15] [1896] A.C. 296.

[16] [1898] Q.B. 809.

will be seen, is arrived at on the basis that there is no reason why dancing in general cannot qualify as a fine art. I cannot bring myself to accept such a wide premise. While it may be that some dancing—for example, ballet dancing—might qualify, the question for this court is whether, on the facts found, the tribunal was entitled in law to hold that the form of dancing here in question, English folk dancing, comes within the expression " fine arts " where used in the Scientific Societies Act, 1843.

What, then, is included in the expression " the fine arts "? It was urged by Mr. Harvey, for the society, that any medium of what he called " pure art " as opposed to " applied art " comes within the expression. Whether an art is also a fine art, he said, depended merely on the use to which it was put. I am unable to accept this view. It seems to me that fine art involves something more than this. What exactly it is I will not attempt to define, but this at least is necessary, I think, before an activity can be so classified: it must be an activity which makes an immediate impression on the mind or imagination, its perception by whatever sense arousing aesthetic satisfaction. Moreover, the person on whom that impression is to be made is the person perceiving the performance, not merely the performer. The fact that the performers get pleasure from their activity does not, of course, prevent an activity from being a fine art if otherwise it is one. But here the main emphasis is on the pleasure derived by the performers. There is little, if any, evidence that people go to watch folk dancing as they undoubtedly go to see ballet dancing, or, if they do, it is to see more than others partaking in a revival of traditional and recreational dances. Dancing does not become a " fine art " merely because what is danced is a revival of that which was performed many hundreds of years ago and because the onlookers enjoy seeing others enjoying themselves. No doubt there is also a considerable historical interest aroused, but that is, in my judgment, not enough. A pageant, or indeed a tattoo, of the times of Henry V has great historical interest and may be performed in such a way as to please the eye; but there is all the difference between that and a performance of Shakespeare's Henry V. The latter performance may well be an exposition of fine art, but certainly not the former.

It was further contended that research into the origins of English folk songs and dances, an undoubted object of the society, was in the nature of a science. Even, however, if that were the case, that is not exclusively the purpose of the society.

Accordingly, I am of opinion that the Lands Tribunal was wrong in law in holding that the society was instituted for purposes of the fine arts exclusively: and accordingly it is

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unnecessary to consider the further question whether the society is supported wholly or in part by annual voluntary contributions. I would allow the appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; E. F. Turner & Sons.*

E. D.

[QUEEN'S BENCH DIVISION.]

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May 2, 3, 11.
Jones J.

* JENNINGS *v.* TAVENER.

[1953. J. No. 7620.]

Vendor and Purchaser—Implied covenant—Warranty of fitness—Contract to purchase dwelling-house—Implied warranty—Purchase of bungalow in course of erection or to be erected—Cracks in walls appearing after completion—Caused by withdrawal of moisture from subsoil by roots of poplar trees—Not fit for habitation—Builder's obligation to provide proper foundations—National Conditions of Sale, 15*th ed.*, 12 (3).

By a contract made in February, 1950, the plaintiff's husband agreed to buy from the defendant, a builder, a bungalow "in the "course of erection or to be erected," and he entered into occupation shortly after the completion date. Cracks appeared in the structure which were caused by the settlement of the walls owing to the withdrawal of moisture from the subsoil by the roots of poplar trees growing near the bungalow. In 1953, her husband having died, the plaintiff, as administratrix of his estate, sued the defendant for breach of contract:—

Held, that the warranty implied in a contract for the sale of a house in the course of construction that it should be fit for habitation, and completed in a workmanlike manner when handed over on completion, was not confined to the parts of the house above the ground, but extended to the provision of proper foundations on ground where they would not settle. Accordingly, as the defendant had taken no steps to prevent the settlement of the walls which resulted in the cracks, he was in breach of the implied warranty, and was liable to the plaintiff in damages.

Miller v. *Cannon Hill Estates Ltd.* [1931] 2 K.B. 113, and *Perry* v. *Sharon Development Co. Ltd.* [1937] 4 All E.R. 390 applied.

ACTION.

The defendant, Jack Lockhart Harry Tavener, a builder, carrying on business at Chingford, Essex, before 1939 acquired some land adjoining a road known as Gunners Grove intending to build bungalows upon it. Plans were prepared by an architect in 1938, but owing to the outbreak of war the defendant was unable to proceed with the building. In 1949 he obtained a licence from the Chingford Borough Council to build, in addition to other buildings, two semi-detached bungalows to be known as 34 and 36 Gunners Grove. The architect did not supervise the

building of the bungalows or examine the site, the defendant relying on his own ability to attend to those matters.

In 1949, the plaintiff's husband, Ronald Raymond George Jennings, entered into an agreement with the defendant to buy No. 34, approval of the borough council having been obtained. He paid a deposit on August 31 and on December 29 his solicitors submitted a questionnaire to the defendant's solicitors, in the answers to which the bungalow was described as being "in the "course of erection." On February 22, 1950, the contract was signed. It incorporated the National Conditions of Sale (15th edition) in so far as they were not inconsistent with certain special conditions which included, inter alia, special condition 10, providing that, if the property had not been completed by the date fixed for completion, completion should take place within seven days of the production of a letter from the Chingford Borough Council to the effect that the property had been completed to their satisfaction. The day fixed for completion was April 28, 1950. Work on the bungalow was finished on May 11, the purchase was completed on May 17 and the plaintiff and her husband moved in on May 20. Soon after they occupied the bungalow cracks appeared in the walls, and other cracks developed later. Complaints were made to the defendant by the plaintiff's husband before his death in September, 1950, and afterwards by the plaintiff. The defendant inspected the cracks in 1951 and in 1953 a further inspection was carried out by an architect, Mathew, on behalf of the plaintiff. He concluded that the cracks were caused by the withdrawal of moisture from the site by the roots of poplar trees growing in a cemetery some 30 or 40 feet from the back of the bungalow. In December, 1953, at the request of the plaintiff, the cemetery proprietors cut down the trees and destroyed their roots and no further damage occurred to the bungalow thereafter. It was eventually agreed between the parties that the cracks in the walls were caused by the withdrawal of moisture from the subsoil by the roots of the trees.

In November, 1953 the plaintiff, as administratrix of her husband's estate, issued a writ against the defendant claiming damages for breach of a contract for the sale of a bungalow in the course of erection or to be erected. She alleged that the bungalow had become unfit for habitation and claimed that the defendant, in breach of implied terms in the contract, had failed to build the bungalow with reasonable skill and care, to use good and suitable materials and to build in a proper, efficient and workmanlike manner in that he had failed to take any adequate precautions against damage resulting from the shrinkage in the subsoil which he knew or ought to have known was likely to occur; failed to take any or any effective steps to remove the roots of the poplar trees from the site of the bungalow or otherwise prevent them from affecting the stability of the soil; and failed to lay sufficiently deep foundations having regard to the nature of the subsoil on which the bungalow was to stand. She

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alleged two other circumstances as contributing causes but conceded that neither alone would have caused the damage.

The defendant denied breach of contract and alleged that the bungalow was constructed with sound materials and in a workmanlike manner and to the satisfaction of the local authority. Counsel for the defendant, in argument, also relied on condition 12 (3) of the National Conditions of Sale.*

C. P. Harvey Q.C. and *M. R. Hickman* for the plaintiff.
H. J. Phillimore Q.C. and *H. E. Francis* for the defendant.

Cases cited in argument (other than those referred to in this report of the judgment) were as follows: *In re Puckett and Smith's Contracts* †; *Thomson* v. *Cremin*.‡

Cur. adv. vult.

May 11. JONES J., reading his judgment, stated the facts, reviewed the evidence, referred to the cases cited in argument and continued: Mr. Harvey relied on an implied warranty that the house would be built in a workmanlike manner. Mr. Phillimore agreed that a warranty of fitness is to be implied in the case of the sale of a half-built house, but he maintained that the warranty was only that the builder would complete the building in a proper and workmanlike manner, and he claimed that the defendant had done this. He relied also on Condition 12 (3) of the National Conditions of Sale, 15th ed., but Mr. Harvey submitted that that condition was inconsistent with special condition 10 and did not apply to the contract. I am not sure if the defendant knew that these poplar trees were likely to cause this damage. I think that he should have known, as much literature had been published to builders that informed them of this danger, and I think that it is certain that if the defendant had employed an architect to supervise the building of the bungalow the architect would have known of the danger caused by the presence of these trees. It is interesting to notice the facts in *Butler* v. *Standard Telephones*,[1] where damage was done, and I observe that there was a case[2] before Harman J. recently in which similar damage appeared to have been done.

I hold that condition 12 (3) of the National Conditions does not apply to this contract, as it seems to me (though it is not easy to decide the point) to apply to a completed house and to be inconsistent with special condition 10, which clearly applies to a house in course of construction.

* National Conditions of Sale, 15th ed.: "12 (3). The purchaser "shall be deemed to buy with full "notice in all respects of the actual "state and condition of the property "sold and shall take the property as "it is."

† [1902] 2 Ch. 258.

‡ [1953] 2 All E.R. 1185.

[1] [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121.

[2] *McCombe* v. *Read* [1955] 1 W.L.R. 635; [1955] 2 All E.R. 458.

It is necessary first of all to ascertain what is the nature and extent of the warranty in the case of the sale of a house in course of construction. In the first case to which I referred, *Lawrence* v. *Cassel*,[3] there was an express agreement to complete the house in accordance with certain plans, and it was a breach of that agreement that was alleged. It is interesting, however, to observe the passage in the judgment of Scrutton L.J. where he said[4]: "I "agree that it might require very careful consideration whether "the agreement to complete the house referred exclusively to "work to be done subsequently, accepting what had already been "done as executed according to the contract, or whether it "included the whole of the work to be done on the house—that "which purported to be completed as well as that which was "plainly unfinished. There is a good deal to be said for the "view that a contract to complete a house is not performed by "making a house full of defects some of which subsequently "appear in consequence of work badly done before the contract "and some of which are due to bad work done after the contract. "But on this question I say nothing, because no point was made "at the trial that clause 4 of the contract only related to work "which was to be done under clause 5, after the date of the "contract and before completion of the sale, but did not apply "to work done before the contract. In these circumstances I "do not think we ought to interfere even if we were of opinion "that the contract had no relation to work which had been done "before it was entered into, a question which, as I say, I am not "going to decide."

The headnote to the report of *Miller* v. *Cannon Hill Estates Ld.*[5] is as follows: "In a contract with builders or with the "owners of a building estate for the purchase of a house to be "erected or in course of erection, there is an implied warranty "by the vendors that the house shall be built in an efficient "and workmanlike manner and of proper materials, and that it "shall be fit for habitation. *Lawrence* v. *Cassel*[6] followed. A "representation by builders in conversation with a prospective "buyer, that all houses on the estate are of the best material and "workmanship may amount to a warranty collateral to a sub-"sequent formal contract, for breach of which an action will "lie." That is not really material to this case.

In the course of his judgment in that case, which came before a Divisional Court in the days when appeals from county courts went to a Divisional Court, Swift J. first of all referred to the sale of a completed house. Then he said[7]: "The position is "quite different when you contract with a builder or with the "owners of a building estate in course of development that they "shall build a house for you or that you shall buy a house which "is then in the course of erection by them. There the whole

[3] [1930] 2 K.B. 83.
[4] Ibid. 89.
[5] [1931] 2 K.B. 113.
[6] [1930] 2 K.B. 83.
[7] [1931] 2 K.B. 113, 121.

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" object, as both parties know, is that there shall be erected a " house in which the intended purchaser shall come to live. It " is the very nature and essence of the transaction between the " parties that he will have a house put up there which is fit for " him to come into as a dwelling-house. It is plain that in those " circumstances there is an implication of law that the house " shall be reasonably fit for the purpose for which it is required, " that is for human dwelling. Our attention has been called to " the well known passage from the judgment of Bowen L.J. in " *The Moorcock* [8] as to the cases in which a warranty will be " implied in law. Can the parties here be thought, when the " plaintiffs were bargaining for a dwelling-house which was to be " erected in accordance with the character of the other dwelling- " houses in the neighbourhood, to have been bargaining for some- " thing which was no protection in wet weather? The jury have " found here that this house was in such a leaking or porous con- " dition that it was quite unfit for human habitation. If the " plaintiff has no implied warranty that it shall be fit for human " habitation, then the consideration for which he bought this " house wholly fails."

The decision in *Miller* v. *Cannon Hill Estates, Ld.*[9] was considered and approved by the Court of Appeal in *Perry* v. *Sharon Development Co. Ld.*[10] The headnote is as follows: " The " plaintiff on December 19, 1935, entered into an agreement for " the purchase of a house stated to be ' erected or in the course " ' of erection.' The balance of the purchase money was to be " paid, and completion to be made, on January 7, 1936, or ' so " ' soon thereafter as the premises shall be completely finished " ' and ready for occupation.' On December 19, the house, in " addition to the decorations, lacked such things as water-taps, " baths, and grates, and the plastering of the walls of the dining " room and drawing-room was incomplete. The plaintiff actually " went into occupation on January 7, 1936. In May, 1936, he " complained of various defects in the house, and in this action " he relied upon an implied warranty that the house should be " of the same standard of building and of finish as was the show- " house, and, in any event, that the construction should be " carried out in a proper, efficient and workmanlike manner. It " was contended that this was the sale of a completed house, and " that there was no such implied warranty. Held: this was a " purchase of a house in the course of erection, and not a purchase " of a completed house, and the plaintiff was, therefore, entitled " to rely upon the implied warranty."

Greene M.R. said [11]: " The county court judge has dealt with " the matter of law only. He has not gone into any of the details " of damage claimed. . . . Accordingly, in his judgment he " dealt with the question of law only, and he held that the

[8] (1889) 14 P.D. 64, 68; 5 T.L.R. 316.

[9] [1931] 2 K.B. 113.

[10] [1937] 4 All E.R. 390.

[11] Ibid. 392.

" warranties, or terms mentioned in the particulars of claim, " were to be implied, basing himself on *Miller* v. *Cannon Hill* " *Estates Ltd.*[12] I propose to consider this case without refer- " ence to any authorities, for the moment. It is, of course, well " settled that a vendor of a completed house, in respect of which " there is no work going on and no work to be done, does not, in " the absence of some express bargain, undertake any obligation " with regard to the condition of that house. It is further well " settled that, quite apart from obligations in contract, there is " no obligation in tort lying upon him in respect of want of proper " care in the construction or in the condition of the house which " he is selling. Indeed, the reason for that is obvious. Every " contract must, of course, be construed with reference to the " subject-matter with which it is dealing, and, where a contract " for the sale and purchase of a house is dealing with a house " which is, in the contemplation of both parties, and to the " knowledge of both parties, supposed to be a completed house, " there is no room for the implication of any term as to the doing " of further work upon it. But it seems to me that, where the " contract is a contract relating to a house which is still in the " process of being completed, where the vendors' workmen are " still on the job, and particularly where the completion is not " to take place until the house has arrived at the contemplated " condition—namely, complete finish and readiness for occupation " —there must be implied in that contract an undertaking that " the house shall be in that condition. The very fact that the " contract is a contract for the purchase of a house in course of " erection, that the contract contemplates that it is not to be " completed until the house has been erected, and contemplates " that the degree or the state of erection which that is to mean " is the complete finishing of the house and its readiness for " occupation, makes it almost possible to say (and I am not sure " whether it is not more correct to say) that, on the true con- " struction of the contract itself, there is an express obligation to " finish that house. For present purposes, however, it matters " not which way it is put. When this contract is examined in " relation to the facts of the case as found by the county court " judge, there is, in my opinion, imported into it an obligation on " the vendors to put the house into the contemplated condition " of complete finish and readiness for occupation. The county " court judge has found that that was not done."

He said further, dealing particularly with the judgment of Swift J. in the earlier case[13]: " The case upon which the county " court judge relied in this case was a decision of the Divisional " Court in the case of *Miller* v. *Cannon Hill Estates Ltd.*[14] " That was a case where there was a collateral agreement which " had been held to amount to a contract, and it was held by

[12] [1931] 2 K.B. 113.
[13] [1937] 4 All E.R. 390, 394.
[14] [1931] 2 K.B. 113.

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" the Divisional Court that the jury was entitled to find that " there was a contract. A further matter was discussed, where " Swift, J., says in his judgment [15]: ' Indeed it seems to me that " ' it is a matter of very little moment whether there was or " ' whether there was not an express warranty as to the condi- " ' tion of the material or the nature of the workmanship which " ' should be used in this house, because I think that it is plain " ' from the whole of the facts of the case that the law will " ' imply a warranty that the house which was to be built by " ' the defendants for the plaintiff should be a house which was " ' habitable and fit for human beings to live in.' "

The Master of the Rolls continued: " Then Swift, J., deals " with the case of an unfurnished house, and points out that " there is no implied contract with regard to its condition. He " goes on to say [16]: ' The position is quite different when you " ' contract with a builder or with the owners of a building estate " ' in course of development that they shall build a house for " ' you or that you shall buy a house which is then in the " ' course of erection by them. There the whole object, as both " ' parties know, is that there shall be erected a house in which " ' the intended purchaser shall come to live. It is the very " ' nature and essence of the transaction between the parties " ' that he will have a house put up there which is fit for him " ' to come into as a dwelling-house.' "

The Master of the Rolls went on to say [17]: " I am not sure " (and it is not necessary to go into this question) whether some " of the reasoning of the judge in that judgment commends " itself to me, but, so far as concerns his conclusion as to the " implication of a term in the contract in the case where it is " dealing with a house in course of erection, I am in agreement " with the general conclusion to which he came."

Romer L.J. said [18]: " It is well established by numerous " authorities, to some of which Serjeant Sullivan has called our " attention, that, in the case of the sale of a completed house, " there is to be implied on the part of the vendor no warranty " as to the house being in any particular condition. The same " rule would apply in the case of an uncompleted house, which " is the subject-matter of a sale, where the structure stands at " the time of the sale. Where, however, the contract is for the " sale of a house when completed, there is an implied contract " on the part of the vendor, in the absence of there being any " express contract as to the way in which the house is to be " completed, that the house shall be completed in such a way " that it is fit for human habitation." He says further—it is not necessary to read all that he says—" In my opinion, in those " circumstances, there was an implied contract on the part of

[15] Ibid. 120.
[16] Ibid. 121.
[17] [1937] 4 All E.R. 390, 394.
[18] Ibid.

" the vendors that, at the date of completion, the house should " be in a state fit for human habitation."

Mackinnon L.J. in a short judgment said [19]: " . . . a house " only partly erected, or to be completed . . . the buyer . . . " cannot inspect it, either by himself or by his surveyor, and, " in the second place, from the point of view of the vendor, the " contract is not merely a contract to sell, but also a contract " to do building work, and, in so far as it is a contract to do " building work, it is only natural and proper that there should " be an implied undertaking that the building work should be " done properly."

In my view, the evidence of the architect, which I accept in preference to the evidence of the defendant and his surveyor where there is a conflict between their evidence, and also the photographs of the cracks in the bungalow, which are really not disputed, establish that this bungalow was not in a state fit for human habitation and had not been completed in a workmanlike manner when handed over by the defendant to the plaintiff's husband at the date of completion because the defendant had failed to take the necessary steps to prevent a settlement of the walls of the house which resulted inevitably in these cracks in the walls. I hold that a breach has been committed of the warranty that is implied in the case of the sale of a house in course of construction. I think that the obligation imposed on the defendant by the implied warranty was not confined to building the parts of the house that are above the ground but extended to the provision of proper foundations for the bungalow, and the building of these foundations in a place where they would not settle or collapse. The defendant assumed the responsibility of supervision of the siting and building of the bungalow without the assistance of an architect and failed to provide the plaintiff's husband with a bungalow fit for habitation, as he omitted to consider or guard against the well-recognised danger that the proposed site of a house may be unfit for that purpose because moisture has been extracted from it by the roots of such quick-growing trees as poplars growing in the immediate neighbourhood of the site. I find that the defendant could have prevented the occurrence of these cracks by cutting the roots of the trees at a distance from the house or by asking the cemetery company to do so or by putting a concrete bed under the foundations. I find also that the other defects in the bungalow mentioned by Mr. Mathew existed, but neither of those alone would have made the bungalow unfit for habitation.

Judgment for plaintiff for agreed damages of £275.

Solicitors: *Chandler & Creeke; J. H. Fellowes.*

E. M. W.

[19] Ibid. 395, 396.

[CHANCERY DIVISION.]

1955
June 30;
July 1.

Harman J.

* *In re* WYNN.
PUBLIC TRUSTEE *v.* NEWBOROUGH (No. 2).

[1953 W. 1808.]

Settled Land—Trustee for sale—Improvement—From capital money—Repairs—Expenditure on repairs by trustee out of income—Claim by tenant for life for recoupment out of capital—Settled Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 18), *s.* 73 (1)—*Agricultural Holdings Act*, 1948 (11 & 12 *Geo.* 6, *c.* 63), *ss.* 1 (1), 81 (1), *and Sch. III, Pt. II, para.* 23.

A testator, who died in 1932, devised all his landed property on trust for sale with certain consents and with a power to postpone. The income from that property was to be held on trust (after payment of certain costs, charges and expenses) to divide the net income into two equal parts and pay half to each of two of the testator's nephews during their joint lives with cross-remainders between them and with limitations over (as to any part of the property which remained unsold and as to the capital moneys representing the proceeds of sale) after the death of the survivor. The testator further gave directions as to what charges were to come out of the income of the general estate. These included all costs of (inter alia) repairs and similar outgoings.

Between 1946 and 1952 the Public Trustee (who was one of the trustees of the will) expended considerable sums out of income on repairs to agricultural properties forming part of the estate.

The tenants for life desired to be repaid out of capital in respect of these expenses, and a summons was taken out by the Public Trustee to ascertain his powers in this respect, having regard to the material statutory provisions and the decision in *In re Duke of Northumberland* [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181:—

Held, that the tenants for life were not entitled to payment out of capital in respect of the expenditure in question. There was an essential difference between a trust for sale and a strict settlement, in that the Public Trustee, as trustee for sale, had the management of the trust property. By the will he was directed to defray such expenditure out of income, and had done so. He had, in addition, statutory powers to defray, in his discretion, repairs out of capital; but once he had defrayed them out of income no question could arise of undoing that which had been done.

In re Duke of Northumberland, supra, distinguished.

ADJOURNED SUMMONS.

By his will, dated July 31, 1931, Frederick George Wynn (who died on January 20, 1932) appointed three trustees (including the Public Trustee) executors and trustees of his will and devised unto them (by clause 11) all his landed property on trust for sale with certain consents and with power to postpone the sale thereof and to invest the proceeds, and he directed as follows: "My trustees shall stand possessed of the income of "such investments and of the income of my landed property until

" the sale thereof and the income derived from [a certain mort-
" gage] and also the income if any of my residuary estate . . .
" upon the trusts following:—(1) Out of the gross income to pay
" such costs charges annuities and expenses as are by this my
" will directed or authorized to be paid thereout (2) To divide
" the nett income into two equal parts (3) To pay one such equal
" part to my nephew Lord Newborough during his life and after
" his death to my nephew the said Robert Vaughan Wynn if then
" living during his life (4) To pay the remaining equal half part
" to the said Robert Vaughan Wynn during his life and after his
" death to Lord Newborough if then living during his life."
After the death of the survivor of Lord Newborough and Robert Vaughan Wynn he directed his trustees to stand possessed of such part of his landed property as should then be unsold and of the proceeds of the land sold on trust for the first and other sons of Lord Newborough (who, at the date of these proceedings had no son) successively in tail male with remainder to Robert Charles Michael Wynn (the eldest son of Robert Vaughan Wynn) for life with remainder for his first and other sons successively in tail male with remainders over. The infant defendant to these proceedings, Robert Vaughan Wynn, the younger, who was born in 1949, was the only son of Robert Charles Michael Wynn.

By clause 12 of his will the testator directed as follows. " I
" declare that the hereinbefore mentioned trust for sale of my
" landed property is a trust for sale within the meaning of section
" 205 (i) (xxix) of the Law of Property Act, 1925, and I declare
" that the said trust for sale shall as to the parts of my landed
" property hereinafter mentioned only be exercised with the
" [consents therein mentioned] . . . When the trusts for the
" payment of the nett income of the proceeds of sale of the
" property devised to my trustees upon trust for sale shall have
" come to an end then I appoint the persons who at that date
" shall be the trustees of this my will to be the trustees for the
" purposes of the Settled Land Act, 1925, of the settlement which
" under the provisions of this my will thereupon come into
" force . . ."

By clause 14 the testator bequeathed the residue of his estate to his trustees on trust for sale and to apply the proceeds for the purposes therein mentioned for which purposes he anticipated (as proved to be the fact) that his residue might prove insufficient. He also declared that the expression " my general estate " where thereinafter used meant " my landed property and the proceeds
" of sale thereof and the principal sums secured by [the above
" mentioned mortgage] and any such balance of my residuary
" estate as aforesaid."

By clause 15 the testator authorized his trustees to continue the system of estate management carried on by him and to appropriate for the purpose of estate management any houses or premises forming part of his estate. He also directed his

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trustees "in the management of my estate and in considering "the question of repairs drainage cutting timber planting "improvements rebates to tenants and in all other matters to "act as good landlords. They should consider not only the "interests of persons entitled under this my will but also the "interests of the persons living on my estate. My trustees may "charge to income matters which might strictly be charged to "capital."

By clause 16 the testator directed that his trustees "shall out "of the income of my general estate pay all the legal and other "costs of estate management and pay all costs of repairs insur- "ance rates taxes tithe and the expenses of running the power "house and electric plant and other machinery and other out- "goings in their opinion properly attributable to income and "shall also out of the said income pay all such parts as they shall "not in their discretion charge to capital of drainage improve- "ments and other matters arising between them and lessees "tenants or occupiers of any part of the estate and shall pay the "interest on all charges on my landed property . . ."

In 1951, certain questions having arisen in connexion with the administration of the estate, an originating summons was taken out to determine those questions and an order was made in those proceedings, dated January 17, 1952. [See *In re Wynn.*[1]]

The Public Trustee from time to time carried out improvements to the property, which was subject to the trusts of clause 11, and charged the costs of those improvements to capital.

In addition, he carried out repairs to agricultural buildings forming part of the property and fixed equipment thereon required for the proper farming of agricultural land forming part of the property. None of these repairs were repairs which the tenant of the property was under an obligation to carry out.

Until 1952, the cost of the repairs and also the general costs of management of the property were debited to income to which Lord Newborough and Robert Vaughan Wynn were entitled in equal shares. Further substantial sums had been similarly spent since April, 1952, but their allocation to capital or income was held in suspense pending the result of the present proceedings.

Lord Newborough and Robert Vaughan Wynn claimed that the Public Trustee had and should exercise the power to recoup to them out of the capital of the property the sums expended as and out of income on repairs, and the Public Trustee, being doubtful whether he had power to make this recoupment, took out a summons to determine (1) whether, having regard to the provisions of the Settled Land Act, 1925, the Law of Property Act, 1925, and section 96 of the Agricultural Holdings Act,

[1] [1952] Ch. 271; [1952] 1 T.L.R 278; sub nom. *In re Wynn's Will Trusts, Public Trustee* v. *Newborough (Baron)* [1952] 1 All E.R. 341.

1948,[2] and the decision in *In re Duke of Northumberland*,[3] or otherwise, the plaintiff as the trustee of the will "has power to "apply capital of that part of the testator's estate, which is held "on the trusts of clause 11 of his will . . . in recouping to Lord "Newborough and Colonel Wynn in equal shares sums paid by "the plaintiff out of income of the landed property for repairs "of the nature specified in para. 23 of Part II of Schedule III "to the Agricultural Holdings Act, 1948, to agricultural land "forming part of the landed property, notwithstanding that such "agricultural land was and is held by the plaintiff on trust for "sale."

Cases referred to in argument: *Clarke* v. *Thornton*[4]; *In re Gray*[5]; *In re Conquest*[6]; *In re Duke of Northumberland*[7]; *In re Smith*[8]; *In re Sutherland Settlement Trusts*[9]; *In re Brougham and Vaux (Lord)*.[10]

J. A. Wolfe for the Public Trustee.

Lionel Edwards Q.C. and *Arthur Bagnall* for Lord Newborough.

Raymond Jennings Q.C. and *B. S. Tatham* for the defendants Robert Vaughan Wynn and Robert Charles Michael Wynn.

Michael Albery Q.C. and *Paul Baker* for an infant.

HARMAN J. This is an originating summons by the Public Trustee, which has been pending for some two years and which

[2] Settled Land Act, 1925, s. 73 (1): "Capital money arising under "this Act . . . shall, when received, "be invested or otherwise applied "wholly in one, or partly in one and "partly in another or others, of the "following modes (namely):—. . . "(iv) In payment as for an improve- "ment authorized by this Act of any "money expended and costs incurred "by a landlord under or in pursuance "of the Agricultural Holdings Act, "1923, . . . in or about the execution "of any improvement comprised in "Part I or Part II of the First "Schedule to the said Agricultural "Holdings Act."

Agricultural Holdings Act, 1948, Sch. III, Pt. II, para. 23 [substituted by s. 96 of the Act for Sch. II, Part II, to the Act of 1923]: "Re- "pairs to fixed equipment, being "equipment reasonably required for "the proper farming of the holding, "other than repairs which the tenant "is under an obligation to carry out."

Section 1 (1): "In this Act the "expression 'agricultural holding' "means the aggregate of the agri- "cultural land comprised in a con- "tract of tenancy, not being a "contract under which the said land "is let to the tenant during his "continuance in any office, appoint- "ment or employment held under the "landlord."

Section 81 (1): "Where under "powers conferred by the Settled "Land Act, 1925, . . . capital money "is applied in or about the execution "of any improvement specified in "the Third Schedule to this Act no "provision shall be made for re- "quiring the money or any part "thereof to be replaced out of income, "and accordingly any such improve- "ment shall be deemed to be an "improvement authorized by Part I "of the Third Schedule to the Settled "Land Act, 1925."

[3] [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045: [1950] 2 All E.R. 1181.

[4] (1887) 35 Ch.D. 307; 3 T.L.R. 299.

[5] [1927] 1 Ch. 242.

[6] [1929] 2 Ch. 353.

[7] [1951] Ch. 202.

[8] [1930] 1 Ch. 88.

[9] [1953] Ch. 792; [1953] 2 All E.R. 27.

[10] [1954] Ch. 24; [1953] 2 All E.R. 655.

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concerns the will of one Frederick George Wynn. It invokes certain statutory relief with which I am not here concerned. I am now to decide a question arising under the trusts of the will as follows: [His Lordship read the question set out above].

There are large numbers of agricultural properties and repairs have been done on them by the Public Trustee; and a great deal of money has been spent. An elaborate schedule was put before me showing the repairs year by year since 1946. The total in the years 1951–52 was as high as £5,000. The items are all in connexion with properties let to agricultural tenants; and are not repairs which the tenants themselves were bound under their tenancies or leases to do. But it is submitted on behalf of one, at any rate, of the tenants for life, the persons entitled to the income, that all those repairs, having regard to certain statutory provisions, ought to have been done at the expense of the corpus of the estate; and in so far as they have been done and paid for out of income, that ought to be adjusted now between capital and income, and that in future all such repairs must be done out of capital.

The alternative view is that the Public Trustee has a discretion, and counsel for the remainderman concedes that, in so far as no determination has been made in fact: that is, from April, 1952, there is a discretion vested in the trustee whether he should pay for these repairs out of income, and so affect the enjoyment of the income, or out of capital under the statutory powers which have been conferred on him. As to the period up to April, 1952, the life beneficiaries deny and the remainderman asserts that the book is closed, that the income has been spent and that the trustee has exercised the trust or the power and that there should be no readjustment because the matter is at an end.

In order to understand the argument I must shortly state the facts. The testator made his will in 1931 and he died in 1932. He left a large estate, principally real estate, in Wales. In the upshot there has turned out to be no residue. At the present time the real estate still unsold amounts to about half a million pounds in value, and there are capital moneys representing the proceeds of sale of the real property in the trustee's hands amounting to something under £100,000.

The testator by his will, so far as material for this purpose, devised by clause 11 all his landed property as therein defined to his trustees on trust for sale with certain consents and with a power to postpone. That is the trust for sale now subsisting as interpreted by the order of 1952. The income from that landed property and from a mortgage which is still subsisting was to be held on the following trusts: " (1) Out of the gross income to pay " such costs, charges, annuities and expenses as are by this my " will directed or authorized to be paid thereout. (2) To divide " the net income into two equal parts " and pay half to each of the first and second defendants during their joint lives with cross remainders between them: that is to say, the survivor will take

the whole income. Then, "Upon the death of the survivor of "my said two nephews my trustee shall stand possessed of all "such parts of my landed property as shall be then in fact "unsold," and of the capital moneys representing the proceeds of sale upon certain limitations under which it is enough to say that the last two defendants are interested, one of them for his life and the other one in tail.

There was then in paragraph 14 a bequest of residue. The first trust of that is to pay the estate duty and it was all used for that purpose. The testator then declared that "The expres- "sion 'my general estate,' where hereinafter used, means my "landed property and the proceeds of the sale thereof and the "principal sum secured" by the mortgage "and any such "balance of my residuary estate as aforesaid"—there being none. He then authorizes his trustees to carry on his system of estate management and in considering the question of repairs to act as good landlords and to charge to income if they pleased matters which might strictly be charged to capital.

By clause 16 he explains what the charges are which are to come out of the income of the general estate. The trustees are to "pay all the legal and other costs of estate management and pay "all costs of repairs insurance rates taxes tithe and the expenses "of running the power house and electric plant and other "machinery and other outgoings in their opinion properly attri- "butable to income and shall also out of the said income pay all "such parts as they shall not in their discretion charge to "capital" of among other things "improvements." In my judgment, the words "in their opinion properly attributable to "income" apply only to outgoings and not to repairs. Therefore, under the will there is a direction to pay for repairs out of income and a power to pay for improvements out of income, unless the trustees in their discretion think they should be paid for out of capital. There is again a similar expression at the end of clause 16 where he says: "It is my wish that my trustees "shall out of the income of my general estate provide for and "pay . . . all rates taxes tithe land drainage charges repairs "insurance and similar outgoings," in connexion with certain real properties specifically bequeathed.

Therefore, by the will the trustees are not only entitled but enjoined to pay for all repairs out of income and one may suppose that that is what they did for a number of years.

The trust for sale vested in the trustees of the will confers on them, by virtue of section 28 of the Law of Property Act, 1925, the powers of a tenant for life and of trustees under the Settled Land Act, 1925; thus the improvements sections of the Settled Land Act are imported into cases of trusts for sale, the difference being that in the case of a trust for sale the trustees are in the saddle, and not the tenant for life as in a case under the Settled Land Act. In the latter case the tenant for life may decide what improvements are to be done and, if they be improvements within

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Part I of Schedule III, he may call upon the trustees to raise capital to do them.

I pointed out in *In re Sutherland Settlement Trusts* [1] that a tenant for life making an improvement and calling on the trustees to pay for it out of capital must use his powers as trustees would use them with due regard to all those who come after him as well as himself. But, subject to that, the tenant for life decides. It is quite different when there is a trust for sale where the trustees decide. Clauson J. pointed out in *In re Conquest* [2] that trustees for sale have, by reason of section 28 of the Law of Property Act, 1925, two sets of powers: first, the power of management conferred on them by section 102 of the Settled Land Act, and, secondly, the powers regarding improvement under section 84 of that Act. I add that they also have, where the will so directs, the powers given by the will. No doubt the statutory powers are superimposed on those: so if the will provides that repairs may only be paid for out of income, the Act has the effect of conferring the power to do so out of capital, if it be an improvement to which under the Settled Land Act capital moneys may be applied. That was a concession which was in fact offered by counsel for the remainderman and which I think all parties accepted.

But Mr. Edwards, for one of the life tenants, wishes to go much further than that. He says there has been imported into the code, so to speak, a new situation altogether by the Agricultural Holdings Act, 1948. That Act by section 96 had the effect of altering the Settled Land Act, 1925. It will be remembered that section 74 of the Settled Land Act, 1925, which deals with the investment of capital moneys by trustees, authorizes them to pay, as for an improvement authorized by the Act, any money expended under the Agricultural Holdings Act, 1923. The effect of section 96 is to substitute the Act of 1948 for that of 1923. Therefore, one of the ways in which a trustee may invest or apply capital moneys is in payment for improvements or what are treated as improvements under the Act of 1948. The relevant provision is section 81 of the Act of 1948, a very extraordinary piece of legislation. It refers to "any improve- "ments specified in the Third Schedule to this Act." The terms of the Schedule include among the improvements, under No. 23, "Repairs to fixed equipment." Such repairs, therefore, must be treated as being improvements for the purposes of this Act, and are, therefore, matters on which capital moneys may be expended under section 73 of the Settled Land Act. Mr. Edwards contends that section 81 (1) of the Act of 1948 makes it obligatory to spend capital on such items. [His Lordship read the subsection and continued:] In my judgment, the effect of that is to show that these matters which are specified in Schedule III to the Act of

[1] [1953] Ch. 792; [1953] 3 W.L.R. 1163; [1953] 2 All E.R. 27.

[2] [1929] 2 Ch. 353, 358.

1948 are to be treated as what I may call Part I improvements: in other words, improvements in respect of which capital money spent is not to be recouped out of income.

Mr. Edwards says that having regard to the words "such "improvement" the effect of the subsection is that all improvements under the Agricultural Holdings Act, 1948, are Part I improvements and must be defrayed out of capital. I do not follow that argument. All the section seems to me to say is that, if capital is spent on such improvements, it cannot be recouped out of income. Indeed, it starts by saying that where capital money is applied in the improvement then it shall not be recouped. That is all it says and that is all, in my opinion, that it effects.

In the present case no capital money has been applied in any of the improvements and, therefore, it does not seem to me that the section has come into operation at all. Apart from that, I can see nothing in that section, or anywhere else, to show that the powers thrust on the trustees for sale, being Settled Land Act powers, override their powers as trustees for sale. They are given additional powers and, therefore, they may override the instructions of the will to this extent that, whereas under the will the trustees had only the right to pay out of income, they may now in addition pay out of capital. It does nothing to destroy the testamentary power which they had to pay out of income if they chose: so, therefore, I reject Mr. Edwards' proposition.

There remains the question about the back payments. The evidence upon that is not very complete. First I have the statement in the affidavit in support of the summons that the Public Trustee has from time to time carried out improvements to the property and has charged the cost of such improvements to capital. No doubt that was an exercise of his powers under the Settled Land Act. It is further stated: "In addition, the Public "Trustee has carried out repairs to agricultural buildings forming "part of the landed property and the fixed equipment thereon "required for the proper farming of agricultural land forming "part of the landed property. None of these repairs were repairs "which the tenant of the property concerned was under an obli-"gation to carry out." Then he specifies these repairs and says: "The cost of all such repairs and also the general costs "of management of the landed property have been debited to "income of the landed property to which Lord Newborough and "Colonel Wynn are entitled in equal shares." That is the position up to April 1, 1952. He has done those repairs and paid for them out of income as the will directed him to do, treating those persons entitled to the income as entitled only after the duties required by the will have been performed. No one can complain, as I see it, of that transaction.

It is further argued or suggested that there ought to be some readjustments, having regard to the decision of Vaisey J. in *In re*

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Duke of Northumberland.[3] That case drew the attention of those concerned in the management of land to this rather revolutionary section in the Act of 1948 enabling the cost of repairs to be met out of capital, and landowners were not slow to take advantage of it. Vaisey J. held that, as the tenant for life there had spent money on repairs, which came within the Schedule to the Act of 1948, he was entitled to call on the trustees for a number of years to recoup those expenses. So it is suggested here that the trustee who has spent the money may recoup it from himself, as I understand it, by raising it out of capital and paying it over to the tenant for life as income.

In my judgment, there is an essential difference between a settlement on trust for sale and a strict settlement in this respect. Here it is not the tenant for life who has spent the money or who has to raise the capital which he wishes to spend. It is the trustee who has spent the money in the exercise of his powers and, indeed, as the trusts imposed on him by the will direct. Having done that, it seems to me that no question arises of undoing that which has been done. It is said: that he had no idea that he had a discretion to pay these sums out of capital under the Act of 1948. There is no evidence whether he had any such idea or not. Even if he had no such idea, I do not see that there was anything wrong in the Public Trustee carrying out the trusts of the will. Whether he would have come to a different conclusion, if the provisions of the Act of 1948 had been pointed out to him, I do not know, and I think it quite irrelevant to ask. In April, 1952, and since, payments have not been allocated to capital or to income; and, in fact, that has been done advisedly in order to await the guidance of the court on the matter. As to those payments, in my judgment, the matter is still open and the Public Trustee may exercise his discretion about it, or he may surrender his discretion and ask the court what he should do. But that part of the summons is not before me and I say nothing about it. The matter, in my judgment, for the reasons I have given, ought to be left as it is, and the plaintiff has no power to recoup these earlier payments to the tenants for life.

Declaration accordingly.

Solicitors: *Whitfield, Byrne & Dean for Carter, Vincent & Co., Caernarvon; Lewis & Lewis and Gisborne & Co.; Patersons, Snow & Co., for Longueville & Co., Oswestry.*

J. L. D.

[3] [1951] Ch. 202.

[COURT OF APPEAL.]

* REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL AND ANOTHER. *Ex parte* PORTLAND URBAN DISTRICT COUNCIL.

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May 25, 26;
June 24;
July 7.

Denning, Birkett and Romer L.JJ.

Trade Dispute—Industrial Disputes Tribunal—Jurisdiction—Award by tribunal that recognized terms and conditions should apply to local authority—Local authority's circumvention of award by dismissing and re-engaging employee for same duties on different terms—Report of an "issue" by union to Minister—Reference of issue by Minister to tribunal—"Issue" and "dispute"—Not mutually exclusive—No duty to exhaust alternative negotiating machinery before reporting issue to Minister—Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 2 (*b*), 10, 12 (1).

After protracted efforts by an employee of a local authority, his trade union, and the relevant provincial (Whitley) council to persuade the local authority that a particular scheme of recognized terms and conditions should apply to the post occupied by the employee, an award of the Industrial Disputes Tribunal in September, 1953, made that scheme, by operation of article 10 of the Industrial Disputes Order, 1951, an implied term of the contract of employment between the local authority and the employee. The local authority sought to avoid implementing the award by dismissing the employee and re-engaging him to perform the same duties under another designation and under a new contract of employment, to which a different scheme applied. The union thereupon, in February, 1954, reported to the Minister of Labour and National Service that an issue had arisen under article 2 of the Order as to whether the local authority should observe the scheme in relation to the redesignated post which, they contended, being identical in character with the former post, was one to which the scheme applicable under the award should apply. The Minister referred the matter to the tribunal; but the local authority objected that the tribunal had no jurisdiction to hear it, and obtained from the Divisional Court an order prohibiting the tribunal from proceeding. The court held that at the relevant date there was no "issue" within the meaning of article 2, as construed by the majority of the Court of Appeal in *Reg.* v. *Industrial Disputes Tribunal. Ex parte Technaloy Ld.* ([1954] 2 Q.B. 46; [1954] 2 W.L.R. 932; [1954] 2 All E.R. 75) between the local authority and their employee or the union, and that if there was any controversy at that date it was one to be decided under the appeals machinery provided by paragraph 25 (2) of the scheme, as "a "question whether or not an employee was 'an officer' to whom "the scheme" applied, by reference to the relevant provincial (Whitley) council. On appeal by the trade union:—

Held, that the tribunal had jurisdiction to proceed, since (a) at the relevant date there was a conflict between the union and the local authority arising out of the provocative action of the local authority with intent to avoid implementing the award of the tribunal; (b) that conflict was an "issue" within article 2 (*b*) of the Order of 1951, the union seeking to procure the application of the scheme to the employment of their member, while the local authority contended that the scheme did not apply to his present employment; and (c) nothing in the Order placed the union under any contractual or legislative duty to exhaust the administrative

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machinery under the scheme before reporting the issue to the Minister; a fortiori, when the local authority had repudiated altogether the application of the scheme to their employee in all other respects.

Per curiam, approving obiter dicta of Romer L.J. in *Reg.* v. *Industrial Disputes Tribunal. Ex parte Technaloy Ld.* ([1954] 2 Q.B. 46, 61, 64) that the terms "dispute" and "issue" in the Industrial Disputes Order, 1951, were not mutually exclusive.

Per Denning L.J. The word "parties" in article 10 of the Industrial Disputes Order, 1951, means parties to the contract of employment, and not parties to the dispute or issue reported to the Minister.

Per Romer L.J. The Minister is not the sole arbiter, by virtue of article 3 (2) of the Order, to determine whether a controversy constitutes an issue or a dispute.

Decision of Divisional Court reversed.

APPEAL from Divisional Court (Lord Goddard C.J., Ormerod and Gorman JJ.), March 10, 1955.

The following statement of the facts is taken substantially from the judgment of Denning L.J.: In 1949, one Carter was employed by the Portland Urban District Council as "station "engineer" at their waterworks, and was given a house on the spot. On January 6, 1951, he applied to the council (hereinafter called "the local authority") to be graded as one to whose employment should be applied the scheme of conditions of service for the miscellaneous classes of officers of the National Joint Council for local authorities' administrative, professional, technical and clerical services. This scheme was applicable to persons employed by local authorities whose duties were of a special nature, neither wholly clerical nor wholly manual, and, as approved by a Whitley Council (consisting of representatives of employers and workers in equal numbers), was set out in a red book.

On February 24, 1951, the local authority refused to grade him as a "miscellaneous" man. On April 6, 1951, his trade union, the National and Local Government Officers' Association (the appellant trade union), took up the matter and appealed to the local authority to grade him as a "miscellaneous" man; but on April 23, 1951, the local authority refused their request. On January 30, 1952, the trade union suggested that the matter should be referred to the Whitley Council for the "miscel-"laneous" men, according to the procedure laid down in the red book, but the local authority refused this suggestion, saying that the appeals procedure laid down therein was inappropriate. The trade union were not deterred, and themselves referred the matter to the Whitley Council. That council heard both the trade union and the local authority, and unanimously recommended to the local authority that Carter should be graded as a "miscellaneous" man. The local authority refused to accept the recommendation of the Whitley Council. The trade union thereupon reported the

matter to the Minister under the Industrial Disputes Order, 1951,[1] on the ground that an "issue" had arisen as to whether the local authority should observe the recognized terms and conditions in regard to Carter. The Minister, on August 4, 1953, referred to the Industrial Disputes Tribunal the issue stated to be "whether the Portland Urban District Council in respect of Mr. "C. H. Carter, station waterworks engineer, should observe the "terms and conditions of employment established by the National "Joint Council" for the miscellaneous class. On September 7, 1953, the tribunal decided that Carter came within the miscellaneous class. Their finding was contained in award No. 426 as

[1] Industrial Disputes Order, 1951, art. 2: "Where—(*a*) in any trade or "industry or section of trade or "industry in any district terms and "conditions of employment are established which have been settled by "machinery of negotiation or arbitration to which the parties are organisations of employers and trade "unions representative respectively of "substantial proportions of the employers and workers engaged in that "trade or industry or section of trade "or industry in that district (hereinafter referred to as 'recognised "'terms and conditions'); and (*b*) an "issue as to whether an employer in "that district should observe the "recognised terms and conditions "(hereinafter referred to as 'an "'issue') is reported to the Minister "in accordance with this Order by an "organisation of employers or a trade "union; and (*c*) the Minister is of "opinion that the organisation of employers or trade union reporting the "issue habitually takes part in the "settlement of terms and conditions "of employment in the trade or "industry or section of trade or industry concerned; that issue shall "be dealt with in accordance with "the subsequent provisions of this "Order."

Art. 9: "Reference of issues to "the Tribunal. (1) Where an issue "has been reported to the Minister "in accordance with this Order, that "issue shall, if not otherwise settled, "be referred by the Minister to the "Tribunal. (2) Where an issue has "been referred by the Minister to "the Tribunal and the Tribunal is of "opinion that there are recognised "terms and conditions applicable to "the case and that the employer concerned is not observing those terms "and conditions . . . it may by its "award require the employer to "observe the recognised terms and "conditions or such terms and conditions of employment as may be "determined by it to be not less "favourable than the recognised terms "and conditions."

Art. 10: "Where an award on a "dispute or issue has been made by "the Tribunal then as from the date "of the award or from such other "date . . . as the Tribunal may "direct, it shall be an implied term "of the contract between the employer and workers to whom the "award applies that the terms and "conditions of employment to be "observed under the contract shall "be in accordance with the award "until varied by agreement between "the parties or by a subsequent "award of the Tribunal or until "different terms and conditions of "employment in respect of the "workers concerned are settled "through the machinery of negotiation or arbitration for the settlement of terms and conditions of "employment in the trade or industry "or section of trade or industry or "undertaking in which those workers "are employed."

Art. 12: "(1) In this Order, unless "the contrary intention appears, the "following expressions have the "meanings hereby respectively assigned to them, that is to say:— "'dispute' does not include a dispute as to the employment or non-"employment of any person or as to "whether any person should or should "not be a member of any trade "union but, save as aforesaid, means "any dispute between an employer "and workmen in the employment of "that employer connected with the "terms of the employment or with "the conditions of labour of any of "those workmen; 'issue' has the "meaning assigned to it in Article 2 "of this Order."

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follows: "The tribunal find that the recognized terms and conditions of employment applicable to Mr. C. H. Carter's position are the terms and conditions of employment established by the National Joint Council for local authorities' administrative, professional, technical and clerical services. The tribunal award that the Portland Urban District Council shall apply to Mr. Carter the provisions of the scheme of conditions of service for the miscellaneous classes of officers as established by the aforesaid National Joint Council. This award shall have effect as from the beginning of the first full pay period following the date hereof."

Upon that award being made, article 10 of the Industrial Disputes Order, 1951,[1] came into operation, with the result that it was an implied term of the contract between the local authority and Carter that they should apply the terms of the red book to him until varied by agreement between him and them.

The local authority duly implemented that award for a few weeks, but on October 23, 1953, they gave Carter one month's notice in writing terminating his employment as station engineer. They then immediately advertised for a maintenance fitter in language very similar to that in which they had previously advertised for a station engineer, knowing presumably that Carter would be an applicant for this new post, because he needed the employment and the house which went with it. He did in fact apply for the position and was appointed to it on November 26, 1953; and he continued as before. He occupied the same house and did the same work, but was described as maintenance fitter instead of station engineer. Incidentally he filled in the printed forms which still had the description of him as station engineer. The only difference was that the conditions of appointment stated that he should "be subject to the conditions of service laid down by the National Joint Council for the Waterworks Undertakings Industry." The terms and conditions of that industry, which had also been approved by a Whitley Council, were contained in a white book. The effect of grading under the red book and white book schemes respectively was that the red book men were a little better off than the white book men.

The trade union regarded this as a palpable device by the local authority to get out of the award which had been made by the tribunal. On February 12, 1954, the local branch of the union unanimously passed a resolution asking the union to take appropriate action. On February 13, 1954, the union reported to the Minister under the Industrial Disputes Order, 1951, an "issue" under article 2 as to whether the local authority should observe the terms of the red book. They reported: "The issue arises out of the terms and conditions of employment of Mr. C. H. Carter, who holds a post now designated by the employing authority as 'maintenance fitter,' Friar Waddon Waterworks. It is contended that this post is identical in character to a post previously existing in this authority and titled 'station

" ' engineer,' Friar Waddon Waterworks, and is therefore one to " which the scheme of conditions of service for the miscellaneous " classes of officers of the National Joint Council should be " applied." The Minister sent a copy of that report to the local authority, who took objection to it, saying that " it is not true " that there is an issue between the council and Mr. C. H. " Carter." On April 29, 1954, the Minister replied that it appeared to him that the matter reported by the trade union was an " issue " within the meaning of article 2 of the Industrial Disputes Order, 1951, and that the Minister proposed to proceed with the reference of the issue to the Industrial Disputes Tribunal. The tribunal sat on June 24, 1954, to hear the case, but the local authority took objection to the jurisdiction of the tribunal and the hearing was adjourned until the courts had determined the question. The Divisional Court, on March 10, 1955, prohibited the tribunal from entertaining the matter. They held that on a proper construction of the word " issue " in article 2 (*b*) of the Industrial Disputes Order, 1951, as construed by the majority of the Court of Appeal (Somervell and Birkett L.JJ.) in *Reg.* v. *Industrial Disputes Tribunal. Ex parte Technaloy Ld.*,[2] there was at the relevant date (February 13, 1954) no controversy between the local authority and Carter or the trade union, and even if there were, the controversy was not whether the local authority was observing the recognized terms and conditions of employment, but whether the occupation of Carter under his new contract of employment brought him within the terms of the red book scheme. They held that that was not an issue within the meaning of article 2 (*b*), but a controversy to be decided by the machinery provided by the red book scheme itself. Lord Goddard C.J. expressed the view that it was much to be regretted that the local authority had acted as they did when the award of the tribunal was made against them, and described the dismissal of Carter and his re-engagement as a fitter instead of an engineer to perform exactly the same duties as a palpable sham and not an action which one would expect of a local authority, which ought to be a model employer. An order issued accordingly against the tribunal prohibiting them from hearing the issue.

The trade union appealed.

Gerald Gardiner Q.C. and *Rodger Winn* for the trade union.

R. I. Threlfall for the local authority.

S. B. R. Cooke for the Minister of Labour and National Service.

The following cases were cited in the argument: *Reg.* v. *Industrial Disputes Tribunal. Ex parte Technaloy Ld.*[2]; *Bolton* v. *Stone*[3]; *Reg.* v. *Industrial Disputes Tribunal. Ex parte*

[2] [1954] 2 Q.B. 46; [1954] 2 W.L.R. 932; [1954] 2 All E.R. 75.

[3] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

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Derbyshire County Council[4]; *Rex* v. *Industrial Disputes Tribunal. Ex parte Banstead Urban District Council*[5]; *Rex* v. *National Arbitration Tribunal. Ex parte Keable Press Ld.*[6]; *Reg.* v. *Industrial Disputes Tribunal and Another. Ex parte Practical Banking Ld.*[7]; *R.* v. *National Arbitration Tribunal. Ex parte South Shields Corporation.*[8]

Cur. adv. vult.

July 7. DENNING L.J. We are here concerned with a trade dispute which has arisen over a man employed by the Portland Urban District Council, whom I will call the local authority. The local authority have their waterworks at Upwey, ten miles from Portland. The man in charge is a Mr. Carter, who is given a house on the spot. When he was first appointed in 1949 he was described as the "station engineer." In 1953 he was given a month's notice but was soon afterwards reappointed under the description of "maintenance fitter." His work was just the same as before. It was only a change of name. The reason is because the local authority hope in this way to put him into a different trade category.

There are two trade categories into which Mr. Carter may fall. The one is the "miscellaneous" class, which consists of men employed by local authorities whose duties are of a special nature, neither wholly clerical nor wholly manual. The other is the "waterworks" class, which consists of men employed in waterworks undertakings. There is a Whitley council for each of these trade categories which has power to recommend what should be done for the men but no power to enforce its recommendations. A Whitley council consists of representatives of employers and workers in equal numbers: and it makes recommendations only when a majority of each side are in agreement on what should be done. The Whitley council for the "miscellaneous" class has approved a scheme of conditions of service for miscellaneous men which is contained in a red book. The Whitley council for the "waterworks" class has approved a scheme for waterworks men in a white book. Under these schemes the miscellaneous men are a little better off than the waterworks men. If Mr. Carter is graded as a miscellaneous man he might in due course get £520 per annum, whereas he would only get £482 19s. 0d. as a waterworks man.

There has already been one long contest as to whether Mr. Carter should be graded as a miscellaneous man or as a waterworks man. This contest took over two and a half years from January 6, 1951, to September 7, 1953, and ended with Mr. Carter being graded as a miscellaneous man. All this took place while Mr. Carter was described as a "station engineer" and I

[4] Unreported. June 11, 1952.
[5] Unreported. January 29, 1952.
[6] [1943] 2 All E.R. 633.
[7] [1952] 2 Q.B. 662; [1952] 1 T.L.R. 1448; [1952] 1 All E.R. 1370.
[8] [1952] 1 K.B. 46; [1951] 2 T.L.R. 791; [1951] 2 All E.R. 828.

ought perhaps to give in outline the steps in that contest. [His Lordship stated the facts set out above, and continued:] Upon that award (award No. 426) being made, article 10 of the Industrial Disputes Order, 1951, came into operation, with the result that it was an implied term of the contract between the local authority and Mr. Carter that they should apply the terms of the red book to him until varied by agreement between him and them. I say "between him and them" because I think that the word "parties" in article 10 means the parties to the contract of employment and not parties to the dispute or issue. The local authority duly implemented that award, but not for long. They got out of it by the simple expedient of determining the contract of employment and, with it, the term implied by the award of the tribunal.

[His Lordship completed the statement of facts set out above, and continued:] The first point is whether there was any controversy existing on February 13, 1954, when the trade union reported the matter to the Minister. I think there clearly was. The action taken by the local authority was so provocative that no one could suppose that the trade union would acquiesce in it or remain silent under it. Mr. Carter may have himself been content, so that there was no issue between Mr. Carter and the local authority; but there was clearly an issue between the trade union and the local authority which needed only to be formulated. It was suggested that the union should have written a letter to the local authority before they reported the matter to the Minister. I think not. I do not see any need for a letter before report any more than a letter before action. If there was no difference between the parties, the local authority could immediately say so; whereas if there was a difference, there could be no objection to its being reported.

The second point is whether the matter was within article 2 of the Order, that is, whether there was "an issue as to whether "an employer in the district should observe the recognized terms "and conditions." The difficulty about this question is that it has sometimes been assumed that a matter must either be a "dispute" or an "issue," but cannot be both. I do not agree with this assumption. I find myself in agreement with what Romer L.J. said in *Reg.* v. *Industrial Disputes Tribunal. Ex parte Technaloy Ld.*,[1] that there may be a very considerable overlap. Some matters may give rise to an "issue" only, as, for instance, when all employers in a particular trade observe the recognized terms and conditions but a trade union wishes an employer in an allied trade to observe those terms also. In such a case there is no "dispute" within article 12 (1), because there is no dispute between an employer and the workmen in his employ: but there is clearly an "issue." Other matters may

[1] [1954] 2 Q.B. 46, 61, 64.

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give rise to a "dispute" only, as, for instance, when the workmen are dissatisfied with their pay or conditions, but there are no recognized terms or conditions with which they can be compared.

Apart from those cases, there are many matters which can properly be described either as a "dispute" or as an "issue." The *Technaloy* case [1] is, I think, a good instance. It raised an "issue" whether the employers should pay their men the recognized rates. That is how the Divisional Court looked at that case. It also raised a "dispute" between an employer and some of his workmen connected with the terms of their employment. That is how this court looked at it. So also with the present case. It could, I think, be described as a "dispute" because it is, as I understand it, a dispute between the local authority and some of their staff connected with the terms of employment of Mr. Carter. It can also be described as "an "issue," because the union claim that the local authority should observe the recognized terms and conditions in regard to Mr. Carter.

In these cases when a matter can properly be described either as a "dispute" or as an "issue," it seems to me that the choice lies with the persons who report it to the Minister. If an organization of employers or a trade union reports it as "an "issue," the Minister must deal with it as such; but if they report it as a "dispute," he must act on that footing. In either case the matter will, unless settled, come before the tribunal. The jurisdiction of the tribunal should not depend on any nice distinctions between a "dispute" and an "issue," especially in those cases where the matter can properly be brought under either of those descriptions. The words of Lord Goddard C.J. in an unreported case from Derbyshire (*Reg.* v. *Industrial Disputes Tribunal. Ex parte Derbyshire County Council* [2]) are in point: "Both issues and disputes can be referred . . . we "certainly should not order prohibition because it may be called "a dispute instead of an issue or an issue instead of a dispute." In my opinion the union was, in this case, quite entitled to refer this matter as "an issue" to the Minister, and the Minister acted quite correctly in referring it to the tribunal.

The third point which was strongly pressed on us by Mr. Threlfall was that the difference ought to have been referred by the trade union in the first place to the Whitley council for the miscellaneous class. It ought not, he said, to have been referred straight away to the Minister. This point finds its origin in paragraph 25 (2) in the red book (the scheme for the miscellaneous class), which says that "a question as to whether or not an "employee is an officer to whom the scheme applies, as distinct "from a question arising out of the application of the scheme, "shall be dealt with under the procedure for the settlement of

[1] [1954] 2 Q.B. 46. [2] Unreported. June 11, 1952.

"differences as set out in the constitution for the provincial "council."

Perhaps the strongest way of putting this point for the local authority is this: The only thing that can be reported as an "issue" to the Minister is whether an employer should observe the recognized terms and conditions. One of those terms is paragraph 25 (2) in the red book. So long as the local authority are prepared to let the matter be decided in the way laid down in paragraph 25 (2) in the red book, it cannot be said that they are not observing the recognized terms and conditions.

The short answer to this point is that the local authority here repudiate the red book altogether. They say that it does not apply to Mr. Carter. They cannot be heard to say that he is bound by it when they say they are not bound by it themselves.

Furthermore, paragraph 25 (2) is not, properly speaking, one of the "terms and conditions of employment" at all. It is only machinery for settling a difference. The existence of such machinery is no bar to a report to the Minister. It is often of the greatest public importance that an issue should be reported to the Minister at once before resort is had to the trade machinery for settlement. It may be the only way in which a strike can be averted. It is then a matter for the Minister to decide what steps to take to settle the difference. It is for him to say whether there is suitable machinery for settlement of the difference and whether it should go first to the Whitley Council or be sent straight to the Industrial Disputes Tribunal. It would be very unfortunate if a difference could not be reported to the Minister until all trade machinery for settlement had been exhausted. The Order does not so require, and I do not think the courts should require it either. I think the trade union were entitled to report this matter to the Minister without first going to the Whitley Council.

In the result, I see no reason for issuing a writ of prohibition in this case. I think the tribunal has jurisdiction to determine the issue referred to them. I do not agree with the views of the Divisional Court, and would allow this appeal.

BIRKETT L.J. stated the facts shortly, and continued: The local authority did not pretend that they had created a new post for Mr. Carter; he did precisely the same work as before; he occupied the same house; the only change was the change of name, and the condition of the employment that he should henceforth be governed by the conditions of service in the white book and not the red book as formerly.

In the Divisional Court this procedure on the part of the local authority met with strong disapproval. I am bound to say that it does not seem to me to be consonant with the standards local authorities ought to set as employers to try to defeat the decision of the tribunal by this rather transparent device. But the result was a renewal of the contest which had begun in 1951.

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[His Lordship concluded his statement of the facts, and continued:] The Divisional Court has directed the writ of prohibition to issue because they said that there was no "issue" which the Minister could properly refer to the tribunal. Part I of the Order of 1951 is headed "Reporting of disputes and issues," and, after dealing with disputes, deals with the reporting of "issues" in article 2, subclause 2 (*a*), (*b*) and (*c*) of which are concerned specifically with the reporting of issues concerning recognized terms and conditions of employment. Article 9 of the Order deals with "Reference of issues to the Tribunal," and article 10 with the way the awards of the tribunal are to be applied to the contract between the employer and the worker.

For the purposes of the Order at least, a clear distinction is drawn between disputes and issues. It would appear that an issue is concerned only with recognized terms and conditions of employment as laid down in article 2.

In *Reg.* v. *Industrial Disputes Tribunal. Ex parte Technaloy Ld.*,[3] Somervell L.J. suggested that the wording of the Industrial Disputes Order, 1951, might well be made clearer than it is, and added[4]: "It would be unfortunate if it remained a happy hunting "ground for prerogative writs." In *Reg.* v. *Industrial Disputes Tribunal. Ex parte Derbyshire County Council*[5] the Divisional Court had before it a motion to prohibit the Industrial Disputes Tribunal from dealing with a "dispute" which the Minister had referred to them under the Order. Lord Goddard C.J. reviewed the previous cases which had come before the Divisional Court, and concluded his judgment with these words: "I am inclined "to think, but it does not make any difference for the purpose "of this case, that so far as the description of what is referred "is 'that the county council should implement the recommenda-"'tions of the joint negotiating committee for chief officers of "'local authorities,' I think that, strictly speaking, is what the "Order calls an issue; but the second point, that 'the council "'should fix salary scales of not less than £2,600 rising to "'£2,900' for the four men is clearly a dispute; but I do not "think it makes any difference, because both issues and disputes "can be referred. The matter has been referred in this way, "and therefore the Industrial Disputes Tribunal can deal with "the matter; and we certainly should not order prohibition "because it may be called a dispute instead of an issue or an "issue instead of a dispute." But in the *Technaloy* case[6] the Divisional Court allowed a writ of prohibition to issue on the ground that the matter referred by the Minister of Labour was not a "dispute" but was an "issue" and should have been referred to the Minister as an "issue" and not as a "dispute." In this court the decision of the Divisional Court was reversed on the ground that the controversy in that case was a "dispute"

[3] [1954] 2 Q.B. 46.
[4] Ibid. 56.
[5] Unreported. June 11, 1952.
[6] [1954] 2 Q.B. 46.

and not an "issue." Romer L.J., while not dissenting from the decision of the court, made some important observations for himself, which have a great bearing on the way the Order should be interpreted. He said [7]: "It is, in my opinion, a matter "of some difficulty to fix with exactitude the precise line of "demarcation between what is a 'dispute' under the Industrial "Disputes Order, 1951, and what is an 'issue.' I am fully in "agreement with my brethren in thinking that the conception "of an 'issue' in the Order is primarily related to the question "whether or not a general code of terms and conditions of "employment which exist in any particular district should be "enforced as a whole on some employer in the district who is "not already bound by them. For myself, however, I feel some "difficulty in accepting the view that an 'issue' is rigidly con-"fined to the question of enforcing a code in its entirety and that "any difference between employers and employees which is in "any degree narrower in its scope than that cannot constitute "an 'issue' but must be considered on the footing that it is a "'dispute.'" Later he said [8]: "I am accordingly of opinion, "on the whole, that the failure or refusal of an employer to "observe some part only of a generally accepted code may con-"stitute an 'issue' and be referred to the tribunal as such, but "it may nevertheless also be a 'dispute' within the definition "in the Order and be reported and determined upon that footing. "It seems to me, indeed, that too rigid a distinction between the "two kinds of difference envisaged by the Order, involving as "it does the view that 'disputes' and 'issues' are mutually "exclusive, might well lead to trouble in the working of the "Order—as it has in fact led to trouble in the present case. In "my judgment there may in some cases, although not, perhaps, "in many, be an overlap between the two." In that case, Mr. Pritt, who argued the case for the trade union, said in the course of the argument [9]: "Even if the difference between the employer "and workmen is an issue, it also has all the qualifications of a "dispute, and there is nothing in the Order to suggest that "'dispute' and 'issue' are mutually exclusive terms"; and Mr. Cooke, who appeared for the Minister of Labour, said [10]: "If it is a question of the meaning of the terms and conditions "it is a 'dispute'; but if it is a question whether the employer "shall observe the terms and conditions it is an 'issue.' Where "the workmen are contented there cannot be a 'dispute' but "only an 'issue.' When it is a question whether the employers "are observing the national agreement the question whether it "is a 'dispute' or an 'issue' depends upon how the matter is "put forward. In effect, the parties themselves decide under "which definition they will bring forward the report. The "employer cannot report an issue and therefore the case can be

[7] Ibid. 61.
[8] Ibid. 64.
[9] Ibid. 49.
[10] Ibid. 50.

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" reported as both a dispute and an issue." Mr. Beney, who appeared for the employers, said [11]: " What the report by the " union is seeking to say is that this company is not carrying out " an agreement which has been nationally agreed, and that is " the very topic which article 2 is intended to cover. If the " workmen were saying ' you are not carrying out the terms of " ' the agreement,' and the employer was replying ' I am carrying " ' them out,' that would be a dispute; but where a union asks " for a decision whether a particular employer should carry out " an agreement and is doing so, the Minister has no power to " refer a dispute, because there is no dispute, but only an issue." These quotations are enough, I should hope, to show the divergence of view on the interpretation of the Order. In my own judgment in the *Technaloy* case I confined myself to a decision on the point at issue, namely, whether the facts of the case brought the matter within article 2 of the Order as an " issue " or whether it came within the provisions of the Order dealing with disputes. I said [12]: " The real point to be decided " is whether the facts in the case show the controversy to be an " ' issue ' or a ' dispute ' within the meaning of the Order. The " agreement of November 29, 1951, was concerned with two " matters only—the 11s. increase and the question of holidays. " In asking the employers to fulfil the terms of this agreement " the union was asking for the increase in wages and for the " additional holiday; and in refusing to fulfil the terms of this " agreement, the employers were saying: ' We will not pay the " ' increase, nor will we make any alteration in the holidays we " ' grant.' ". I continued: " I am of opinion that article 2 and " article 9 (2) of the Order do not apply to the facts of the " present case, so as to make this an ' issue ' within the meaning " of the Order." It is clear from this quotation that I was then deciding that the view of the Divisional Court was wrong, because they had said that this was an " issue " and not a " dispute," whereas my view of what the Order meant by an " issue " was what I described in the passage quoted.

The difficulty in construing the Order arises mainly because the Order itself draws such a clear distinction between a " dispute " and an " issue." At the time of the *Technaloy* case,[12] and again today, I was impressed by the distinction drawn, and endeavoured to discover the reasons for the distinction. It still seems to me that on the facts of the *Technaloy* case [12] it was right to decide that the matter in controversy was a " dispute " and not an " issue," for the reasons given.

In the present case the local authority contend that no " issue " had arisen, and there was no controversy between Mr. Carter and the local authority on February 13, 1954, the date of the report to the Minister. The Divisional Court said on these matters: " It would appear from the facts that there was

[11] Ibid. 51. [12] Ibid. 59.

" no controversy between the council and Mr. Carter or the " association at this relevant date and, even if there were, the " controversy was not whether the council was observing the " recognized terms and conditions of employment but whether " the occupation of Mr. Carter under his new contract of employ- " ment brought him within the terms of the scheme. This is " not, in the opinion of the court, an issue within the meaning " of the article but a controversy to be decided by the machinery " provided by the scheme itself." In my judgment, the question whether there was any controversy between Mr. Carter and the local authority is irrelevant, and to state the controversy which had arisen as one which did not raise the question whether the council was observing the recognized terms and conditions of employment, but only whether Mr. Carter in the new name the local authority had given to him of maintenance fitter came within the scheme at all is to take much too narrow a view of the controversy. From the history of the case it seems to me clear that the union was raising the question as stated in their report to the Minister which has been quoted in the judgment delivered by Denning L.J. (supra). To submit that the proper procedure is to apply the provisions of paragraph 25 (2) of the scheme when the local authority has expressly repudiated any application of the terms of the red book to Mr. Carter is a little cynical; but in my view the Minister was fully entitled to refer the matter to the tribunal as an " issue."

That really disposes of this appeal, and strictly no question arises concerning the definitions of " dispute " and " issue," for on the view I take there was here an " issue," and the Divisional Court has not suggested that there was a " dispute," but merely that paragraph 25 (2) of the red book must first be applied. But in view of the argument it is clear, I think, that while there can be " issues " which can only be " issues " within the meaning of this Order, and " disputes " which can only be " disputes " within the meaning of the Order, there can be controversies which partake of the nature of a " dispute " and an " issue " at the same time, and in any such case it would seem that it might be reported as a " dispute " or as an " issue." I would allow the appeal.

ROMER L.J. One of the primary contentions of the Portland U.D.C. on this appeal was based on the provisions and alleged effect of the " scheme of conditions of service for the miscel- " laneous classes of officers," to which I will refer hereafter as " the scheme." Paragraph 25 of the scheme concerns appeals, and in subparagraph (2) thereof provides as follows: " A question " as to whether or not an employee is an officer to whom the " scheme applies, as distinct from a question arising out of " the application of the scheme, shall be dealt with under the " procedure for the settlement of differences as set out in the " constitution of the provincial council, and any decision in favour

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" of the employee . . . shall have effect from a date not earlier " than that on which application was first made to the employing " authority." The urban district council say that, by reason of this provision, the question as to whether the scheme applies to Mr. Carter in his present employment cannot (at all events at present) be referred by the Minister as an " issue " under the Industrial Disputes Order, 1951. The matter is put in two ways. First it is said that no issue can arise unless and until the question has been submitted for settlement to the provincial council and an award obtained from them which is adverse to the employers and which the employers refuse to implement. Secondly, it is said that no issue can be reported unless it be shown that employers are declining to observe recognized terms and conditions and that that cannot be shown of the urban district council because they are willing to proceed under paragraph 25 (2) of the scheme. In my opinion one answer to the first of these contentions is that the National and Local Government Officers' Association has no right, so far as I can see, to bring the machinery of paragraph 25 (2) into operation—although they managed to do so in 1952. The opening words of the sub-paragraph, " a question as to whether or not an employee is an " officer to whom the scheme applies," mean, as it appears to me, a question as between an employee and his employer and not a question as between the employer and his employee's union. But further than this, and assuming that the union can in fact resort to paragraph 25 (2), I can find no support for the view that no issue can arise until they have done so. The union is under no contractual or legislative obligation to obtain an award from the provincial council, and if it reports an issue to the Minister without obtaining one there is nothing in the Industrial Disputes Order, 1951, which precludes the Minister from referring it at once to the tribunal, for article 5 of the Order does not apply to issues but only to disputes. Then, as to the second question, it is not easy to see how the urban district council can, at one and the same time, say that the scheme does not apply to Mr. Carter's present employment and yet contend that it contains a relevant term or condition of employment with which they are complying or are willing to comply. If the scheme as a whole constitutes the terms and conditions of Mr. Carter's employment the urban district council are plainly not complying with them; if, on the other hand, it does not, then the willingness of the urban district council to comply with one of the terms and conditions is an irrelevant consideration. But apart altogether from this, I do not regard paragraph 25 (2) as forming a part of the " recognized terms and conditions " within the purview of that phrase as used in article 2 of the Order of 1951. The scheme admittedly formulates a complete code of terms and conditions but that is not to say that a term or condition of employment emerges from every paragraph of the scheme. No such term or condition emerges from paragraph 25 (2), which does no more

than provide administrative machinery for the purpose of settling questions whether or not an employee is in fact an officer to whom the scheme applies. From this it follows that the purported adoption by the urban district council of paragraph 25 (2) does not enable them to say that they are conforming to even one of the recognized terms and conditions of employment and they cannot therefore displace the application of article 2 of the Order on that ground.

The next point on which the urban district council relied is that the difference of opinion which has arisen with regard to the terms of Mr. Carter's employment constitutes a "dispute" under the Industrial Disputes Order, 1951, if it falls within the Order at all; and that as it is a "dispute" it cannot be reported to the Minister as an "issue" and be referred by him to the tribunal as such. As to this, it seems to me to be at least a possible view that the question which is in controversy does not constitute a "dispute" at all; for that word is defined by article 12 (1) of the Order as meaning (so far as relevant) "any dispute "between an employer and workmen in the employment of that "employer" connected with terms of employment or with conditions of labour, and no such dispute exists between Mr. Carter and the urban district council. On the assumption, however, that a dispute does exist as to the terms which regulate Mr. Carter's employment, this does not in itself, in my opinion, prevent the co-existence of an issue. I expressed my views on this aspect of the Order of 1951 in the *Technaloy* case [13] and I will not repeat them now. Suffice it to say that in my judgment "disputes" and "issues" under the Order are not mutually exclusive and there is, in some degree at least, an overlap between the two. In the present case it is the aim of N.A.L.G.O. to procure the application to Mr. Carter's present employment of the terms and conditions set forth in the scheme. The urban district council, as Mr. Carter's employers, contend that these terms and conditions are not applicable to his employment. It appears to me that this conflict of views does give rise to an issue and can be dealt with as such under the Order; and none the less because it may also constitute a dispute and certainly would constitute one if Mr. Carter were a party to the controversy himself. I find myself no more able now than I was in the *Technaloy* case [13] to define the difference between a dispute and an issue with any satisfactory degree of precision; but where, as here, one finds "recognized terms and conditions" which an employee's union contends should be applied to his employment, and that contention is rejected by the man's employers, it seems to me that a controversy arises which the union can report as an "issue" under article 2 of the Order and which the Minister can refer to the tribunal under article 9. I would only mention in conclusion on this point a suggestion which was put forward

[13] [1954] 2 Q.B. 46, 61, 64.

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in argument by Mr. Gardiner to the effect that the Minister himself is the sole arbiter, by virtue of article 3 (2) of the Order, to determine whether a controversy constitutes an "issue" or a "dispute" and that his decision is binding upon the parties. Such a power was repudiated by Mr. Cooke, on behalf of the Minister, and in my opinion rightly so. In my judgment the certificate of the Minister which is referred to in the subclause is not a certificate as to whether what has been reported to him is a "dispute" on the one hand or an "issue" on the other, but merely an authoritative statement that he has received a reported dispute or a reported issue, as the case may be.

I agree with Denning L.J. that it is not a condition precedent to the reporting of an issue that a trade union should first communicate to the employers their intention so to do and there is nothing that I can usefully add to what he has said either on that point or on the urban district council's submission that no controversy existed at the date of the report. On the appeal as a whole I agree that the urban district council has not made out a case for a writ of prohibition and that the appeal should therefore be allowed.

Appeal allowed.
Order for prohibition set aside.

Solicitors: *Timothy Hales; Sharpe, Pritchard & Co.; Solicitor, Ministry of Labour and National Service.*

M. M. H.

[CHANCERY DIVISION.]

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July 13.
Danckwerts J.

* *In re* LEVIEN. LLOYDS BANK *v.* WORSHIPFUL COMPANY OF MUSICIANS.

[1954 L. 1515.]

Charity — Education — Singing — Trusts for encouragement of singing and advancement or study of organ music—Validity.

A testator directed that a sum should be set aside out of his residuary estate to form a trust fund to be transferred to the Worshipful Company of Musicians, the annual income of which was to be devoted to the making of presentations (other than money or medals), through a committee, to distinguished members of either one or any of the following professions, namely (a) singers, (b) composers of vocal music, (c) writers on the subject of singing, and (d) researchers into matters relating to the human voice; and that the committee, in awarding the presentations, should always bear in mind as part of their standard of excellence "Santley's "views and doctrine upon singing and voice production as "exemplified in my two monographs, 'Sir Charles Santley' and "'Some notes for singers.'"

The testator further directed that his trustees, after providing for the above fund, should transfer the residue of the capital and

income of the residuary trust fund to the company for the establishment of a trust fund to be applied for the benefit of professional or amateur musicians, whose work or study might be devoted wholly or partly to the music of the organ:—

Held, that, the objects of the trusts being to confer benefit on the public by raising the standards of vocal and organ music, each of the trusts was a valid trust for educational purposes.

Observations of Lord Greene M.R. in *Royal Choral Society* v. *Inland Revenue Commissioners*, 25 T.C. 263, 273; [1943] 2 All E.R. 101, 104 applied.

ADJOURNED SUMMONS.

The testator, John Joseph Mewburn Levien, who died on July 2, 1953, by clause 9 of his will, dated January 17, 1945, directed that Lloyds Bank Ld.—the executor and trustee of his will—should stand possessed of his residuary estate on the following trusts, namely:—"(1) Upon trust in the first place to set "aside out of the residuary trust fund a sum of £2,000 and to "pay and transfer the same to the Worshipful Company of "Musicians (hereinafter called 'the company') for the purpose "but subject to the conditions hereinafter mentioned of establishing and conducting a trust fund to be called 'The Sir Charles "'Santley Memorial Fund' according to the following provisions "and conditions namely:—Upon trust to invest the same [in "manner therein mentioned] and to employ the annual income "arising from the same investments or some part thereof in "awarding every year presentations to distinguished members "of either sex of any of the following professions viz.:— "(a) singers (b) composers of vocal music (c) writers "upon the subject of singing (d) researchers into matters "relating to the human voice (including in such class, "laryngologists and similar specialists upon the physiological "aspect of singing) and in payment of all costs and expenses "incidental thereto and it is my desire though I expressly do not "impose any trust upon the company in that behalf but leave "the matter to their unfettered discretion that they will "administer the Sir Charles Santley Memorial Fund in accordance with the following principles viz.: (a) The fund shall be "administered by a standing committee of three chosen from "the past masters and assistants of the company. (b) The "number of the presentations to be awarded in any one year and "the respective recipients shall be decided by such committee "subject to confirmation by the Master, Wardens and Court. "(c) The presentation shall not be money prizes or medals but a "piece of plate a jewel or such other token as the committee "shall subject to confirmation as aforesaid decide. (d) In awarding the presentations the committee shall always bear in mind "as part of their standard of excellence Santley's views and "doctrine upon singing and voice production as exemplified in my "two monographs 'Sir Charles Santley' and 'Some notes for "'singers.' (2) Upon trust in the second place to hold the "residue of the capital and income of the residuary trust fund

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LEVIEN, *In re.*

" after first setting aside and applying the Sir Charles Santley " Memorial Fund as prescribed by subsection (1) of this clause " and to pay and transfer the same to the company for the pur- " pose but subject to the conditions hereinafter mentioned of " establishing and conducting a trust fund to be called ' The " ' W. T. Best Memorial Fund ' according to the following pro- " visions and conditions namely (a) Whereas the gift is made " by me in memory of W. T. Best late organist of St. George's " Hall Liverpool and the Handel Festival the capital and income " of the trust fund if accepted by the company shall be kept " separate from the other funds of the company and be called " ' The W. T. Best Memorial Fund ' (b) The income of the trust " fund shall from time to time at the discretion of the company " or a standing committee of three . . . be applied during such " periods whether continuous or discontinuous as they shall for " the time being think fit and proper for the maintenance support " education assistance or otherwise for the benefit of any one or " more person or persons who may be musicians or students of " music whether in a professional or amateur capacity and whose " work or study may be devoted wholly or partly to the art of " the organ in its higher aspects whether as executant composer " transcriber or writer and whom the company committee or " other governing body as aforesaid may from time to time select " as being in their opinion of especial merit and deserving of such " maintenance support education assistance or benefit or alter- " natively such income shall from time to time at such discretion " as aforesaid be applied for the advancement or study of the " music of the organ in such other manner as the company com- " mittee or other governing body as aforesaid shall for the time " being think fit and proper Provided always and I hereby declare " that the company shall have full power from time to time or " at any time in their discretion or that of their committee or " other governing body as aforesaid to expend and apply for all " or any of the purposes prescribed in subsections (1) and (2) " of this clause the whole or such part or parts of the capital of " the Sir Charles Santley Memorial Fund and the W.T. Best " Memorial Fund as the company may think fit and determine " and that in all other respects the company shall have an " absolute and unfettered discretion as to the mode and manner " of their application of either of the trust funds and the income " thereof respectively."

The testator further provided by clause 9 (3) of the will for the receipt of the person who professed to be the treasurer or other proper officer of the Worshipful Company of Musicians being a sufficient discharge to the bank and by clause 9 (4) for a gift over of the residuary trust fund to the person or persons who would be entitled on his intestacy in the event of the refusal of the company to notify its acceptance of the said gifts on the conditions above set out within one year from the date of his death.

A summons was taken out by the bank to determine whether the trusts contained in clause 9 of the will were valid charitable trusts.

J. A. Armstrong for the executors and trustees of the will.
Nigel Warren for the Worshipful Company of Musicians.
Timothy Barnes for next-of-kin.
Bryan Clauson for the Attorney-General.

Cases referred to in argument:—*Royal Choral Society* v. *Inland Revenue Commissioners* [1]; *In re Central Employment Bureau for Women & Students' Careers Association* [2]; *In re Corelli* [3]; *Crystal Palace Trustees* v. *Minister of Town and Country Planning* [4]; *In re Gestetner Settlement* [5]; *In re Shaw's Will Trusts* [6]; *In re Dupree's Deed Trusts* [7]; *Chesterman* v. *Federal Commissioner of Taxation* [8]; *In re Meyers* [9]; *Hunter* v. *Attorney-General* [10]; *In re Price.* [11]

DANCKWERTS J. This case concerns the will of the testator which was dated January 17, 1945. The testator died on July 2, 1953. He was very much interested in singing, of which he was a professor, and he had been a liveryman of the Worshipful Company of Musicians since the year 1912 (a company of which I myself became a liveryman in 1913), but the Worshipful Company of Musicians is only interested in the matter in the position of trustee, and the question at issue is whether the trusts which they are directed to carry out are of a charitable nature and therefore valid.

The trusts are contained in clause 9 of the will. [His Lordship read the trusts as above set out and continued:]

It seems to me that the case which gives me the greatest assistance with regard to the present questions I have to decide is that of the *Royal Choral Society* v. *Inland Revenue Commissioners.* [12] That was a case of a society which was formed for the advancement of choral singing in London, and the question was whether it was "established for charitable purposes only" and whether its income was "exclusively applied for such purposes" in regard to income tax law. Some observations of Lord Greene M.R. seem to me to be very relevant to the matter which I have to decide; after discussing the question of whether the matter was a matter of law or a matter of fact, he continued as follows: "That, of course, does not conclude the matter;

[1] 25 T.C. 263; [1943] 2 All E.R. 101.
[2] [1942] 1 All E.R. 232.
[3] [1943] Ch. 332; 59 T.L.R. 437; [1943] 2 All E.R. 519.
[4] [1951] Ch. 132; 66 T.L.R. (Pt. 2) 753; [1950] 2 All E.R. 857n.
[5] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.
[6] [1952] Ch. 163; [1951] 2 T.L.R. 1249; [1952] 1 All E.R. 49.
[7] [1945] Ch. 16; 61 T.L.R. 50; [1944] 2 All E.R. 443.
[8] [1926] A.C. 128; 42 T.L.R. 121.
[9] [1951] Ch. 534; [1951] 1 T.L.R. 435; [1951] 1 All E.R. 538.
[10] [1899] A.C. 309; 15 T.L.R. 384.
[11] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.
[12] 25 T.C. 263, 273; [1943] 2 All E.R. 101, 104.

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" because it has to be shown that the purpose of this body of " persons is charitable and only charitable. We are accordingly " thrown back upon an examination of the purposes for which it " was established and for which it carries on its work. It is the " purpose of the members of the society, ten in number, that is " relevant. The maintenance of the choir may be regarded in " two aspects: first as an educative process for the members of " the choir; and, secondly, as an instrument by which the per- " formance of this type of music is presented to the public. I " should have said that there is no flavour of commercial profit, " or anything of that kind, about this society. So far as the " choir is concerned the object, as I have said, paraphrasing the " language of the rule, is the encouragement and advancement of " choral singing; or, taking the language of the rule, ' the pro- " ' motion of the practice and performance of choral works.' " Bearing in mind the nature of the works in question and the " medium through which they are performed, it seems to me that " the objects, so far as the public are concerned, are educational; " and in so far as possibly they may not be regarded as educa- " tional, they would fall within the fourth case referred to in " Lord Macnaghten's analysis in *Commissioners for Special* " *Purposes of Income Tax* v. *Pemsel*.[2] Dealing with the educa- " tional aspect from the point of view of the public who hear " music, the Solicitor-General argued that nothing could be " educational which did not involve teaching—as I understood " him, teaching in the sense of a master teaching a class. He " said that in the domain of art the only thing that could be " educational in a charitable sense would be the education of the " executants: the teaching of the painter, the training of the " musician, and so forth. I protest against that narrow concep- " tion of education when one is dealing with aesthetic education. " Very few people can become executants, or at any rate " executants who can give pleasure either to themselves or to " others; but a very large number of people can become instructed " listeners with a trained and cultivated taste. In my opinion, a " body of persons established for the purpose of raising the artistic " taste of the country and established by an appropriate document " which confines them to that purpose, is established for educa- " tional purposes, because the education of artistic taste is one " of the most important things in the development of a civilized " human being. In the case of artistic taste, one of the best " ways of training it is by presenting works of high class and " gradually training people to like them in preference to works of " an inferior class. The people who undergo this process go no " doubt with the idea of being amused or entertained; but it is " not the state of mind of the people who go to the performance " which matters for the present purposes, it is the purpose of the " people who provide it which is important. If the people who

[2] [1891] A.C. 531, 533; 7 T.L.R. 657.

" are providing the performance are really genuinely confining " their objects to the promotion of aesthetic education by present- " ing works of a particular kind, or up to a particular standard, " it seems to me that that is just as much education (and, in " fact, having regard to the subject-matter the best available " method of education) as lecturing or teaching in a class, or " anything of that kind. The Solicitor-General referred to a " number of cases in which he said it was established that educa- " tion in the charitable context is limited to teaching in that " narrow sense. In my opinion, those cases do not establish " any such proposition. I should be very sorry to think that they " did. The matters that were being dealt with in those cases " have nothing to do with aesthetic education or the cultivation " and improvement of public taste in music or the other arts. " I cannot help thinking that the Board of Education, which has " taken the Council for the Encouragement of Music and the " Arts under its wing, would be very surprised to learn that that " enterprise, in which public funds are now being used, was not " an educative one."

Then he goes on to deal with the evidence of Sir George Dyson, and he criticises the passage in Tudor on Charities as being misleading. The passage in Tudor on Charities (5th ed., p. 39) was: " ' The fine arts, however, are probably not regarded " ' as objects of charity; and a gift to encourage artistic pursuits " ' was held not charitable. But it is otherwise if the element of " ' instruction is introduced: a gift for an art school is good.' " He then continued: " I do not know what that passage means " when it says: ' The fine arts are probably not regarded as objects " ' of charity.' Does it mean that education of artistic taste is " not education in the charitable sense? If it does, I dissent from " that most vehemently. There is not a particle of authority in " support of such a view. If it means that the only way you can " bring the fine arts into the charmed circle of charity is by setting " up a class to teach executants, whether to teach actors to act, or " painters to paint, or musicians to perform, again I dissent most " vehemently from any such proposition. Accordingly, in my " opinion, that paragraph is inadequate and, indeed, misleading." Then he refers to two authorities; the first is *In re Allsop*,[3] and he discusses that, and he then refers to the case of *In re Ogden*[4] and continues: " There the testator desired that his executors, " with the assistance of certain gentlemen and an art master, and " any persons they might call in to assist them, should expend his " residue: ' . . . in any manner they may think desirable to " ' encourage artistic pursuits or assist needy students in art.' " I have referred to that case because on somewhat similar lines it was argued in the present case that the trusts were not charitable.

The Master of the Rolls continued: " Again, the report of " the case is very meagre. Lord Cozens-Hardy, M.R. said that

[3] [1884] W.N. 196; 1 T.L.R. 4. [4] (1909) 25 T.L.R. 382.

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" no less than three times in the previous year had it fallen to his " lot to express his view on what the law was in that kind of " case. He went on, at page 383: ' In the present case the " ' Vice-Chancellor had thought that the trustees were bound to " ' spend the money to encourage in some way or other educa- " ' tion in art.' With the greatest respect to the Vice-Chancellor, " he did not see how it was possible to get that meaning out of " the words. I do not myself derive any assistance from that " case: but it is worth pointing out that a gift merely ' to " ' encourage artistic pursuits ' might be expended in a way that " nobody would consider charitable; for instance in merely pro- " viding for one or two individuals paints and paint-brushes. or " a grand piano on which the beneficiaries could play in their " drawingroom. I apprehend nobody would say that that was a " charitable object; but the money could have been spent for " some such purpose as that." Then he refers to *In re Shakespeare Memorial Trust*,[5] a case before P. O. Lawrence J. which he said was in line with the conclusion which he had reached.

It is argued in this case that one could consistently with the trusts laid down by the testator find that the trustees could apply the money for the purpose of benefiting individual singers or individual organists, merely for benefiting them in their way of life, I suppose, and therefore not for a purpose which is wholly charitable. It is argued (of course, quite correctly) that if one finds that application may be made for purposes which are not charitable, then that invalidates the whole trust because one at once gets the difficulty of uncertainty and the whole trust is invalid and fails. But, in the present case, it seems to me that one has to read the trust as a whole. It seems to me, in the case of the Sir Charles Santley Memorial Fund, reading the trust as a whole and ignoring, if you like, as not being lawfully binding the part of the trust which is plainly of a precatory nature and expresses the testator's hope, that the object of the whole trust is to improve the training of singers, including research by experts, like laryngologists and others, in the methods of singing and therefore to produce better singers; it is really to effect the training of singers for serious music for aesthetic purposes, and it seems to me to fall exactly within the words used by Lord Greene in the case to which I have referred. Taking the trust as a whole, it is not intended to be a trust for the benefit of individual singers, but to be a trust to benefit the public by producing better singers and voice production.

Turning to the other trust, the W. T. Best Memorial Fund, it is even clearer I think in that case that the object of that trust is educational (to produce the better education of performers on the organ) because one finds in the concluding words of clause 2, before the proviso, a reference to application, " for the advance- " ment or study of the music of the organ in such other manner

[5] [1923] 2 Ch. 398; 39 T.L.R. 676.

" as the company committee or other governing body as aforesaid " shall for the time being think fit and proper." That indicates that what the testator has in mind is not a gift for the benefit of individual organists, but to produce better organists and better organ music, and that seems to me to be for the benefit of the public and to fall within the educational trust, or within the fourth class laid down in *Pemsel's* case.[6]

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Accordingly, it seems to me, that, on a proper reading of the trusts in the present case, the trusts are entirely confined to charitable purposes and are perfectly valid.

Solicitors: *Palmer, Bull & Mant; Waterhouse & Co.; Wegg-Prosser & Co.; Treasury Solicitor.*

J. L. D.

[6] [1891] A.C. 531.

[LIVERPOOL ASSIZES.]

* STRINGER *v.* AUTOMATIC WOODTURNING CO. LD.

1955
June 17, 20.

Oliver J.

[1954 S. No. 4015.]
[1954 S. No. 2160.]

Factory — Dangerous machinery — Fencing — Woodworking machine — Circular saw—Saw not used for sawing—Duty to comply with Act notwithstanding compliance with regulations—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Woodworking Machinery Regulations*, 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 10.

The plaintiff, who was employed by the defendants at their factory, was, in the course of her employment, engaged in cutting lengths of timber by means of a circular saw, and, having cut a number of such lengths, was removing some off-cuts from the bench where they had accumulated when her fingers came into contact with the revolving saw and she sustained injuries. Oliver J. found that although the saw had been fenced in accordance with the requirements of regulation 10 of the Woodworking Machinery Regulations, 1922,[1] it was not fenced so as to comply with section 14 (1) of the Factories Act, 1937[2]:—

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

[1] Woodworking Machinery Regulations, 1922, reg. 10 (*c*): " The top " of the saw shall be covered by a " strong and easily adjustable guard, " with a flange at the side of the saw " farthest from the fence. The guard " shall be kept so adjusted that the " said flange shall extend below the " roots of the teeth of the saw. The " guard shall extend from the top of " the driving knife to a point as low " as practicable at the cutting edge of " the saw."

[2] Factories Act, 1937, s. 14 (1): " Every dangerous part of any " machinery . . . shall be securely " fenced . . . Provided that, in so " far as the safety of a dangerous " part of any machinery cannot by " reason of the nature of the opera- " tion be secured by means of a fixed " guard, the requirements of this " subsection shall be deemed to have " been complied with if a device is " provided which automatically pre- " vents the operator from coming into " contact with that part."

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Held, that if the plaintiff had been injured while she was sawing wood the defendants would have been protected by the regulation, but the removing of off-cuts, whilst directly ancillary to such work, was not the job of sawing wood; accordingly, it was the duty of the defendants to comply with section 14 (1) of the Act of 1937, and, notwithstanding the fact that the defendants had provided a fence complying with regulation 10 of the Regulations, they were in breach of the duty imposed upon them by the sub-section.

Dickson v. *Flack* [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840 and *Benn* v. *Kamm & Co. Ld.* [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833 applied.

Miller v. *William Boothman & Sons Ld.* [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333 distinguished.

ACTION.

The plaintiff, who was employed by the defendants at their furniture factory, had worked for about six months at a circular saw and on January 7, 1954, she was using the saw to make chair legs. The saw had been set up and fenced for the purpose of cutting the timber, so as to comply with regulation 10 of the Woodworking Machinery Regulations 1922–1945. The timber to be cut by the plaintiff was in proper sized pieces and was placed upon and held tightly against a jig so that it was presented to the teeth of the circular saw and cut into particular lengths. After cutting each length of timber a piece of wood, called an off-cut, remained on the bench at the side of the saw after the saw had passed through the timber. The plaintiff was engaged in removing the off-cuts from the bench in the manner in which she had been trained, i.e. she moved to the side of the saw and, using her push-stick, flicked away the off-cuts whilst the saw was in motion, when her fingers came into contact with the saw and she sustained injuries. The plaintiff brought this action claiming damages for personal injuries, leave being given at the hearing to amend the statement of claim so as to allege a breach by the defendants of the duty imposed upon them by section 14 (1) of the Factories Act, 1937.

J. Melville Kennan for the plaintiff.
H. I. Nelson Q.C. and *R. S. Nicklin* for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

June 20. OLIVER J. This case raises the interesting question whether a circular saw which has been set up for sawing correctly within regulation 10 of the Woodworking Machinery Regulations becomes unprotected by that regulation when the saw is being used not for sawing; but for a different, but ancillary, purpose of clearing off-cuts from the top of the bench. I have come to the conclusion with considerable hesitation that it is not so protected.

[His Lordship described the set-up of the saw, stating that it came within the provisions of regulation 10 of the Woodworking Machinery Regulations, 1922–1945, read paragraph (*c*) of the regulation and continued:]

Without going into an elaborate exposition, what that provides for is this: that the piece of wood which is to be cut, when presented to the saw, is as close as practicable to the under-side of the fence so that there is no room for fingers to go between it and the saw on the side from which the operator works. The object of that regulation was to make the circular saw able to function at all, since it has been realised for many years that no circular saw could be used at all if it had to be so fenced that nobody could cut themselves with it. The object of that regulation was to make the piece of timber which had to be cut—a chair leg in this case—part of the fence. If the fence were put up much higher, so as to leave a space between the chair leg and the bottom of the fence, the work would not be set up so as to come within the Woodworking Machinery Regulations.

The facts of this case are agreed, that the plaintiff was cutting these chair legs, and every now and then, (although I should not have thought as often as the defendants' foreman said, for the reason that if these were long pieces of timber there would not be many off-cuts) there would be accumulated on the table of the saw a number of off-cuts. They would be on the right-hand side of the blade as one looks at it; and, of course, the operator would never be encouraged to try and move them from where she was standing to do the sawing, because to do that she would have to put her hand right across the blade. What she did was to do what she had been taught to do, quite properly. She came round to the near side of the machine and took up a position close to the wheel and then, with the push-stick, she flicked away, as she said, these off-cuts from the table of the saw. She was doing this operation habitually and she did it on the day of the accident. The saw was left running, and that was how she had been taught to do it. The man who had instructed her was an excellent type of workman and he habitually did it that way himself. He formed the opinion that if a push-stick was used there was no danger: but there was danger; because, when the last cut was made, the jig had travelled beyond the saw teeth and three and a half inches of sharp buzzing teeth was absolutely unfenced.

[His Lordship referred to the evidence and continued:] I accept that the plaintiff had been perfectly properly instructed, so that question narrows itself down to this: Mr. Nelson contended that in the case of a circular saw, once you have set up the machine so as to comply with the Woodworking Machinery Regulations, you take the machine away from section 14 of the Factories Act, 1937 (the fencing section), altogether. In support of that proposition he cited *Miller* v. *William Boothman & Sons Ld.*[1] With all respect to Mr. Nelson I do not think

[1] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

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that the case has any bearing on the circumstances before me. That was a case of an injury to an operative while he was actually using the saw, and the saw complied with the Woodworking Machinery Regulations. I find as a fact here that, for the purpose of using the saw for sawing, this saw was properly set up within regulation 10 of the regulations. In *Miller* v. *Boothman* [2] the man was hurt while he was operating the circular saw, and using it to cut with the circular saw, which was set up within regulation 10 of the regulations. In that case it was argued that it is not enough to comply with the regulation; but you have got to comply with section 14 of the Act of 1937 as well. It was pointed out by the court that the very reason for making regulation 10 was to make the machinery usable without encouraging risks of penalties or actions for damages. Having been framed for that purpose, it was correctly and lawfully framed within the meaning of section 79 of the Factory and Workshop Act, 1901 (now section 60 of the 1937 Act), and that is all that that case decided. If the plaintiff had been injured while she was sawing timber, nothing more would be said about it—she would be quite clearly within the ruling of *Miller* v. *Boothman* [3]; but she was not sawing wood. It seems to me that this case is exactly the same as if she had left the saw running and some other employee had come in contact with it unfenced; I do not see any difference. It is quite true that the moving of off-cuts is directly ancillary to the job of sawing; but it is not the job of sawing. I find no difficulty in saying that a saw may be correctly fenced for the purpose of operation as a saw, but not correctly fenced for some other purpose. I find full support for that proposition in two cases—*Dickson* v. *Flack* [4] and in *Benn* v. *Kamm & Co. Ld.* [5]

I suppose it may be argued that if this decision of mine is right, a great hardship is put upon the owners of circular saws. That reflection in itself is not sufficient to make one decide something which appears to be wrong; but I do not, myself, appreciate what the inconvenience will be. Every circular saw has normally an efficient stop switch, and it was said by the witness who was called for the defendants that in this case it would cause undesirable delay; because every time the saw was switched off it diminished speed gradually and was still dangerous until the blade stopped. It might take half a minute to stop. One would have thought it was perfectly simple to have some sort of brake which would pull up the saw almost immediately. Some machines have to be stopped immediately in the case of danger, but there is always danger in the case of the naked teeth of a saw. I should have thought that every time it was necessary to move these off-cuts, the blade should be stopped to make it completely safe, so that it should only run when it was completely fenced. That

[2] [1944] K.B. 337.
[3] Ibid.
[4] [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; [1953] 2 All E.R. 840.
[5] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

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being so I have come to the conclusion that there was a breach of section 14 of the Factories Act, 1937. [His Lordship considered the question of contributory negligence and continued:] In the circumstances, the responsibility for the accident must be equally shared.

Judgment for the plaintiff.

Solicitors: *Linaker & Linaker, Runcorn; H. G. C. Day & Co., Liverpool.*

[PROBATE, ETC. DIVISION.]

* PRACTICE DIRECTION.
(TRANSCRIPTS)

1955
July 25.

Lord Merriman P. and Davies J.

Husband and Wife—Divisional Court—Transcripts of judgments—Provision at public expense.

LORD MERRIMAN P. I am now in a position with the consent of the Lord Chancellor to make the following announcement:

The Treasury have agreed that transcripts of the judgments of the Divisional Court may be provided at the public expense in all cases in which the Divisional Court directs a rehearing by magistrates, and in any other case which the court considers fit for a transcript.

E. J.

[CHESTER ASSIZES.]

* SIMPKINS *v.* PAYS.

1955
June 13, 14.

Sellers J.

Contract—Formation—Intention to create legal relationship—Competition — Fashion competition in newspaper — Three forecasts by different persons in one coupon—Coupon submitted in defendant's name—Agreement to "go shares"—Claim to recover share of prize —Intention to create legal relations.

A was a paying boarder at B's house, and C was B's granddaughter. By arrangement among the three it was agreed that A, who had been in the habit of entering for a fashion competition run by a Sunday newspaper, should fill in a coupon every week consisting of three forecasts made by A, B and C respectively, and send it off in B's name. There was no hard and fast rule as to which of the three paid the incidental expenses. This arrangement had been operated for seven or eight weeks when a forecast made by C in a coupon submitted in B's name was successful.

[Reported by H. EIFION ROBERTS, Esq., Barrister-at-Law.]

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B obtained the prize of £750. A sought to recover one-third of the prize from B, alleging an agreement to "go shares" in the event of success. B contended that A had merely assisted her in completing the coupon and that there had been no intention to create legal relations:—

Held, that on the facts the parties had entered into the competition as an informal syndicate on the understanding that whichever forecast in any coupon was successful they should "go shares" in the prize; there was mutuality in the arrangement between the parties and an intention to create legal relations could be inferred; A was, therefore, entitled to recover a one-third share of the prize.

ACTION.

The plaintiff, the defendant and her granddaughter had an arrangement whereby the plaintiff submitted a coupon every week in the name of the defendant for a newspaper fashion competition. The coupon contained three forecasts made by the plaintiff, the defendant and the granddaughter respectively. A forecast made by the granddaughter was successful and the defendant obtained the prize. The plaintiff sought to recover a third part of the prize alleging an agreement to "go shares" in the event of success.

Robin David (*Morgan Hughes* with him) for the plaintiff. The parties formed a syndicate and made a joint entry. There was an express agreement to "go shares." Alternatively a third part was held by the defendant to the use of the plaintiff: see dictum of Denning L.J. in *Hoddinott* v. *Hoddinott*,[1] viz., ". . . "if husband and wife together embark on a joint venture in "which they equally contribute their skill, then if nothing is "said between them, the proper inference is that the proceeds "go to them jointly." That principle was not limited to husband and wife.

Bertrand Richards for the defendant. If there was an agreement between the parties it was not such as was intended to be enforceable: see dictum of Scrutton L.J. in *Rose & Frank Co.* v. *J. R. Crompton & Bros. Ld.*[2] and of Cohen L.J. in *Hoddinott* v. *Hoddinott.*[3] *Balfour* v. *Balfour*[4] was also referred to.

SELLERS J. Happily this is an unusual type of case to come before a court of law, and it arises out of what seems to be a popular occupation of the public—taking part in a competition run by a Sunday newspaper. In this particular case there was a contest, No. 397, in the Sunday Empire News, of June 27, 1954, whereby readers were invited to place in order of merit, attraction or beauty, eight fashions, or articles of attire. Both the plaintiff and the defendant, along with the defendant's granddaughter, Miss Esme Pays, sent in a coupon with three forecasts on it. The middle line of the second forecast was successful

[1] [1949] 2 K.B. 406, 414; 65 T.L.R 266.
[2] [1923] 2 K.B. 261, 288.
[3] [1949] 2 K.B. 406, 413–4.
[4] [1919] 2 K.B. 571; 35 T.L.R. 609.

and won the prize of £750. This action is brought to recover one-third of that amount, £250.

The plaintiff had been living in the defendant's house for some time in 1950, having gone there some six months after the defendant's husband had died. The defendant was some 83 years of age. The plaintiff was a much younger person, and was then divorced, though she has married again. They lived together in harmony, the plaintiff paying a weekly sum for her board and lodgings to the defendant. The plaintiff had been competing for some time in newspaper competitions, including the News of the World and the Sunday Empire News, before she went to live in the defendant's house. When she became a lodger at the defendant's house she found that the defendant was competing in the News of the World competition, and they seemed to have joined forces and competed together, but independently, although throughout the time I accept the plaintiff's evidence that she was filling up, week by week, a similar sort of competition in the Sunday Empire News, and she so did alone up to a time some seven or eight weeks before this successful forecast, and she was doing that, as far as I can appreciate the evidence, unbeknown to the defendant. She kept the Sunday Empire News up in her room and made her weekly forecast.

About seven or eight weeks before June 27, 1954, something had happened which brought the two parties to this action to take an interest in the Empire News. The plaintiff says that she left the Empire News in the living room of the house occupied by the defendant on a Sunday, and the defendant picked it up, took an interest in it and discussed competing in the competition run by the paper. The defendant says that it was the plaintiff who brought the paper down and said: "Why "don't you compete in this as well?" It may be that the truth lies somewhere between the two, but on the whole I think perhaps the plaintiff's version is the preferable one, and that when the defendant did get to know about the paper and they were discussing it, the plaintiff may have said to her: "Well, "why don't you compete?"

From then onwards, each week the two parties to this action, together with the defendant's granddaughter, sent in a coupon with forecasts on it, and, as far as the Empire News is concerned, I am satisfied that the method of doing this was for the defendant to make her forecast, put it on a piece of paper, for the granddaughter to make hers and put it on the same piece of paper, and then when the plaintiff came home, perhaps rather late at night, as the defendant says, when she was in bed, she would pick this piece of paper up and would fill in the coupon in her own room, putting her own line in first, the granddaughter's second, and the defendant's third, and that would be dispatched on the Monday.

The evidence is a little uncertain as to who actually paid for

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the necessary stamps for the postage, or for the twopence-halfpenny which had to be sent for each line forecast, but I accept the plaintiff's evidence that it was done more or less alternately. There was no hard-and-fast rule. In regard to the winning coupon, the defendant had asked the plaintiff to get the stamps and deduct them from the weekly payment, but apparently they were not deducted. The weekly payment was 30s. and, as I understood the defendant, she paid 30s. I think one of the cases that were referred to in argument held that the payment, when it comes, is not a vital matter in this sort of transaction. It might well be done informally; one party can pay one time, the other party can pay another time. It might well be the case that, in fact, all the stamps were obtained and paid for by the defendant. The substantial matter is, on what basis were these forecasts being made?

When the plaintiff made out the coupon she put down the forecasts in the way I have indicated, and entered in the appropriate place on the coupon the name of Mrs. Pays, 11, Trevor Street, Wrexham, and so with each coupon in those seven or eight weeks as if they had been the defendant's. In fact there were three forecasts there, and when the matter first came to be considered, I accept the plaintiff's evidence that what was said, when they were going to do it in that way, was: "We "will go shares" or words to that effect. "Shares" was the word used, and I do not think anything very much more specific was said. Whether it was said by the plaintiff or the defendant does not really matter. I think that was the basis, and it may well be that the plaintiff is right when she said, in her evidence, that the defendant said: "You're lucky, May, and if we win we "will go shares."

The alternative position to that of these three competing together as a syndicate is that the plaintiff, with all her propensity for having a gamble, when the defendant became interested, suddenly abandoned all her interest in the competition in the Empire News, and handed it over to the defendant. I think that is most improbable, and I accept her evidence that she did not do that. She combined her efforts with the defendant's in the way I have indicated, and from then onwards she had shares in the result. It may well be that in the family circle—and this had some element of a family circle about it, although there was no relationship between the parties—or even as between very close friends, the facts might indicate that all that was intended was that if anybody rendered a service to the defendant to fill up her coupon that person also rendered a service to make some forecasts, which might reveal that all they were doing was to help her make her forecasts and make suggestions, and to give her the benefit of their skill or their capacity to guess, whichever it is, so that the venture would be entirely that of the person in whose name the coupon was

sent in. On the facts of this case, and on the probabilities as I see them, I do not think that was the case here, and having balanced it as best I can, I prefer the plaintiff's evidence as to how the matter came into being, and how it was carried out. However, it is true that the plaintiff stands alone—she was the only witness for her case.

[His Lordship received the evidence and continued:] The competition, successful as it was for the coupon sent in the defendant's name, was not in fact won, as it would appear, by the forecast of either the plaintiff or the defendant. If the plaintiff's evidence is right, and I see no reason to reject it—she gave it before the facts were known at all—the middle line was one not composed by either of the parties, but by the granddaughter, and the defendant's case involves this, that whichever forecast won—either the plaintiff's or the defendant's, or the granddaughter's—the whole prize was to go to the defendant. I think that is highly improbable.

When the prize-money became known the defendant was obviously elated. I think the matter went to her head, and to the heads of her family as well, who all thought they had got a great prize. There was something of a celebration on the very Sunday when this paper had the winning forecast in it. Between them they have sought to shut out the plaintiff from her interest, but from the time when the cheque became due the plaintiff has persisted that she was entitled to her share. I think on what was said she was to "go shares." Properly interpreted, there being three of them, their shares were one-third each. If there were two, there would have been half-shares.

On the finding that the plaintiff's evidence is right as to what was said about the shares, and rejecting the incidental evidence given by the witnesses as to what occurred afterwards, counsel for the defendant not unnaturally said: "Even if that "is so, the court cannot enforce this contract unless the arrange-"ment made at the time was one which was intended to give rise "to legal consequences." It may well be there are many family associations where some sort of rough and ready thing is said which would not, on a proper estimate of the circumstances, establish a contract which was contemplated to have legal consequences, but I do not so find here. I think there was here a mutuality in the arrangement between the parties. It was not very formal, but certainly in effect it was agreed that every week the forecast should go in in the name of the defendant, and that if there was success, no matter who won, all should share equally. That seems to be the implication from or the interpretation of what was said, that this was in the nature of a very informal syndicate so that they should all get the benefit of success. It would be equally wrong, I think, to say from what was arranged that because the granddaughter's forecast was the one which was successful of those submitted by the

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defendant that the plaintiff and the defendant were to get nothing. Although she was not a party before the court and I have not had the benefit of her evidence, as far as I can see, on this arrangement she would be as entitled to the third share as the others, certainly, so far as the plaintiff is concerned. Esme was not, apparently, present when this bargain was made, but both the others knew, at any rate soon after the outset, that she was coming in. It is possible, of course, although the plaintiff is not concerned in it, that the granddaughter's effort was only to assist the defendant, her grandmother. She may accept that, but it makes no difference, so far as I can see, to the fact that the plaintiff and the defendant entered into an agreement to share. The plaintiff does not seek to say: "Esme was only "aiding Mrs. Pays," in asking for half the shares, but she was entitled to one-third, and I so find and give judgment to the amount of £250.

Judgment for the plaintiff.

Solicitors: *Mason & Moore Dutton, Chester; Cyril Jones, Son & Williams, Wrexham.*

[LIVERPOOL ASSIZES.]

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* LUTTMAN *v.* IMPERIAL CHEMICAL INDUSTRIES LD.

[1954 L. No. 2677.]

Factory—Definition—Works canteen—Premises within the curtilage of a factory—User—Purpose incidental to the processes of manufacture carried on at the factory—Part of the factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1) (6).

A factory contained within its curtilage a canteen which was used for the purposes of feeding and entertaining people working in the factory. A cleaner, employed by the occupiers of the factory, fell and sustained injuries as she was proceeding to the basement of the canteen down a staircase not provided with a handrail, and claimed damages on the ground of breach by the defendants of, inter alia, their statutory duty under section 25 (2) of the Factories Act, 1937:—

Held, that the canteen was a part of a factory within the definition of a factory in section 151 (1) of the Factories Act, 1937, since the use of the canteen for the purposes of feeding and entertaining the people working in the factory was a purpose that was incidental to the processes of manufacture carried on at the factory and was therefore not a place solely used for some purpose other than the processes carried on in the factory within the meaning of subsection (6) of section 151; accordingly, the defendants were in

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[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

breach of the duty imposed upon them by section 25 (2) of the Factories Act, 1937.

London Co-operative Society Ld. v. *Southern Essex Assessment Committee* [1942] 1 K.B. 53; [1941] 3 All E.R. 252 applied.

ACTION.

The plaintiff, Mrs. Beatrice Luttman, who was employed as a cleaner by the defendants, was on June 10, 1954, engaged in cleaning a canteen which was within the curtilage of the defendants' factory premises. After completing her cleaning work she went towards the basement, taking with her a bucket and mop in order to put them away, when, in the course of going down a staircase leading to the basement, she fell and sustained injuries. The staircase was not provided with a hand-rail.

The plaintiff claimed damages for personal injuries on the grounds of breaches of statutory duty under sections 5, 25 (2) and 26 of the Factories Act, 1937, and of breach by the defendants of their common law duty to provide and maintain a safe working place for the plaintiff. The defendants, while admitting that their general premises were a factory, contended that the canteen was not a part of the factory, relying upon subsection (6) of section 151 of the Factories Act, 1937,* and the case is reported only on that point.

E. Wooll Q.C. and *A. D. Pappworth* for the plaintiff.
H. I. Nelson Q.C. and *C. M. Clothier* for the defendants.

The following case in addition to those referred to in the judgment was cited in argument: *Wood* v. *London County Council.*†

JONES J. stated the facts, referred to the pleadings, read subsection (6) of section 151 of the Factories Act, 1937, and continued:

The language of that subsection certainly suggests that some building like a canteen might very well not be part of the factory, because, prima facie, it might be said that the canteen is not used solely for the processes of manufacture carried on in the factory; but there is a decision to which I have been referred by Mr. Nelson: *London Co-operative Society* v. *Southern Essex Assessment Committee*,[1] in which words similar to those in this subsection had occurred under a Rating and Valuation Act.[2] Those words were considered and the effect of that decision,

* Factories Act, 1937, s. 151 (6): "Where a place situate within the "close, curtilage, or precincts forming "a factory is solely used for some "purpose other than the processes "carried on in the factory, that place "shall not be deemed to form part of "the factory for the purposes of this "Act, but shall, if otherwise it would "be a factory, be deemed to be a "separate factory."

† [1941] 2 K.B. 232; 57 T.L.R. 499; [1941] 2 All E.R. 230.

[1] [1942] 1 K.B. 53; [1941] 3 All E.R. 252.

[2] Rating and Valuation (Apportionment) Act, 1928.

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which I need not go into in any detail, is that the Divisional Court held that a canteen was not a place which is solely used for some purpose either of manufacture or handicraft carried on in the laundry, which were the premises being used in that particular case. Having regard to that case and having regard to the fact that the decision in that case was approved and applied in *Thurogood* v. *Van den Berghs and Jurgens Ld.*,[3] it seems to me quite impossible that I should come to any conclusion other than that this canteen was not solely used for some purpose other than a process carried on in the factory and that the use of the canteen for the purposes of feeding and entertaining the people working in the factory was a purpose that was incidental to the processes of manufacture carried on at the factory. In those circumstances, therefore, I have come to the conclusion that the canteen was part of the factory.

I should not have held that it was a separate factory. In view of the case to which I have been referred, I do not think that the process which was carried on there could be regarded as a process carried on in a factory; but it is part of the factory, because it is not solely used for some purpose other than a process carried on in the factory. That being so I have to hold that the Factories Act applied to this building and thus to consider whether there has been any breach of the provisions of the Factories Act referred to in the statement of claim. The conclusion I have come to is that there was a breach of section 25 (2) because that provides: "For every staircase in a building or affording a means "of exit from a building, a substantial handrail shall be provided "and maintained."

Judgment for the plaintiff.

Solicitors: *E. Rex Makin & Co., Liverpool; J. W. Ridsdale.*

[3] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[COURT OF APPEAL.]

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June 27, 28, 29; *July* 22.

Evershed M.R., Jenkins and Parker L.JJ.

* SHELL-MEX AND B.P. LD. *v.* CLAYTON (VALUATION OFFICER) AND ANOTHER.

Rating—Docks—Freight-transport hereditament—Oil piped by company from ships into storage tanks on hereditament—"Dock purposes"—"Dock undertaking"—Whether storage tanks warehouses—Business of shipping and unshipping—"Use of undertakers"—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *ss.* 5 (1) (*c*), (2) (*c*), (3); 6.

The Rating and Valuation (Apportionment) Act, 1928, by section 5 (1) (*c*), defines "freight-transport hereditament" as: "(*c*) A hereditament occupied and used wholly or partly for dock "purposes as part of a dock undertaking being an undertaking

"whereof a substantial proportion of the volume of business is "concerned with the shipping and unshipping of merchandise not "belonging to or intended for the use of the undertakers."

The British Transport Commission had leased the hereditament in question, being waste land adjoining its Hull Docks undertaking, to the appellant company, a company concerned in the importation and distribution of oil. Pursuant to the terms of its leases the company had erected on the land storage tanks for oil, and the commission had constructed two jetties, which were owned by them. Incoming tankers unshipped their oil at the jetties, the unshipping being effected through a system of pipes running along the jetties to the storage tanks, from whence the company distributed it to customers, retaining only a small proportion for its own use. The company also owned a barge berth some 300 yards away from the hereditament and connected with it by pipes. The barge berth was a dock within section 5 (3) of the Act of 1928, and was used by the company for transhipping oil. Approximately one quarter of the oil imported was dutiable and technically the whole hereditament was a bonded warehouse. Substantially the whole of the oil unshipped at the jetties was consigned pursuant to an agreement by three oil companies to the appellant company, as their sole agent for the sale and distribution of their oil, the company being remunerated for its services by commission. The company claimed that the hereditament was a "freight-transport hereditament" within section 5 (1) (*c*) of the Act of 1928, and, as such, entitled to be derated:—

Held, (1) that if it was shown that the whole of the hereditament was primarily used for warehousing merchandise within the meaning of section 6 (3) (*b*) of the Act of 1928, it would be wholly disqualified from derating as a freight-transport hereditament, notwithstanding that it, or part of it, was used for purposes connected with unshipping; if, on the other hand, it was shown that any part of the hereditament was used to some extent at least for purposes connected with unshipping and not, or not primarily, for warehousing merchandise not in the course of being transported then (given fulfilment of the other conditions in section 5 (1) (*c*)) there should be an apportionment, the effect of which would be to give the benefit of derating to the whole hereditament, including any part of it not used for dock purposes, but with the exception of any part primarily used for warehousing merchandise not in the course of being transported, which, by virtue of section 6 (3) (*b*), was not to be deemed to be occupied for transport purposes.

Mersey Docks and Harbour Board v. *West Derby Assessment Committee* [1932] 1 K.B. 40; 47 T.L.R. 468 and *Union Cold Storage Co.* v. *Moon* [1932] 2 K.B. 648 applied. *Assessor for Aberdeen* v. *Shell-Mex and B.P. Ld.*, 1953 S.C. 211 considered.

(2) That the hereditament was partly used for dock purposes and that it had not been shown that the whole of it or every part of it used for dock purposes was primarily used for warehousing oil not in the course of being transported and, accordingly, that the hereditament fulfilled the first of the three conditions laid down in section 5 (1) (*c*).

(3) That the company, in occupying and using the hereditament for its own private purposes, was not occupying and using it as part of the Transport Commission's Hull Dock undertaking, and further, that while the hereditament could properly be described as occupied and used in connexion, inter alia, with the barge berth (which was a dock), it could not be regarded as occupied and used as part of the barge berth and that the hereditament was not used

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as part of a dock undertaking and the second condition of section 5 (1) (*c*) was not satisfied.

Clyde Navigation Trustees v. *Inland Revenue Officer*, 1930 S.C. 454 and *Clyde Navigation Trustees* v. *Assessor for Glasgow*, 1931 S.C. 400 considered.

(4) That the company had failed to satisfy the third condition laid down in section 5 (1) (*c*), in that a substantial proportion of the volume of business at the hereditament was concerned with the shipping and unshipping of merchandise "used" by the company and, accordingly, that the hereditament was not entitled to be derated.

The question whether storage tanks might not primarily be used for warehousing within section 6 (3) (*b*) of the Act of 1928 considered but not decided.

APPEAL from the Lands Tribunal by case stated.

The appellant company, Shell-Mex and B.P. Ld., appealed to the Lands Tribunal against a decision of the local valuation court sitting at Kingston-upon-Hull, dismissing the claim of the company that the hereditament at Salt End, Preston, ought to be treated as a freight-transport hereditament within the meaning of section 5 of the Rating and Valuation (Apportionment) Act, 1928.[1]

The following statement of facts is taken from the case stated by the Lands Tribunal: Para. 2. "The hereditament is situated "at Salt End, Preston within Holderness Rural District Rating "Area, in respect of which the respondents Holderness Rural "District Council (hereinafter referred to as 'the rating autho-"'rity') are the rating authority. The respondent Glanville "Clayton (hereinafter referred to as 'the valuation officer') is "the valuation officer authorized by the Commissioners of Inland "Revenue pursuant to section 33 of the Local Government Act, "1948, to act in relation to the valuation list for the said rating "area.

"3. The said hereditament was described in Part 1 of the "valuation list as 'Tanks, Works and Appurtenances' situated "at Salt End and was assessed at rateable value: £16,986. On

[1] Rating and Valuation (Apportionment) Act, 1928, s. 5: "(1) In "this Act the expression 'Freight-"'transport hereditament' means all "or any of the following hereditaments:— . . . (*c*) A hereditament "occupied and used wholly or partly "for dock purposes as part of a dock "undertaking being an undertaking "whereof a substantial proportion of "the volume of business is concerned "with the shipping and unshipping "of merchandise not belonging to or "intended for the use of the undertakers. . . ."

S. 6: "(3) For the purpose of "determining in what proportions a "freight-transport hereditament is "occupied and used for transport "purposes and for other purposes, "respectively, the hereditament shall "be deemed to be occupied and used "for transport purposes, except in so "far as it is occupied and used for "the purposes of a dwelling-house, "hotel, or place of public refreshment: Provided that— . . .

"(*b*) in the case of a hereditament . . . occupied and used for "dock purposes as part of a dock "undertaking no part of the hereditament, being a building, yard, or "other place primarily occupied and "used for warehousing merchandise "not in the course of being transported, shall be deemed to be "occupied and used for transport "purposes."

" March 28, 1952, the appellant company made a proposal that " the hereditament ought to be treated as a freight-transport " hereditament. On April 10, 1952, the valuation officer gave " notice of objection to the said proposal, and on April 28, 1952, " the appellant company gave notice of appeal to the local valua- " tion court. On September 25, 1952, the appellant company, " the valuation officer and the rating authority appeared before " and were heard by the local valuation court, which decided that " the hereditament ought not to be treated as a freight-transport " hereditament and dismissed the appeal. The appellant com- " pany, being aggrieved by the said decision, gave notice of appeal " to the Lands Tribunal on October 13, 1952, and the rating " authority and the valuation officer gave notice of their intention " to appear at the hearing of the appeal on November 5 and " November 11, 1952, respectively.

" 4. The said hereditament comprised three parcels of land " on the banks of the river Humber. . . .

" 5. The appellant company is the lessee of the said land " which extends to 51½ acres or thereabouts. The said three " parcels are held on different leases from the British Transport " Commission (formerly the Docks and Inland Waterways Exe- " cutive) or their predecessors in title at a total ground rent of " £4,195 per annum. . . .

" 6. On the said land the appellant company or its predecessors " in title have erected offices, stores, garages, filling sheds, pump " houses, a boiler house, tanks and ancillary buildings. The said " erections, save for building number 69, are occupied by the " appellant company.

" 7. In addition the appellant company owns and occupies " exclusively a barge berth which has been erected on part of the " foreshore in part leased from the Board of Trade and in part " under licence from the British Transport Commission and their " predecessors in title. The said berth, which is approximately " 1,000 feet distant from the said hereditament, is connected with " the pump houses and tanks on the said land by means of pipe- " lines which are owned, occupied and used exclusively by the " appellant company.

" 8. From the south west corner of the said land two jetties " which are the property of the British Transport Commission " (formerly the Docks and Inland Waterways Executive) run out " into the river Humber. . . . No. 1 jetty is used jointly by the " appellant company, the Esso Petroleum Company, the Hull " Distillery and British Industrial Solvents, but the appellant " company has its own pipe-lines, 12 in number, which run along " the said jetty and are connected with the pump houses and " tanks on the said land. No. 2 jetty is used jointly by the " appellant company and the Esso Petroleum Company and the " pipe-lines thereon, 10 in number, are common to both users " for the length of the said jetty at the shore end of which con- " nexions are made between the said 10 and the said 12 pipe-lines.

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" In addition along No. 2 jetty there run a 4-inch steam pipe " and 2-inch air pipe. The steam pipe is used in common by " the appellant company and the Esso Petroleum Company and " connections are made at the shore end to a steam pipe of the " appellant company. The air pipe belongs entirely to the appellant company and is used exclusively by it.

" 9. A number of different qualities of oil and other petroleum " products are handled at the hereditament; these will be referred " to collectively hereinafter as ' oil.'

" 10. The appellant company carry on the business of distributing and marketing oil in the United Kingdom. In order to " carry on that business the appellant company has established in " the United Kingdom a number of ' terminal depots,' of which " the hereditament at Salt End is one. The main function of " such terminal depot is to replenish the supplies of a number of " internal depots which are dependent on the terminal depot for " their supplies of oil. The essential function of the subsidiary " depots is the supply of oil to consumers.

" 11. Oil is brought to the Salt End installation in ocean-going " tankers of an average capacity of 10,000 to 12,000 tons and " unloaded at the said jetties. Bills of lading are made out " either in the name of ' Shell-Mex and B.P.' or in the name " of the consignor. In every case the appellant company takes " delivery of the oil at the ships' rail.

" 12. Tankers are unloaded at the said jetties by means of " pipes which are coupled to the ends of the above-mentioned " pipe-lines which run along the said jetties. There are no grid " boxes on either of the said jetties. Grid boxes are simply " chambers in which pipe-lines end, and in which ships' flexible " discharge pipes can be coupled to the pipe-lines. The oil is " pumped from the tanker via the pipe-lines into tanks at the " hereditament.

" 13. The appellant company must have at a terminal such as " the Salt End depot a tankage capacity in excess of that which " would be required to meet the day-to-day requirements of the " subsidiary depots because it must correlate the intake of oil to " the movements of tankers. A much smaller amount of excess " capacity was required to meet unexpected demands.

" 14. The whole of the said hereditament including the said " pipes is a bonded warehouse. In 1951 approximately a quarter " of the total oil which passed through the installation was " dutiable.

" 15. The said hereditament is used by the appellant company " for fulfilling its obligations under an agreement dated December " 31, 1931. . . ."

It appeared from the case stated that under the agreement of December 31, 1931, which was made between " Shell " Marketing Co. Ld. of the first part, Eagle Oil and Shipping Co. Ld. of the second part, Anglo-Persian Oil Co. Ld. of the third part and the appellant company of the fourth part, the appellant company was

the sole consignee for the consigning companies for the distribution of oil within the United Kingdom and was to be paid for its services by a commission.

The case stated continued: "Products from the consigning companies are received by the appellant as consignee and agent in accordance with the said agreement. Upon the sale of the product the appellant company accounts to each consignor for its pro rata share of the receipts from sales of the same after deducting an agent's commission of 8 per cent. except in respect of a small quantity (.17 per cent.) used by the appellant company itself for which the latter pays an agreed price. The same product received from different consigning companies is in practice mixed on the hereditament, although by special arrangement it would be possible to keep separate the contribution of each consignor. . . ."

After a consideration of the accounting methods of the appellant company the case stated continued: "19. The main function of the Salt End terminal depot with regard to onward transmission of oil is to dispatch oil by water, rail or road whichever is the appropriate method to its dependent depots in order to replenish their supplies. It is the practice for the appellant company to replenish supplies at a dependent depot when space is available at that depot. So far as possible each tank at the Salt End depot is emptied before being refilled from an incoming tanker.

"21. The total tankage capacity at the hereditament is 211,781 tons of oil." After setting out the quantities of stocks of oil retained in the hereditament and the total tonnage handled, which in 1951 totalled 1,320,000 tons, the case stated continued: "23. In disposing of oil the appellant company is described in the appropriate documents as 'sellers' and it invariably sells in its own name. . . . Oil supplied for bunkering tankers chartered by the consigning companies is not treated by the appellant company as being sold. The shipping company makes direct payments for such bunker fuel to the consigning company concerned. Such bunker fuel is treated for accounting purposes as if it had never been delivered to the hereditament.

"24. The appellant company contended that the hereditament was within the meaning of section 5 of the Rating and Valuation (Apportionment) Act, 1928, occupied and used by them for dock purposes as part of a dock undertaking carried on by them within the undertaking of the Port of Hull and being an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise (namely, oil of various kinds and grades) not belonging to or intended for the use of the undertakers, and that the hereditament is a freight-transport hereditament wholly occupied for transport purposes.

"25. The valuation officer and the rating authority contended that:—

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" (*a*) The hereditament is not occupied and used wholly or " partly for dock purposes within the meaning of section 5 (1) (*c*) " of the 1928 Act.

" (*b*) The hereditament is not occupied and used as part of a " dock undertaking within the meaning of the said section 5 (1) (*c*).

" (*c*) If, which is denied, the hereditament is occupied and " used wholly or partly for dock purposes as part of a dock under- " taking, such dock undertaking is not an undertaking whereof a " substantial proportion of the volume of business is concerned " with the shipping and unshipping of merchandise not belonging " to or intended for the use of the undertakers.

" (*d*) The whole of the hereditament is a place primarily " occupied and used for warehousing merchandise not in the " course of being transported within the meaning of section 6 " (3) (*b*) of the 1928 Act.

" (*e*) The hereditament is not a freight-transport hereditament " within the meaning of section 5 of the 1928 Act.

" (*f*) If, which is denied, the hereditament is a freight-trans- " port hereditament, the hereditament includes oil storage tanks " which are places primarily occupied and used for warehousing " merchandise within the meaning of section 6 (3) of the 1928 " Act and the net annual value of the hereditament ought to be " apportioned."

Mr. W. Fitzgerald, sitting as the Lands Tribunal, summarized his conclusions in the concluding paragraphs of the case stated as follows: " 26. I came to the conclusion that the land and plant " comprising this hereditament were used solely for the storage " and distribution of oil and spirit in connexion with the business " of the appellant company quite separate and distinct from any " of the activities carried on at the adjacent Port of Hull. I " found that this hereditament is not part of the Hull Docks " Undertaking within the meaning of section 5 of the 1928 Act. " I also found that the land when leased to the appellant company " and its predecessors in title was open land; indeed it might be " called waste land. It was not being utilized as part of the Port " of Hull. I was of opinion that this land was leased for the " purposes of the appellant company's own undertaking and that " there was not in any sense a delegation by the British Trans- " port Commission or their predecessors in title of any of their " functions as a dock authority. I was of the opinion that the " oil in the tanks was there for storage until such time as the " demand for it should arise. I considered that the conveying " of the oil by the pipe-line could be compared with the convey- " ance of ordinary goods in lorries by the consignee from the point " of disembarkation. My opinion was that immediately the oil " entered the pipe-line delivery to the consignee was complete. " It entered into a state of storage for the purpose of distribution " to subsidiary depots. It seemed to me that this was the only " conclusion consistent with the decision in *Assessor for Aberdeen* " v. *Shell-Mex and B.P. Ld. and Shell-Mex and B.P. Ld.* v.

"*Assessor for Aberdeen.*[2] For this reason I was of the opinion "that the hereditaments of the appellants were not freight-"transport hereditaments within the meaning of the Rating and "Valuation (Apportionment) Act, 1928, and I dismissed the "appeal."

The appellant company appealed by case stated.

Michael E. Rowe Q.C. and *G. D. Squibb* for the appellant company.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

H. Edmund Davies Q.C. and *E. P. Wallis-Jones* for the Holderness Rural District Council.

In addition to the cases referred to in the judgment, the following were cited in argument: *Homer* v. *Homer*[3]; *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee and Bottomley*[4]; *W. & R. Barnett Ltd.* v. *Commissioner of Valuation for Northern Ireland.*[5]

Cur. adv. vult.

July 22. The written judgment of the court was delivered.

EVERSHED M.R. The judgment which I am about to read, and which has been prepared by Jenkins L.J., is the judgment of the court.

The appellant company contends that the hereditament described in the case stated by the Lands Tribunal, and consisting of its terminal depot at Salt End, adjacent to the Port of Hull, ought for rating purposes to be treated as a "Freight-"transport hereditament" under section 5 (1) (*c*) of the Rating and Valuation (Apportionment) Act, 1928, which includes in the category of "freight-transport hereditaments": "(*c*) A here-"ditament occupied and used wholly or partly for dock purposes "as part of a dock undertaking being an undertaking whereof a "substantial proportion of the volume of business is concerned "with the shipping and unshipping of merchandise not belonging "to or intended for the use of the undertakers."

As appears from the above definition of the relevant type of freight-transport hereditament, the appellant company, in order to make its contention good, must show that the hereditament in question satisfies all the following conditions, namely: (1) that it is occupied and used wholly or partly for dock purposes; (2) that it is so occupied and used as part of a dock undertaking; and (3) that such dock undertaking is one whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers.

[2] 1953 S.C. 211.
[3] (1878) 8 Ch.D. 758.
[4] [1932] 1 K.B. 40; 47 T.L.R. 468.
[5] [1942] N.Ir. 20.

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Section 5 (2) (*c*) of the Act defines "dock purposes" as meaning (so far as material for the present purpose) "all purposes connected with the shipping or unshipping at a dock of . . . merchandise." Section 5 (3) of the Act adds the following further definitions: "'Dock' includes any harbour, wharf, pier, jetty or other works in or at which vessels can ship or un-ship merchandise or passengers not being a pier or jetty primarily used for recreation. 'Dock undertaking' means an undertaking carried on by a dock authority, but also includes any other undertaking comprising as part thereof a dock in so far only as its business is carried on at and in connection with that dock. 'Dock authority' means any person or body of persons, whether incorporated or not, who are authorised to construct or are owners or lessees of any dock authorised by or under any Act."

We will treat as incorporated in this judgment the facts set out in the case stated and make special reference only to the essential points upon which the arguments for and against the appellant company's claim have turned.

As to the first of the three conditions above stated, is the hereditament occupied and used wholly or in part for dock purposes, that is to say, for purposes connected with the shipping or unshipping of merchandise at a dock? On this question, the essential matters of fact are these: The appellant company uses the hereditament as a terminal depot in its business of importing, distributing and marketing oil. Incoming tankers unship their cargoes of merchandise in the shape of oil at two jetties belonging to the Transport Commission, which are undoubtedly a dock within the meaning of section 5 (3). The unshipping is effected by pumping the oil from the tankers through a system of pipes running out along the jetties and leading to the storage tanks on the hereditament, and the appellant company takes delivery of it at the ship's rail. The total tankage capacity at the hereditament is 211,781 tons and the tanks habitually contain stocks of oil substantially in excess of day-to-day requirements, the stocks on hand (according to typical figures given in the case) being as a rule of the order of 100,000 to 150,000 tons and sufficient to cover, say, one month's deliveries in the event of receipts being suspended. The ratio of receipts to distribution varies from month to month, but it would seem that over a period they more or less balance, so that the surplus of, say, 100,000 to 150,000 tons we have mentioned is in the nature of a reserve. From the stocks of oil in the tanks the appellant company distributes supplies by land and water transport to its own internal depots and also to various categories of customers and consumers. It also effects sales of oil to customers direct from the hereditament and consumes relatively insignificant quantity in its own operations. The media of distribution used by the appellant company include a barge berth owned and occupied by it at Hedon Haven, some 300 yards to the south-

east of the southernmost portion of the hereditament, and connected with pumphouses and tanks on the hereditament by means of pipes owned and occupied exclusively by the appellant company. The barge berth (at which oil is shipped into barges) is undoubtedly a dock within the meaning of section 5 (3). Approximately one-quarter of the oil brought into the hereditament from the incoming tankers is dutiable, and technically the whole hereditament, including the pipes and storage tanks upon it, is a bonded warehouse in which, pending distribution, the dutiable oil can lie without payment of duty. The appellant company must have available on the hereditament a tankage capacity in excess of the day-to-day requirements of distribution, because it must correlate the intake of oil to the movements of tankers, and also, but to a much smaller degree, for the purpose of meeting unexpected demands. The provisions of the leases under which the hereditament is held by the appellant company clearly show them to have been granted for the very purpose of enabling the lessees to receive into the hereditament oil unshipped at the jetties.

On these facts, Mr. Rowe, for the appellant company, argues that the hereditament is, within the meaning of section 5 of the Act, occupied and used, if not wholly, at all events partly, for dock purposes, that is to say, purposes connected with the unshipping of merchandise (that is, oil) at a dock (that is, the Transport Commission's jetties). He observes with force that the unshipping operations here in question consist of pumping the oil from the tankers into the storage tanks through the pipes leading to them from the jetties, and that oil in bulk cannot be unshipped merely by putting it over the ship's rail on to a jetty, but must be transferred from the ship's tanks into suitable receptacles on shore. He bases himself on the simple proposition that pipes through which, and tanks into which, cargoes of oil in bulk are discharged from ships cannot reasonably be said not to be used for purposes connected with the unshipping of that oil. He says that it is only incumbent on the appellant company in the first instance to show that the hereditament is used partly, that is, to some extent, for dock purposes. Once that is shown, the appellant company's claim that the hereditament is a "freight transport hereditament" is made good, so far as the first of the three conditions (*i.e.*, occupation and use wholly or partly for dock purposes) is concerned, and, provided the other two conditions are satisfied, it will remain to consider whether there should be any, and, if so, what, apportionment under section 6 of the Act. It will be convenient at this point to refer to the terms of that section. So far as material for the immediate purpose, it provides as follows: "(1) In every valua-
" tion list every freight-transport hereditament, which is occupied
" and used wholly for transport purposes shall be shown as being
" so occupied and used, and as respects every such hereditament
" occupied and used partly for transport purposes the net annual

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"value thereof shall be shown in the prescribed manner as being "apportioned between the occupation and user of the hereditament for transport purposes and the occupation and user "thereof for other purposes. (2) Where a freight-transport "hereditament is not occupied and used for more than one "transport purpose the nature of that purpose shall be shown. ". . . (3) For the purpose of determining in what proportions "a freight-transport hereditament is occupied and used for "transport purposes and for other purposes, respectively, the "hereditament shall be deemed to be occupied and used for "transport purposes, except in so far as it is occupied and used "for the purposes of a dwelling-house, hotel, or place of public "refreshment: Provided that . . . (*b*) in the case of a hereditament . . . occupied and used for dock purposes as part of a "dock undertaking no part of the hereditament, being a "building, yard, or other place primarily occupied and used for "warehousing merchandise not in the course of being transported, shall be deemed to be occupied and used for transport "purposes."

Mr. Rowe by no means admits that the hereditament or any part thereof is primarily occupied and used for the purpose of "warehousing merchandise not in course of being transported" within the meaning of section 6 (3) (*b*), and argues that the status of a bonded warehouse technically possessed by the hereditament with respect to the dutiable one-fourth or thereabouts of the oil brought into it is a minor and incidental matter which should not affect the result. But, whether he is right or wrong on these points, he says they have no bearing on the question whether the hereditament is a freight-transport hereditament within the meaning of section 5 of the Act, whatever their effect may be on any ensuing apportionment.

Mr. Lyell, for the valuation officer, on the other hand, contends that the hereditament is occupied and used simply for storage purposes and not to any extent whatever for purposes connected with the unshipping of merchandise at a dock. He claims that the process of unshipping is complete the moment the oil is over the ship's rail or, in other words, the moment it passes out of the ship's pipes into one of the pipes lying along the jetties, and that everything happening beyond this point is part of the process of storage and distribution, or, in other words, disposal by the consignee of merchandise which has finished its journey by reaching his hands. Mr. Lyell compares the pipes to a consignee's lorries, into which goods are put over the ship's rail, and compares the passage of the oil into the tanks through the pipes to the conveyance of such goods to some destination determined by the consignee, such as a warehouse perhaps many miles distant from the dock. He relies in support of this argument on the technical status of the hereditament as a bonded warehouse, which he says is essentially a place where a consignee, who has taken delivery of merchandise, may deposit it

pending disposal without in the meantime paying the duty upon it. Alternatively, Mr. Lyell says that the hereditament is primarily used for warehousing merchandise not in the course of being transported within the meaning of section 6 (3) (*b*) of the Act and that this proviso is relevant, not merely to the question of apportionment under section 6, but also to the prior question whether the hereditament is occupied and used for purposes connected with the shipping or unshipping of merchandise at a dock so as to fulfil the first of the three conditions imposed by section 5 (1) (*c*).

If the matter were free from authority, we would have little hesitation in holding that, in accordance with Mr. Rowe's argument, the hereditament is at all events partly occupied and used for purposes connected with the unshipping of oil at a dock (*i.e.*, the jetties) within the meaning of section 5 (2) (*c*) and that this question falls in the first instance to be determined without regard to section 6 (3) (*b*). The phrase " connected with " is a phrase of wide and general import, and we find it extremely difficult to hold that the tanks on the hereditament have no connection with the unshipping of the oil which they are designed to receive. Mr. Lyell's argument to the contrary seems to us highly artificial. We are not persuaded that, when oil is being pumped directly from a tanker into and through one of the pipes lying along the jetties, that pipe is not being used for a purpose connected with the unshipping of that oil or that the tank on the hereditament to which that pipe leads is not being used for such a purpose when it is being filled with oil flowing from the tanker through that pipe. As to the application of section 6 (3) (*b*). we would, for our part, be disposed to hold that it only becomes relevant if and when the hereditament has been found to be a freight-transport hereditament within the meaning of section 5, that is to say, for the present purpose a hereditament occupied and used wholly or partly for dock purposes and fulfilling the other two conditions imposed by section 5 (1) (*c*). If the hereditament is found to be so occupied and used, whether wholly or partly, then, as it seems to us, and only then, does it become relevant to consider whether, for the purposes of apportionment, it should to any, and, if so, what, extent be deprived of the status of a freight-transport hereditament accorded to it under section 5 on the ground that it, or some part of it, is primarily occupied and used for warehousing merchandise not in the course of being transported within the meaning of section 6 (3) (*b*).

But the matter is not free from authority. We should first refer to the Scottish case of *Assessor for Aberdeen* v. *Shell-Mex and B.P. Ld.*[1] That case concerned the appellant company's terminal depot at Aberdeen which was let to the appellant company by the Aberdeen Harbour Commissioners but actually occupied and operated by the appellant company's managing

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agent for Scotland, Scottish Oils and Shell-Mex Ld. The only material (or supposedly material) difference between the facts of that case and this one appears to have been that in the Scottish case connection was made between the ship's pipes and the shore pipes in chambers termed "grid boxes" situated on the quays or jetties, whereas there are no such boxes in the present case.

For reasons which will shortly appear, we should quote what is said in the present case stated concerning them: "12. . . . "There are no grid boxes on either of the said jetties. Grid "boxes are simply chambers in which pipe lines end and in "which ship's flexible discharge pipes can be coupled to the pipe "lines."

The claim made by the appellant company and its subsidiary in the Scottish case was closely comparable to the present claim and was made under the Act of 1928 as applied, without any material variation, to Scotland. Lord Keith said this[2]: "In "my opinion, neither the ground leased in these cases nor the "plant erected thereon is used for dock purposes, *i.e.*, purposes "connected with the shipping or unshipping of merchandise. I "consider that the land and plant are used not merely primarily "but solely for the storage and distribution of oil and spirit in "connection with a business quite separate and distinct from "any of the activities carried on at the adjacent docks. I "proceed in no way upon the terms of proviso (*b*) of subsection "(3) of section 6 of the Act of 1928, which applies, in my "opinion, to warehouses forming part of an admitted dock "occupied by a dock undertaking and at least partly used for "dock purposes. That is not the position, in my opinion, of "the premises here. Any shipping begins and any unshipping "ends, in my opinion, at the grid-boxes. We are not told "exactly what these grid-boxes are, but I assume that they are "tanks or receptacles sunk below the surface of the quay, which "hold considerable quantities of oil and like products. It will "be easier to confine myself to the unshipping process. The "shipping process is largely the same in reverse, but is insignifi-"cant in bulk. The grid-boxes may be regarded as temporary "receptacles for the unshipped oil and it may be said therefore "that they are connected with the unshipping of oil. What the "result may be as regards the grid-boxes taken in isolation I "shall consider later. But when the oil is pumped from the "grid-boxes to the depot, that, in my opinion, has nothing to "do with unshipping the oil, no more than has the conveying "by a consignee of goods from a temporary storage or transit "shed on the quay. The shed may be connected with the "unshipping of goods. But when goods are carried away from "the shed a second stage has begun, *viz.*, the transporting of "goods from the dock to the consignee's place of business. If "in the present case the depot instead of being 20 to 30 yards

[2] 1953 S.C. 211, 218.

"from the quayside were 20 to 30 miles away and the oil were "collected at the quay direct from the ship into road oil-tankers, "the unshipping would be finished when the oil was discharged "into the tankers. I regard the pipes from the grid-boxes and "the ancillary pumping plant as merely a means of conveying "or transporting the oil from the grid-boxes to the depot."

It will be seen that this passage supports to the full Mr. Lyell's primary argument that the purposes here are purely storage purposes, wholly unconnected with the shipping or unshipping of oil. But, unfortunately, Lord Keith seems to have been misinformed as to the nature of the "grid boxes" and to have been under the impression that they were tanks or receptacles which held considerable quantities of oil, whereas they are, in fact, merely chambers giving access to the ends of the shore pipes for the purpose of connecting them with the ships' pipes. If and so far as Lord Keith's judgment was founded on this misapprehension, it cannot (if we may respectfully say so) be regarded as authoritative. But, although he seems to have attached some importance to the grid boxes, his reasoning and the illustrations he gives seem to us to make it reasonably plain that his view would have been the same if there had been no grid boxes.

Lord Patrick came to the same conclusion, but, unlike Lord Keith, called in aid the restrictive effect of section 6 (3) (*b*), thus providing support for the second branch of Mr. Lyell's argument. After quoting section 6 (3) (*b*), which he described as having "a "vital bearing on the determination of what lands and heritages "are excluded from the benefit of derating," he said this [3]: "It "results that you may have lands and heritages occupied and "used *partly* for dock purposes as part of a dock undertaking in "the sense of section 5 (1) (*c*). Nevertheless, if the whole or "part of such lands and heritages consists of buildings, yards or "other places *primarily* occupied and used for warehousing mer-"chandise not in the course of being transported, such whole or "part cannot be treated as occupied and used for 'transport "'purposes,' i.e., by definition for 'dock purposes,' i.e., by "further definition for purposes connected with the shipping or "unshipping of merchandise, and so cannot have the benefit of "derating."

Lord Sorn, with some doubt, expressed his concurrence and, as to section 6 (3) (*b*), he said this [4]: "I desire to reserve my "opinion upon the applicability of section 6 (3) (*b*) to the question "we have to decide. My impression is that section 6 (3) (*b*) was "not intended to affect the definition of a freight-transport here-"ditament contained in section 5 (1) (*c*), and that it only comes "in at the later stage of apportionment. I think that the proviso, "which deals with places used primarily for a certain kind of "warehousing, was meant, not to exclude such places from the "benefit of derating, but only to exclude them from the operation

[3] Ibid. 221. [4] Ibid. 227.

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" of section 6 (3). For the meaning and effect of section 6 (3) (*b*) " at the stage of apportionment, I refer to the explanation given " by Greer L.J. in *Mersey Docks and Harbour Board* v. *West* " *Derby Assessment Committee*.[5] "

In *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee*[5] Scrutton L.J. seems to have been clearly of opinion that the effect of proviso (*b*) to section 6 (3) was to exclude premises to which it applied from the benefit of derating. He said this about warehouses in general and bonded warehouses in particular[6]: " It is probably true that nearly all goods that go " into a dock warehouse will ultimately go out. Goods are not " put into warehouses to stay there for ever. They are put into " warehouses to stay till their owner is ready to take them out, " because he has sold them, or determined a destination for them " which he did not know when he put them in warehouse, and " therefore warehoused them till he did know on what fresh " transit he would send them. This is especially true of bonded " warehouses where the owner of goods leaves them for some " time, because, when he takes them out he will have to pay duty " on them, and where, not having sold them, he does not then " want to transport them any further. So he warehouses them " not in the course of transport." The same Lord Justice said[7]: " On these facts, for the reasons given, I am of opinion that " these three bonded warehouses are not subjects for derating. " The great bulk of the goods received in them are not received " for or in course of transport. They are received because their " transport is to stop. The consignee has received them but " does not want their transport to proceed. He does not know " where they are going, nor does he yet want to pay duty on " them; he therefore stores them in bond, often for a very sub- " stantial time. The warehouse is primarily occupied and used " for warehousing merchandise not in course of transport, " and is excluded from derating. I therefore agree with the " result arrived at by the Divisional Court as to these warehouses, " though as they have not given reasons for their decision, and " indeed had not before them the detailed facts before us, I may " have arrived at the same result as they did for different reasons. " In my view, it can only be in the most unusual cases that a " bonded warehouse would be entitled to the benefit of derating." Slesser L.J. said this[8]: " As regards section 5, I think that, " whatever may be the meaning of the words ' connected with " ' the . . . unshipping at a dock of . . . merchandise,' it is clear " from the proviso to section 6 (3) that any part of the heredita- " ment being a building, yard, or other place primarily occupied " and used for warehousing merchandise not in the course of " being transported must be excluded from what might otherwise " be a hereditament under section 5 (1) (*c*), as being used wholly " or partly for dock purposes. Although the phrase ' wholly or

[5] [1932] 1 K.B. 40.
[6] Ibid. 96.
[7] Ibid. 98.
[8] Ibid. 119.

" ' partly ' in section 5 extends in my view to an occupation or " user of a part either defined by physical limitation or by commercial function, it may well be, in a particular case, that the " whole hereditament in the physical sense may, as a place, " primarily be occupied and used for warehousing merchandise " not in the course of being transported and so nevertheless be " wholly excluded from the special list under the proviso of " section 6, which is limited by its language to physical occupation within metes and bounds, notwithstanding that the " hereditament might otherwise fall within the wider functional " definition of section 5 as being partly connected with the " unshipping of goods."

On the other hand, Greer L.J. said [9]: " In my opinion the " effect of proviso (*b*) is that if you find a building, yard, or other " place, which is partly occupied and used for transport purposes, " but is primarily occupied and used for warehousing merchandise " not in the course of being transported, then no part of that " building, yard, or other place is to be affected by the restraint " on apportionment enacted by subsection (3), but it remains " subject to the provision as to apportionment contained in sub-" section (1), that is to say, it is taken out of subsection (3) but " is left to be dealt with under subsection (1) without the gloss " put on the operation of that subsection by subsection (3). The " net annual value must then be apportioned. In many cases " the place used for warehousing merchandise not in the course " of being transported may be a part of a larger hereditament, " and definable by metes and bounds, and in these cases there " will be no difficulty in making an apportionment. There is " great difficulty in applying this proviso to the cases where the " hereditament that is rated is a warehouse partly used for trans-" port purposes but primarily used for warehousing merchandise " not in the course of being transported, the part user not being " determined by metes and bounds. Though difficult, the task " is not impossible, and in my judgment the Act requires it to " be done."

In *Union Cold Storage Co.* v. *Moon*,[10] Scrutton L.J. said [11]: " I have, however, received a very clear impression from the " language of the 1928 Act that Parliament did not intend to give " the benefit of derating to premises whose primary purpose and " use was storage or warehousing. From industrial hereditaments " to be derated, those were excluded whose primary purpose and " use was storage: section 3. In the case of freight transport " hereditaments, those were excluded in whole or part which were " primarily occupied and used for warehousing merchandise not " in course of transport: section 6 (3) (*b*). But the language of " the Act as to apportionment between different purposes, primary " or secondary, gives rise to great difficulties." The Lord Justice said [12]: " In my view the construction and result of section 6 as

[9] Ibid. 109.
[10] [1932] 2 K.B. 648.
[11] Ibid. 657.
[12] Ibid. 660.

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" a whole is as follows: The direction to apportion contained in " subsection (1) is restricted in two respects by subsection (3). " First, if the whole or part of the hereditament is primarily used " for warehousing merchandise not in course of being transported, " the premises so primarily used are not to be deemed to be used " for transport purposes, though there is a secondary use of such " premises for transport purposes. Secondly, unless premises are " shut out from being subject-matter of derating or apportionment " by the first restriction, they are to be deemed wholly used for " transport purposes, though in fact they are partly used for other " purposes, unless those other uses are for a dwelling-house, hotel, " or place of public refreshment, when there can be apportion- " ment. It is suggested that the main body of subsection (3) and " proviso (*b*) cancel each other and leave subsection (1) requiring " apportionment. But to apportion premises primarily used for " storage not in course of transport seems to me directly contrary " to proviso (*b*). You cannot apportion premises which are not " to be deemed to be occupied and used for transport purposes; " or, which is the same thing, to be deemed not to be occupied " and used for transport purposes."

Lawrence L.J. concurred with Scrutton L.J.'s judgment, expressing his complete agreement with it, both on the interpretation which ought to be placed on section 6 of the Act and on the manner in which its provisions ought to be applied to the facts of the case then before the court.

Greer L.J. concurred in the result, though with some doubt as regards the construction of section 6. He said [13]: " I am not " sure that my brethren and I are in agreement as to the right " construction of section 6 of the statute. I am inclined to adhere " to the views I expressed in the *Liverpool* cases,[14] but this has " no bearing on the question involved in the appeal, and makes no " substantial difference in the advice to be given to the Assess- " ment Committee as to the way in which they should approach " the question of apportionment. I therefore think it unneces- " sary, and probably it might be embarrassing, to restate views " with which the majority of the Court do not agree."

Notwithstanding the attractions of the reasoning of Greer L.J. and the approval of that reasoning tentatively expressed by Lord Sorn, we are thus, as it seems to us, precluded by two decisions of this court from adopting what, from the appellant company's point of view, is the most advantageous application of Mr. Rowe's argument, the effect of which would be that, once the hereditament has been found to be occupied and used partly for dock purposes, the hereditament, given fulfilment of the other two conditions, is to be treated, by virtue of section 6 (3), as being wholly a freight-transport hereditament, subject to apportionment under proviso (*b*) to non-transport purposes of any " part of the " hereditament . . . primarily occupied and used for warehousing " merchandise not in the course of being transported."

[13] [1932] 2 K.B. 648, 665. [14] [1932] 1 K.B. 40, 105.

We think it also follows from the two decisions of this court to which we have referred that, if it is shown that the whole of the hereditament is primarily used for warehousing within the meaning of section 6 (3) (*b*), it is wholly disqualified from derating as a freight-transport hereditament notwithstanding that it, or part of it, is also used for purposes connected with unshipping. If, on the other hand, it is shown that any part of the hereditament is used, to some exent at least, for purposes connected with unshipping and not, or not primarily, for warehousing merchandise not in the course of being transported, then (given fulfilment of the other two conditions) it would seem that there should be an apportionment, the effect of which would apparently be to give the benefit of derating to the whole of the hereditament, including any parts of it not used for dock purposes, but with the exception of any part primarily used for warehousing merchandise not in the course of being transported, which, by virtue of section 6 (3) (*b*), is not to be deemed to be occupied for transport purposes.

With respect to the opinions of Lords Keith and Patrick in the *Aberdeen* case,[15] we are not prepared to hold that no part of the hereditament in the present case is occupied and used for dock purposes, that is, purposes connected with the shipping or unshipping of merchandise at a dock within the meaning of section 5. Nor are we prepared to hold that the whole of it is used primarily for the warehousing of merchandise not in the course of being transported within the meaning of section 6 (3) (*b*). We cannot see that (for example) the pipes and pumps on the hereditament are warehouses or used for warehousing primarily or at all. They seem to us to be physically and functionally incapable of such description or use. The statute does not refer to use for purposes connected with warehousing, but to a building, yard, or other place used for warehousing, which denotes a structure or place actually used for warehousing. We do not think the circumstance that the whole hereditament is technically a bonded warehouse can reasonably be held to alter this conclusion.

The question whether the storage tanks may not be primarily used for warehousing within the meaning of section 6 (3) (*b*) presents more difficulty. These tanks are no doubt used not merely for the purpose of receiving the oil pumped from the tankers but also for containing it pending distribution. On a literal construction of the language of this proviso, it is difficult to maintain that each of the tanks is not a "place" or, having regard to the distinctive function of a warehouse in the ordinary sense of that expression as a repository for goods pending disposal, that the storage of oil in them pending distribution is not at best capable of being described as "warehousing." Moreover, once it has reached the tanks, the oil is, we suppose, no longer "in the course of being transported." In view of the fact that only one-quarter or thereabouts of the oil is dutiable, we can attach no great importance to the technical status of the hereditament as a

[15] 1953 S.C. 211.

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bonded warehouse, but, for what it is worth, it tends to support the view that the tanks are to some extent used for warehousing. We cannot, however, entirely exclude a doubt proceeding from the manifest difference between these tanks and anything which would, in common speech, be ordinarily described as a warehouse. Accordingly, while we propose to assume for the purposes of this case that the tanks are to some extent used for " warehousing " within the meaning of proviso (*b*), we prefer to express no final opinion on the point.

But, on this assumption, are the tanks *primarily* so used? We find difficulty in forming any concluded view on that question. The tanks are, as a practical matter, necessary for the purpose of unshipping the oil. If there were no tanks, there could be no unshipping. The exigencies of sea-borne supply demand that a stock of oil in excess of day-to-day requirements should be maintained in the tanks, and the element of storage or warehousing in their use is largely due to that circumstance. There is, as it seems to us, no conclusive reason for regarding the unshipping use as secondary and the warehousing use as primary, rather than regarding the warehousing use as secondary and the unshipping use as primary, or, for that matter, regarding both as of equal importance.

We find it unnecessary to resolve this question for the purpose of deciding this case and are content to hold that, so far as the first of the three conditions is concerned, Mr. Rowe is entitled to succeed to the extent that the hereditament is used, partly at all events, for dock purposes and that it is not shown that the whole of it, or every part of it used for dock purposes, is primarily used for warehousing oil not in the course of being transported.

We now turn to the second of the three conditions. Given that the hereditament is occupied and used wholly or partly for dock purposes, is it so occupied and used as part of a dock undertaking? Mr. Rowe puts this part of his case in three ways. First, he says that the hereditament is occupied and used by the appellant company as part of the dock undertaking carried on by the British Transport Commission in the shape of the Port of Hull. Secondly, he says that the hereditament is so occupied and used by the appellant company as part of the dock undertaking carried on by them at their own dock in the shape of the barge berth. Thirdly, he says that the pipes running out along the jetties and the appellant company's rights of user over them suffice to constitute a dock, and that the hereditament is occupied and used by the appellant company as part of a dock undertaking carried on by them at that dock.

As to the first of these submissions, it would seem at first sight to be plainly negatived by the fact that the hereditament is in lease to and exclusively occupied by the appellant company for the purposes of its own business of importing and distributing oil and thus excluded and segregated from the Transport Commission's dock undertaking. But Mr. Rowe relies on section 6 (3) (*a*)

of the Act, which is in these terms: "no part of a freight-transport hereditament which is so let out as to be capable of separate assessment shall be deemed to be occupied and used for transport purposes unless it is actually so occupied and used." This seems to show that a part of a freight-transport hereditament may be occupied and used as part of a dock undertaking even though the undertakers have let it to somebody else. There have been two Scottish cases bearing upon the point. In *Clyde Navigation Trustees* v. *Inland Revenue Officer*,[16] parts of dock premises let to ship owners and stevedores for the purposes of their own shipping or stevedoring businesses were held not to be part of the dock undertaking. On the other hand, in *Clyde Navigation Trustees* v. *Assessor for Glasgow*,[17] the opposite conclusion was reached. The difference in the results reached by these two cases apparently turned to some extent on a distinction made in Scotland between buildings erected by a lessor and buildings erected by a lessee. The passage most favourable to Mr. Rowe's argument in the second of these two cases is in the judgment of Lord Hunter, where, after referring to section 6 (3) (*b*), he said[18]: "That means, I think, that, where one finds subjects, capable of separate assessment and leased to tenants, which are so used and occupied as to fall within the definition of freight transport, one must treat the subjects, although let, as part of the dock undertaking for purposes of derating. That is the case here." Lord Fleming did not go so far. He said[19]: "But section 6 (3) (*a*) seems to me to imply that subjects which would otherwise be entitled to be regarded as freight-transport lands and heritages are not to be deprived of the benefits of derating merely because they have been let to and are occupied by some person other than the dock authority."

Mr. Rowe relies strongly on the terms of the leases under which the various parts of the hereditament are held by the appellant company. He says these leases show that the ground was let with a view to the erection and operation thereon of a terminal oil depot for the unshipping, storage and distribution of oil, in connection with which the lessees were to have unshipping facilities in the shape of the pipes running out along the jetties. There was thus, he argues, something in the nature of an arrangement between the dock undertakers and the lessees under which the lessees were to extend the activities of the dock undertaking to the importation of oil. Therefore, says Mr. Rowe, the installation should be regarded as constructed and operated as part of the dock undertaking. We cannot accept this argument. We would be disposed to agree with Mr. Rowe if what the appellent company did was to provide unshipping and storage facilities for anyone having occasion to import oil. But the appellant company does nothing of the sort. It uses the hereditament and the pipe lines on the jetties simply and

[16] 1930 S.C. 454.
[17] 1931 S.C. 400.
[18] Ibid. 405.
[19] Ibid. 406.

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solely for the purposes of its own individual business, and not by way of performing the functions properly within the province of the dock undertakers as such. Notwithstanding the second of the two Scottish cases just cited, we find it impossible to hold that, in occupying and using the hereditament for its own private purposes, the appellant company is occupying and using the hereditament as part of the dock undertaking carried on by the Transport Commission. To hold the contrary would involve the conclusion that the tenants of every industrial site let by the Transport Commission in the vicinity of the Port of Hull would be occupying and using their respective sites as part of the Transport Commission's dock undertaking, if their leases or tenancy agreements allowed them the use for their own private purposes of the dock facilities provided by the commission. In the result, therefore, we find ourselves in agreement with the conclusion of the Lands Tribunal on this point, though we cannot accept the Tribunal's reasoning so far as it is based on the circumstance that, when originally let to the appellant company or its predecessors, the various parts of the hereditament were open or waste land subsequently built upon by the lessees. So far as English law at all events is concerned, this seems to us an irrelevant consideration.

As to Mr. Rowe's second submission on this part of the case, it is to be observed that the expression "dock undertaking" is defined in section 5 (3) of the Act as meaning an undertaking carried on by a dock authority, but also including "any other "undertaking comprising as part thereof a dock in so far only "as its business is carried on at and in connection with that "dock." The purport of the limiting words introduced by the phrase "in so far only as" is somewhat obscure. In the present case the barge berth is undoubtedly a "dock." It is comprised in the appellant company's undertaking. Therefore, apart from the limiting words, the whole of the appellant company's undertaking is, by virtue of the definition, a dock undertaking. That obviously requires some qualification, and a qualification is provided by the limiting words. These words seem to say in effect that, notwithstanding the earlier part of the definition, the appellant company's undertaking is only to rank as a dock undertaking as regards that part of its business which is carried on at and in connection with the barge berth. That would appear to mean that the barge berth and the business of shipping oil there are to be regarded as a dock undertaking carried on as a distinct department of the appellant company's enterprise. The question then arises whether the hereditament is occupied as part of that circumscribed branch of the company's entire undertaking. There was some argument as to the meaning of the word "at" in the definition, and it was suggested that the hereditament, though only some 300 yards from the barge berth and connected with it by a pipe line, was too far away from the barge berth to be capable of being rightly described as occupied

and used as part of an undertaking the business of which was to be treated as confined to business carried on " at and in connec- " tion with " the barge berth. We are not impressed by this argument. We do not think the word " at " can be given so close a geographical significance as necessarily to exclude premises only 300 yards distant from the actual dock (that is, the barge berth) and physically connected with it by pipes from the category of premises occupied and used as " part " of the undertaking carried on at the dock. But we think Mr. Rowe's submission fails on the ground that the hereditament, while it could properly be described as occupied and used in connection with (inter alia) the barge berth to which it supplies oil, cannot reasonably be regarded as occupied and used as part of the barge berth undertaking. The barge berth is no more than one of the media through which oil is distributed from the hereditament by land and water, and distribution is only one aspect of the activities carried on at the hereditament. We think the true position is that the barge berth is occupied and used as part of the undertaking carried on by the company on the hereditament and not that the hereditament is occupied and used as part of the barge berth undertaking.

Mr. Rowe's third submission on this part of the case is to the effect that the rights of laying, maintaining and using the pipe lines running out along the Transport Commission's jetties conferred on the appellant company by the various leases under which the hereditament is held suffice to constitute a dock comprised in the appellant company's undertaking as part of which the hereditament is occupied and used. We do not agree. We think these rights are rights over the Transport Commission's dock and not a dock in themselves. We agree with what was said by Lords Keith and Patrick about a similar submission in the *Aberdeen* case.[20] Accordingly, we think that the hereditament fails to satisfy the second of the three conditions postulated by section 5 (1) (*c*).

As to the third and last condition, if (contrary to our view) the hereditament is occupied and used as part of a dock undertaking, is it an undertaking whereof a substantial proportion of the volume of business is concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers? As appears from the case stated, the whole, or substantially the whole, of the oil unshipped at the jetties is oil consigned by " Shell " Marketing Co. Ld., Eagle Oil and Shipping Co. Ld. and Anglo-Persian Oil Co. Ld. to the appellant company as their sole agent for the sale and distribution of oil for consumption in the United Kingdom under an agreement made between these three consigning companies of the one part and the appellant company of the other part and dated December 31,

[20] 1953 S.C. 211, 219, 224.

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1931. Substantially the whole of the appellant company's business consists of the sale and distribution of this oil and it is remunerated for its services by the three consigning companies on a commission basis. The appellant company is given wide powers under the agreement in regard to prices, terms and conditions of sale and so forth. The agency is exclusive, and the appellant company has, moreover, a positive right to be supplied by the consigning companies with the oil it requires. Although the property in the oil does not, under the terms of the agreement, pass to the appellant company, as between itself and the consigning companies, the appellant company must surely have a good title to the oil as against all other persons. In these circumstances, we think it might almost be said that the oil is merchandise "belonging to" the appellant company within the meaning of section 5 (1) (*c*). At all events, we think the oil must be "intended for the use of" the appellant company within the meaning of the subsection. It is argued against this view that "use" means consumption. We think that is an unduly narrow meaning. We apprehend that a retail tradesman can, with perfect accuracy, be said to be using his stock when he sells it to customers and to have used it up when it is all sold. So here we think that, inasmuch as the appellant company's business consists of the sale and distribution of oil, albeit as agent for others, it is using in its business the oil which it sells and distributes, and the oil is clearly brought to the hereditament with the intention that it should be so used. The word "use" in its natural meaning is a word of wide import. In *British Motor Syndicate Ld.* v. *Taylor & Son* [21] Stirling J. pointed out that "The first meaning "assigned to the word 'use' in Johnson's Dictionary is 'to "'employ to any purpose'; it is, therefore, a word of wide "signification." In this wide sense it is, we think, apt to cover the commodity in which a merchant trades, be he a petroleum merchant, a timber merchant, or other merchant. The commodity is employed in the merchant's business; it is used to supply his customers. We agree on this aspect of the case with the observations of Lord Keith at the end of his judgment in the *Aberdeen* case.[22] Accordingly, we think that, even if (contrary to our view) the appellant company was occupying and using the hereditament as part of a dock undertaking comprising docks in the shape of either the barge berth or the appellant company's rights over the Transport Commission's jetties, it would still fail to satisfy the third of the three conditions laid down by section 5 (1) (*c*) of the Act.

For these reasons, we think that the appellant company has failed to bring the hereditament within the second and third of the three essential conditions of derating demanded by section 5 (1) (*c*).

[21] [1900] 1 Ch. 577, 583. [22] 1953 S.C. 211, 220.

We have thus reached the same result as the Lands Tribunal, though not for entirely the same reasons, and it follows that in our opinion this appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Sydney Morse & Co.; Solicitor of Inland Revenue; Smith & Hudson for Mainprize, Rignall & Whitworth, Hull.*

B. A. B.

[LIVERPOOL ASSIZES.]

*CREED *v.* McGEOCH & SONS LD.

1955
June 8, 9, 10; *July* 7.

Ashworth J.

[1954 C. No. 506.]

Negligence — Child — Injury to — Building site — Child injured while playing upon trailer—Liability of contractors—Whether occupiers of the site—Duty of care—Extent of duty.
Trespass.

The defendants, a firm of contractors engaged under contract in constructing roads, etc., on a housing estate, left their trailer, unattended, near to the place at which they were at the time constructing a road. The trailer, which was an allurement to children, was parked on land adjacent to the newly completed part of the road and at a point between six and ten feet away from the road. Flanking the road was an area of waste land which was freely used by members of the public and on which children played, although the defendants' employees took prompt steps to stop children playing on their works or with their equipment. On a Saturday afternoon, in the absence of the defendants' employees, the plaintiff, a girl of five, sustained injuries while playing with other children upon the trailer:—

Held, that the extent of the duty owed to the plaintiff by the defendants depended upon whether the defendants were in occupation of the land and since, on the facts (whilst bearing in mind the principle that the occupation need not be exclusive) the defendants were not occupiers of the land on which the trailer was situated, the extent of their duty was that illustrated in *Donoghue* v. *Stevenson* [1932] A.C. 562; 48 T.L.R. 494, H.L.; and not the more limited duty owed by occupiers to infant trespassers; accordingly, even if the plaintiff were a trespasser to the trailer itself, the defendants were liable in negligence to the plaintiff in having failed to take reasonable steps to protect her from injury.

Donoghue v. *Stevenson*, supra, applied.

Dictum of Lawrence L.J. in *Hartwell* v. *Grayson Rollo & Clover Docks Ltd.* [1947] K.B. 901 referred to.

Davis v. *St. Mary's Demolition and Excavation Co. Ld.* [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578 followed.

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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Per curiam: "The answer [to the question whether the "defendants are occupiers] in each case depends on the particular "facts of the case and especially upon the nature and extent of "the occupation or control in fact enjoyed or exercised by the "defendants over the premises."

ACTION.

The following summary of the facts is taken from the judgment. The defendants, John McGeoch & Sons Ld., a firm of contractors, by a contract, dated June 21, 1951, made between them and Birkenhead Corporation, undertook to construct certain roads, sewers and formations for paths and verges on the Woodchurch Estate, and on August 1, 1953, had almost completed one such road, known as Home Farm Road, there remaining a short distance to be completed near the T-junction formed with another road. For the purpose of transporting kerb-stones the defendants used a two-wheeled trailer which until June 1953 had been kept, when not in use, in a barn; but which, after demolition of the barn, had remained in the open near the place at which the defendants were at the time carrying out the construction of Home Farm Road. On August 1, 1953, the trailer was parked upon land immediately adjoining a part of the road which had been completed and kerbed, with its nearest edge about six feet from the roadside kerb. Neither side of the road near the trailer had been built upon, the nearest permanent building being an estimated distance of 300 yards away, and the area flanking the road within this distance was waste land (upon which it was the intention of the corporation in due course to build). The defendants had undertaken to carry out excavations for the laying of sewers alongside the road and to level a strip of waste land on each side of the road; but neither of these operations had, on August 1, been commenced in the vicinity of the trailer and the waste land was freely used by members of the public and played upon by children. No steps were taken by the corporation or by the defendants to prevent such use or to drive the children off, although, whenever the defendants' employees saw children playing on their works or with their equipment they took prompt steps to drive them away and they had on a number of occasions seen children playing on the trailer and had chased them off.

On the afternoon of August 1, 1953, which was a Saturday when none of the defendants' employees was working on the site, the plaintiff, Margaret Lesley Creed, a girl of five, in the company of her brother aged nine and two other children was making her way from beyond the T-junction, along Home Farm Road, to her home on the estate when, seeing the trailer and being unable to resist the temptation to amuse themselves on it, the children contrived to make it into a form of see-saw by running or jumping from one end of its wooden flat top to the other. While playing thus, the towing bar of the trailer came down suddenly causing injuries to the infant plaintiff, who brought this action by her mother and next friend, Mrs. Lilia Tucker, claiming damages

alleging that the defendants were guilty of negligence and/or that the presence of the trailer close to Home Farm Road constituted a nuisance to the highway. The defendants by their defence alleged that the infant plaintiff was a trespasser to the land and/or the trailer.

J. S. Watson Q.C. for the plaintiff.

R. H. Forrest Q.C. and *J. Melville Kennan* for the defendants.

The following cases, not referred to in the judgment, were cited in argument: *Burchell* v. *Hickisson* [1]; *Cooke* v. *Midland Great Western Railway Co. of Ireland* [2]; *Latham* v. *R. Johnson* [3]; *Glasgow Corporation* v. *Taylor* [4]; *Addie & Sons* v. *Dumbreck* [5]; *Excelsior Wire Rope Co. Ld.* v. *Callan* [6]; *Hardy* v. *Central London Railway* [7]; *Mourton* v. *Poulter* [8]; *Liddle* v. *Yorkshire (North Riding) C. C.* [9]; *Hay (or Bourhill)* v. *Young* [10]; *Holdman* v. *Hamlyn* [11]; *Sutton* v. *Bootle Corporation* [12]; *Williams* v. *Cardiff Corporation* [13]; *Jacobs* v. *London County Council* [14]; *Edwards* v. *Railway Executive* [15]; *Hawkins* v. *Coulsdon & Purley U. D. C.* [16]; *Bates* v. *Stone Parish Council* [17]; *Phipps* v. *Rochester Corporation* [18]; *Sullivan* v. *Lipton.* [19]

Cur. adv. vult.

July 7. ASHWORTH J. read a judgment (at Manchester Assizes) in which he stated the facts substantially as set out above, and continued: It is contended on behalf of the plaintiff that the defendants are liable for her injury and the claim is framed both in negligence and in nuisance. So far as nuisance is concerned, it is said that the presence of the trailer close to Home Farm Road constituted a nuisance to the highway. In my judgment this contention fails. In the first place, although Home Farm Road was almost complete there was no proof that it had been dedicated as a highway or that the corporation had taken it over. Secondly, I do not consider that the presence of the trailer could be said to constitute a nuisance within the principles

[1] (1880) 50 L.J.C.P. 101.
[2] [1909] A.C. 229; 25 T.L.R. 375.
[3] [1913] 1 K.B. 398; 29 T.L.R. 124.
[4] [1922] 1 A.C. 44; 38 T.L.R. 102.
[5] [1929] A.C. 358; 45 T.L.R. 267.
[6] [1930] A.C. 404.
[7] [1920] 3 K.B. 459; 36 T.L.R. 843.
[8] [1930] 2 K.B. 183; 46 T.L.R. 256.
[9] [1934] 2 K.B. 101; 50 T.L.R. 377.
[10] [1943] A.C. 92; [1942] 2 All E.R. 396.
[11] [1943] 1 K.B. 664; [1943] 2 All E.R. 137.
[12] [1947] K.B. 359; [1947] 1 All E.R. 92.
[13] [1950] 1 K.B. 514; 66 T.L.R. (Pt. 1) 243; [1950] 1 All E.R. 250.
[14] [1950] A.C. 361; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737.
[15] [1952] A.C. 737; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430.
[16] [1954] 1 Q.B. 319; [1954] 2 W.L.R. 122; [1954] 1 All E.R. 97.
[17] [1954] 1 W.L.R. 1249; [1954] 3 All E.R. 38.
[18] [1955] 1 Q.B. 450; [1955] 2 W.L.R. 23; [1955] 1 All E.R. 129.
[19] [1955] 2 C.L. 398a; The Times, February 23, 1955.

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considered in *Jacobs* v. *London County Council*.[1] Thirdly, the conduct of the children in leaving Home Farm Road to play on the trailer would, in my view, amount to a deliberate deviation, even if the road were held to be a highway.

Much of the argument before me was directed to the question whether the defendants were in occupation of the ground on which the trailer rested. A somewhat unusual feature of this case is that the defendants seek to establish that they were in occupation and owed no higher duty to the plaintiff than such as is imposed on occupiers in respect of infant trespassers; on the other hand, the plaintiff contends that whether or no she was a trespasser vis-à-vis the true occupiers, the defendants were not in occupation and owed a higher duty of the type illustrated in *Donoghue* v. *Stevenson*,[2] and more recently in *Buckland* v. *Guildford Gas, Light & Coke Co.*[3]

It may appear surprising, at least to the parties, that the measure of the defendants' obligation to the plaintiff should depend upon the answer to the question whether they were in occupation of the land, and in *Davis* v. *St. Mary's Demolition and Excavation Co. Ld.*[4] Ormerod J. said[5]: "I think any "decision which puts the defendants [who were not in occupation "of land] in a different position from the occupier of the land is "one which must be considered with very great care." It seems to me, however, that there is no escape from the conclusion that as the authorities stand the distinction referred to by Ormerod J. does exist.

In considering whether the defendants were occupiers of the relevant land or any part of it, it is important to keep in mind the principle that the occupation need not be exclusive. In *Hartwell* v. *Grayson Rollo & Clover Docks Ld.*[6] Lord Oaksey said[7]: "In my opinion the true view is that when a person "invites another to a place where they both have business, the "invitation creates a duty on the part of the invitor to take "reasonable care that the place does not contain or to give "warning of hidden dangers, no matter whether the place "belongs to the invitor or is in his exclusive occupation. "Although the rule has generally been stated with reference to "owner, or occupiers of premises, it is indicated by Lord Wright "in the case of *Glasgow Corporation* v. *Muir*[8] that the occupa- "tion need not be exclusive. He said there[9]: 'Before dealing "'with the facts, I may observe that in cases of "invitation" "'the duty has most commonly reference to the structural con- "'dition of the premises, but it may clearly apply to the use "'which the occupier (or whoever has control so far as material)

[1] [1950] A.C. 361; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 73.
[2] [1932] A.C. 562; 48 T.L.R. 494.
[3] [1949] 1 K.B. 410; [1948] 2 All E.R. 1086.
[4] [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578.
[5] [1954] 1 W.L.R. 592, 596.
[6] [1947] K.B. 901.
[7] Ibid. 913.
[8] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44.
[9] [1943] A.C. 448, 462–3.

" ' of the premises permits a third party to make of the premises.' " Invitors, of course, do not as a rule invite others on business to " premises in which the invitors have no business interest or " control, but they may have an interest and control which falls " short of exclusive occupation."

It is true that in both the last-mentioned cases the courts were dealing with alleged invitors, but in my view nothing turns on that point so far as the question of occupation is concerned.

In the present case counsel on both sides sought to derive support for their arguments from the conditions incorporated in the agreement between the Corporation of Birkenhead and the defendants. For my part I do not think that the question whether vis-à-vis the plaintiff the defendants are to be regarded as occupiers or merely as persons carrying out work on land occupied and controlled by the corporation can be answered by reference to that agreement. In some cases it may well be that the terms of an agreement coupled with evidence as to the defendants' conduct with reference to the land will establish conclusively that they must be regarded as occupiers, but in the present case the terms of the agreement are not such as to lead to any conclusion either way on the problem now under consideration.

Moreover, I think that there is substance in the alternative submission put forward by Mr. Watson for the plaintiff on the footing that the terms of the agreement were in the defendants' favour, namely, that the agreement should be treated so far as third parties are concerned in the same way as agreements whereby a servant of one employer renders services for another; see *Mersey Docks and Harbour Board* v. *Coggins*.[10] In these circumstances I do not propose to lengthen this judgment by detailed reference to the provisions of the agreement.

Davis v. *St. Mary's Demolition and Excavation Co. Ld.*[11] has undoubtedly a resemblance to the present case, in that in both cases the defendants at the material time were carrying out work as contractors on property owned by a corporation. In *Davis's* case [11] the work involved the demolition of bomb-damaged houses, and in the present case it involves the construction of roads and ancillary works on a building estate. It is not clear from the report of *Davis's* case [11] to what extent the question whether the defendants were occupiers was argued, and the judgment is founded on the premise that they were not occupiers. I do not accept Mr. Watson's submission that the decision in *Davis's* case is conclusive on the issue as to occupation. In my judgment, the answer in each case depends on the particular facts of the case and especially upon the nature and extent of the occupation or control in fact enjoyed or exercised by the defendants over the premises.

[10] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[11] [1954] 1 W.L.R. 592.

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In *Hartwell's* case [12] and in *Prenton* v. *General Steam Navigation Co. Ld.*[13] the facts were sufficient to render contractors occupiers of part of a ship; *Davis's* case [14] is an illustration of the converse results in relation to real property.

In my judgment, so far as Home Farm Road is concerned, the defendants can only be described as occupiers of such land as was comprised in the length actually under construction. That is to say, on August 1, 1953, they were not in occupation of more than a relatively short length terminating in the T-junction. The road had been completed and kerbed from the Roman Catholic church to a point between the trailer and the T-junction, and assuming in the defendants' favour that they were in occupation of successive portions of that length during their construction, the defendants had completed that work and on August 1, 1953, were no longer in occupation of any part of it. It is true that the defendants had still to carry out work of excavation alongside the roadway, in order that sewers might be laid, but this work had not been begun, at any rate in the area near the trailer, and in my view the fact that the land on which the trailer was standing would in due course be excavated by the defendants is not sufficient to render them occupiers of it on August 1, 1953. Similarly, in regard to the strip 80 feet in width on either side of Home Farm Road, the defendants would in due course have to carry out levelling work, but this strip had not even been fenced or otherwise marked off from the remainder of the waste land, and in these circumstances I hold that the defendants were not in occupation of it.

The position therefore is that when the plaintiff and her companions left the roadway of Home Farm Road and went on to the land whereon the trailer stood they were not trespassers vis-à-vis the defendants in relation to that land. Nor indeed do I think that they were trespassers vis-à-vis the corporation, since the evidence established that children frequently played on the waste land without let or hindrance on the part of the corporation. In my view the principles applied in *Buckland's* case [15] and in *Davis's* case [16] are equally applicable in the present case and I refer in particular to the last two paragraphs of Ormerod J.'s judgment in the latter case.[17]

In the present case the defendants were fully aware of the risk of injury to children who might play on the trailer and they also knew that it was attractive to children. Admissions to this effect were frankly made by all the witnesses called on behalf of the defendants. Moreover, one of their directors said that he had considered turning the trailer upside down as a measure of precaution, but had not taken this course as he thought that children might then sustain injury while playing with the wheels. It seems probable that in any event the defendants would not

[12] [1947] K.B. 901.
[13] (1943) 77 Ll.L.Rep. 174.
[14] [1954] 1 W.L.R. 592.
[15] [1949] 1 K.B. 410.
[16] [1954] 1 W.L.R. 592.
[17] Ibid. 596.

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have had any occasion to make further use of the trailer in connection with Home Farm Road and it could have been removed. In my judgment, steps could quite easily have been taken by the defendants to prevent such injury to children as occurred in this case either by turning the trailer upside down or by securing the towing bar in a fixed position, or by removing the trailer altogether. In these circumstances I hold that they were negligent.

It was argued for the defendants that even if the plaintiff was not a trespasser in regard to the land whereon the trailer stood, she was at least a trespasser in regard to the trailer itself. Reference was made to *Lynch* v. *Nurdin* [18] and it was contended that the plaintiff in that case would have failed as being a trespasser had it not been for the gross negligence of the defendant, and that no such negligence has been established here. For the plaintiff reliance was placed on *Gough* v. *National Coal Board*,[19] and although that case may be distinguishable in that the plaintiff was held to be a licensee of land occupied by the defendants, there are passages in the judgment which clearly indicate that the defendants' argument on this point should be rejected. It scarcely lies in the mouth of a defendant, who is found to have negligently left a dangerous and attractive object in a place where children are known to play, to contend that a child who has done the very thing which forms the basis of the finding of negligence should fail because he was a trespasser on the object. I therefore hold that the present claim succeeds. In my judgment, a reasonable amount to award by way of compensation is the sum of £600. There will therefore be judgment for the plaintiff for that sum.

Judgment for the plaintiff.

Solicitors: *Dodds, Ashcroft & Cook, Liverpool; Barrell & Co., Liverpool.*

[18] (1841) 1 Q.B. 29.

[19] [1954] 1 Q.B. 191; [1954] 3 W.L.R. 900; [1953] 2 All E.R. 1283.

[LIVERPOOL ASSIZES.]

*BAKER v. BAKER.

1955
June 6, 7, 8, 15.

Davies J.

Husband and Wife—Divorce—Cruelty—Drunkenness—Husband's persistent excessive drinking.

Persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse, certainly if it is known to be injuring the other spouse's health, may well of itself amount to cruelty.

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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The gravamen of a wife's charge of cruelty in her defended petition for divorce was that her husband regularly and persistently drank to excess and was often drunk, thereby causing her acute mental distress and injuring her health. The wife repeatedly remonstrated with the husband about his drunkenness and told him that his conduct was endangering the marriage. On occasions the husband promised to reform, but a short time later reverted to his former habits, which were the real cause of the break-up of the marriage. When the wife was ill and confined to bed in April, 1954, her husband went out drinking for practically the whole of the permitted hours of licensed premises. After the wife's convalescence the husband promised to reform and did so for a short period before relapsing into his former habits: the wife refused to forgive him this relapse. Thereafter, the husband, who, despite his drunkenness, was not a violent man, frightened his wife on two occasions by exhibitions of temper and violence and frequently kept her awake at night trying to compel her to forgive him. When, on these occasions, the wife refused to have sexual intercourse, her husband compelled her to submit to him. On July 25, 1954, there was an attempted reconciliation between the parties, the wife agreeing to "try again" upon the husband's promise to reform, not to drink anything more that day and to go to work the following day. Despite the husband's promise, he went out drinking at a public-house on the evening of July 25 and was too ill to go to work on the following day, whereupon the wife, who was on the verge of a complete nervous breakdown, left the matrimonial home:—

Held, that such conduct amounted in the circumstances to cruelty.

Wife's defended petition for divorce on the ground of cruelty.

The parties were married in July, 1943, and there was one child born in 1950. The nature of the allegations, based in the main on the husband's drinking habits, is set out in the following paragraphs in the petition:

"9. That the respondent is a man of drunken habits who has "assaulted abused and threatened the petitioner.

"10. That since the celebration of the . . . marriage the "respondent has been drunk on occasions too numerous for the "petitioner to specify. On many occasions the petitioner has "remonstrated with the respondent about his drunkenness and "the respondent has promised to change his ways but after a "short time has always reverted to his normal habits.

"11. That in or about the month of April, 1954, the petitioner "was ill and confined to bed. During this period the petitioner "frequently requested the respondent to stay in the house with "her but the respondent persisted in remaining away from the "house when the public-houses were open. The petitioner had "to wait until 3 p.m. or thereabouts for her mid-day meal and "then was obliged to have her tea before 5.30 p.m. when the "respondent left the house.

"12. That after her . . . illness the petitioner went to a "convalescent home. Shortly after her return home the respon-"dent commenced drinking heavily again and when the petitioner

"refused to forgive him his behaviour when drunk the respondent commenced the practice of going to the petitioner's bedroom at night abusing her and refusing to allow her to go to sleep until 2 a.m. or 3 a.m. When the petitioner closed her eyes to attempt to sleep the respondent shook her to waken her and said that he was trying to break her spirit to force her to forgive him. This practice continued until the petitioner was compelled by his conduct to leave the respondent on or about July 26, 1954. On one such occasion the respondent put his hands round the petitioner's throat.

"13. That on or about July 13, 1954, the respondent threatened the petitioner with violence if she did not submit to sexual intercourse with him.

"14. That on each night between July 17 and 26, 1954, the respondent desired sexual intercourse with the petitioner and when she refused threatened her and kept her awake until she was on each occasion forced in the early hours of the morning to submit.

"15. That on or about July 23, 1954, the respondent threatened to burn off the petitioner's hair and held a match to the side of her head. When she blew it out he took hold of her hair, pulled it and struck her in the face.

"16. That by reason of the respondent's cruelty as aforesaid the petitioner has suffered in her health."

The husband by his answer denied the allegations of cruelty; alleged that the wife left him, not as a result of any conduct on his part, but solely in order that she might associate more freely with a man named Capper; and pleaded that his cruelty, if any, had been condoned. By her reply the wife denied the allegations contained in the answer; alleged that it was by reason only of the husband's conduct that she in any way associated with Capper; and pleaded that the husband's cruelty, if condoned, was revived by his constructive desertion on July 26, 1954.

David McNeill for the wife.
T. H. Pigot for the husband.

The following cases in addition to those referred to in the judgment were cited in argument: *Squire* v. *Squire* [1]; *Carpenter* v. *Carpenter.* [2]

Cur. adv. vult.

June 15. DAVIES J. read a judgment in which he referred to the pleadings and, after stating the fact of the marriage and the places of cohabitation of the parties, continued: The real gravamen of the wife's complaint is that the husband is a drunkard, and by reason of and in consequence of his drinking habits cruel to her. Mr. Pigot, who appeared for the husband, in the course

[1] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[2] [1955] 1 W.L.R. 669; [1955] 2 All E.R. 449.

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of what, if he will allow me to say so, was a most excellent final speech, was constrained to admit that his client was "a heavy "drinker by any standards," though he suggested that the extent of the husband's drinking had been exaggerated by the wife for the purposes of this case. I do not think that it was. It appears that the husband's business consists largely of selling cleansing substances to licensed victuallers, and he protests that in order to promote sales he has to do a certain amount of drinking with customers. For many weeks of the year he was away from home except at week-ends; but it is perfectly plain that his business drinking during the week did not prevent him from drinking heavily at the week-ends as well—I suppose for pleasure.

[His Lordship referred to the evidence, observing that the husband's appearance was obviously that of an extremely heavy drinker, and continued:] The husband, if not an habitual drunkard, regularly and persistently drinks to excess and is often drunk. And I have no doubt that that is what has really broken up this marriage.

But, as was pointed out by Lord Greene M.R. in *Buchler* v. *Buchler*[1]: "The legislature has not thought fit to make the "continuous unhappiness of one spouse caused by the unkind-"ness, the lack of consideration, the selfishness or even the "drunken degradation of the other spouse, a ground for obtaining "a dissolution of the marriage." There was also cited the well-known passage in the judgment of Denning L.J. in *Kaslefsky* v. *Kaslefsky*,[2] which passage has, no doubt, now to be read in the light of the recent decision of the Judicial Committee in *Lang* v. *Lang*.[3] Denning L.J. said[4]: "When the conduct does not "consist of direct action against the other, but only of miscon-"duct indirectly affecting him or her, such as drunkenness, "gambling or crime, then it can only properly be said to be "aimed at the other when it is done, not only for the gratification "of the selfish desires of the one who does it, but also, in some "part, with an intention to injure the other and to inflict misery "on him or her. Such an intention may readily be inferred from "the fact that it is the natural consequence of the conduct, "especially when the one knows, or it has been brought to his "notice what the consequences will be, and nevertheless he does "it, careless and indifferent whether it distresses the other or not. "But the court is not bound to draw the inference: the presump-"tion that a person intends the natural consequences of his acts "is one that may—not must—be drawn. If, in all the circum-"stances, it is not the correct inference, then it should not be "drawn. In cases of this kind, if there is no desire to injure "or inflict misery on the other, the conduct only becomes cruelty "when the justifiable remonstrances of the innocent party

[1] [1947] P. 25, 35; 63 T.L.R. 100; [1947] 1 All E.R. 319.

[2] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

[3] [1955] A.C. 402; [1954] 3 W.L.R. 762; [1954] 3 All E.R. 571.

[4] [1951] P. 38, 46.

" provoke resentment on the part of the other which evinces itself " in actions or words actually or physically directed at the " innocent party." [4]

In my judgment, persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse, certainly if it is known to be injuring the other spouse's health, may well of itself amount to cruelty. In any case, such drunkenness, if it is combined with other acts of ill-treatment, may obviously be of the greatest importance.

Before the parties were married, the engagement was on one occasion broken off by the wife because of the husband's drinking. But it was made up on the husband's promise to mend his ways. For a time he was better. But not long after the marriage he was drinking heavily again, and the wife threatened to leave him if he did not pull up. He was better at times, but there were occasions when he was brought home drunk and occasions when he was incapable of getting to bed. There was more than one occasion during the marriage when he suffered injury through falling when drunk, for example, an injury to his nose and face and an injury to his spine. In April, 1946, when he started as a salesman, his drinking became worse for a time. It is fair to say that in December, 1948, when the wife's mother died, the husband was kind and helpful to her though he was still drinking.

Some short while before the parties moved to their last home, the wife had to sell her engagement ring to help the husband who was in debt. On another occasion she had to be a passive party to a lie which he told as to some of his company's money which was short. These are not, of course, acts of cruelty, but they are part of the picture of the life which the wife had to lead. In April, 1952, when they moved to their new house, the wife had to borrow money from the husband's mother and gave her fur coat as security. The husband was in debt to his company and still is: the present debt is about £600.

In addition to his drinking habits and financial difficulties there were two occasions when he frightened his wife by exhibitions of temper and violence, though it is not suggested that there was ever violence towards her until the year 1954.

It is now time to mention a man called Capper. Until February, 1954, when he obtained a divorce from his wife, he was a married man, though he had been living apart from his wife for some years. He was called as a witness on behalf of the husband. It is beyond dispute in this case that at the present time the wife and Capper are in love with one another and wish to marry. The wife and Capper first met in 1952, when they went to a dance in a party organized by neighbours of the Bakers. During the ensuing twelve months or so there were similar dance parties. The husband knew about these dances and made no objection. I reject entirely the husband's evidence that on one

[4] [1951] P. 38, 46.

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of these occasions when the wife returned home very late she was very drunk.

On January 1, 1954, the wife contracted whooping cough and was undoubtedly seriously ill. Eventually she went to stay near St. Asaph to recuperate. There can be no doubt that something approaching a close friendship was beginning to grow up between the wife and Capper, for he visited her three times while she was at St. Asaph, at her invitation. On the first occasion he was to have been accompanied by some friends who were at the last moment unable to come.

It is, of course, important, in considering the husband's conduct in the last few months of the marriage, to consider also the wife's conduct. If a wife is provoking her husband by associating with another man to his knowledge and against his wishes, or indeed, if in consequence of such an association, even if unknown to her husband, she is, either deliberately or because she cannot help it, adopting a cold and provocative attitude to her husband, that may well explain or excuse conduct on the part of the husband which would otherwise be inexcusable. But in the present case there are two factors to be considered on the other side. In the first place, the association between the petitioner and Capper—there is no suggestion of adultery or of any impropriety apart from the fact of the association—was the result of the husband's continued drunkenness: but for the unhappiness which he had caused her, this association would never have happened. Secondly, even after the association had commenced and the wife's feelings for Capper were waxing as those towards her husband were waning, he had on two or three occasions—as will appear—a real opportunity of reconstituting the marriage if only he could have behaved nicely to her and, above all, kept off the bottle.

[His Lordship read some notes, of which the following are extracts, made by the wife in respect of a week spent in North Wales in 1954, stating that they formed a truthful and substantially accurate record and that, in general, the wife's evidence was to be accepted in preference to that of the husband, he being so sodden with drink as to render his evidence in general most unreliable:]

"Friday, March 26th: Roy [the husband] came in at 9.30. "Had been drinking and didn't stay even for a cup of coffee. "Left 5 minutes later for Salisbury Arms. Asked me to get "supper for him at 10.30. Came back late. . . . He had had far "too much whisky and everything was wrong as usual.

"Saturday, March 27th: Took Roy's breakfast up as he felt "awful. Was greeted with 'What the hell's that?' and told to "take it away. . . . Roy came in at 1.30 for his [luncheon] and "then went up to Salisbury Arms again. . . . When I asked "him not to drink any more he told me not to speak to him today. "He came back at 3 p.m. . . . Putting Rosaline [the child of "the marriage] to bed when Roy called. He was going out. Got

" in at 10.45 very drunk. Had a long talk but doubt if it will " make any difference.

" Sunday, 28th March: Roy refused to get up. Had to stop " Rosaline from talking until we went down for breakfast. . . . " Impossible to hold any sort of a conversation with Roy. I don't " know how much longer I can go on. If only I had some money " or somewhere to go. He says he is a dipsomaniac and I believe " him. What a life. I told him I must leave him. Thinking it " over until the week-end.

" Monday, 29th March: . . . Was very unhappy but will get " over it. . . ."

" Wednesday, 31st March: [Capper] came in the evening and " we had a few happy drinks, then Roy came in unexpectedly. " Don't know whether he intended to go to the house to pick " me up, or perhaps he would have stayed at the Salisbury until " they closed and then come home or driven to Wallasey, I just " don't know. He stayed with us until about 11 o'clock, then " went to the Tolardy Hotel to stay the night.

" Thursday, 1st April: Roy called for us at 10.30 and we went " to Llandudno. A beautiful day but I was very edgy trying to " stop Rosaline from talking as Roy wouldn't have it. Went to " the Salisbury at night and told Roy we'd try again together, " had a nice evening and hope it will be alright now.

" Friday, 2nd April: . . . We [the parties] had a nice evening " together."

[His Lordship then referred to the evidence relating to the evening of March 31: accepting as may well being true the husband's testimony that he was most upset upon finding his wife and Capper in the bar, and that that was the only visit of Capper to see his wife of which he knew; observing that there was on April 1 something in the nature of a reconciliation; and continued:] This incident should have been a severe warning to the husband. She had told him on the 28th that she must, because of his drinking, leave him. He had found her in the company of Capper on the 31st, and it therefore behoved him to be particularly careful in his behaviour in order to win back his wife and restore her confidence in him. He did for a week or so behave better.

On or about April 19 the wife was taken ill again with bronchitis. She was in bed at home for about 10 days. He was at home for a week and no doubt did a good deal of domestic work; but on every single day, with his wife in bed, and despite her requests that he should not got out, he was out for practically the whole of the permitted opening hours of licensed premises. He says this was in order to carry on his business of selling his goods: but I have no doubt that he was with this business combining a good deal of his old pleasure. He was drinking heavily—going back to the old ways of which his wife had complained, and this at a time when his wife was seriously ill, and when a decent husband might have been expected to be

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more than ordinarily kind and considerate. On April 29 the wife was seen by a specialist who diagnosed virus pneumonia and ordered that she be removed next day to hospital. The husband went with the doctor to fetch some drugs and admitted that on his way home he could not prevent himself from going into the public-house and buying some bottles of beer to consume in the house in which his wife was so gravely ill.

[His Lordship referred to the wife's convalescence at Ilkley, and continued:] On June 7 the husband fetched his wife from Ilkley. He told her that her illness had been a great shock to him, that it had taught him a lesson and that he would not drink again. For 10 days they were happy and might have remained so but for the fact that the husband relapsed. On Friday, June 18, the husband came in completely drunk, hardly able to stand or to speak coherently. He said that he hated everyone in the world and his wife in particular. He called her offensive names and said that he would drink as much as he liked. The wife refused to forgive him for this conduct, and he then and on subsequent occasions said that if she wouldn't forgive him there was no point in his ceasing to drink.

From this point there are a number of very brief entries in the wife's diary which, like the earlier notes, are, I am satisfied, substantially accurate. The husband was drunk for three nights in succession and from June 19 to 23 he was constantly keeping his wife awake very late at night trying to make her forgive him, and on several occasions he actually forced her to have sexual intercourse with him against her will. On at least one occasion he said that he was using Chinese torture to make her submit and forgive him. One one occasion when the wife was refusing intercourse he put his hands round her throat but took them away when she told him not to be a fool, remarking, however, that he ought to have pressed harder. After this miserable week, the wife went on June 24 to St. Asaph with Capper in his car without telling her husband. On that evening the husband arrived home drunk and having run short of cigarettes went to her handbag for some. In her bag he found a diary with the entry "St. Asaph," and he also found two letters from Capper, in themselves perfectly harmless, written to her while she was ill.

[His Lordship referred to the evidence, and continued:] The husband's discovery led to a row between them about Capper, in the course of which the wife said that she wanted a divorce. Shortly after this the wife telephoned to Capper, and as a result they did not meet again until after the wife had left her husband. The entry in the diary for June 27 says: "Roy "went to Belgravia"—that is a public-house—"after promising "not to. Did not tell me. Pam and Norman did": for June 28: "Threatened to bribe and corrupt in order to win his case and get "Rosaline"—that is something which the wife heard him say to her aunt: for June 30: "Roy in Belgravia 12.30." On July 3 the husband demanded intercourse when in drink. The wife

refused. Whereupon he said: "I am going out to get drunker "than you have ever seen me and when I come back I'll knock "you down so hard that you'll never get up again." He did not carry out either of these latter threats, but when he came in he kept her up till half past two and held her down and had intercourse with her. From July 10 to 17 they were away at Torquay on holiday, the child being with them. On two occasions during that week he kept her awake late at night with arguments and also woke the child. She says that he wanted intercourse: he, however, says that this never arose, because she was menstruating. It does not, I think, matter particularly what were the causes of the altercations. During the last few days of their cohabitation, which ended on July 26, the husband was constantly keeping the wife awake till very late—half past two or three—trying to compel her to forgive him and wanting intercourse. Sometime during July, the wife, whose endurance was plainly coming to an end, on one occasion suggested to the husband that he should divorce her for desertion. The entry in the diary for Thursday, July 22, is: "Roy in bed all day. Not "allowed out except to Belgravia so he could check on me"; for July 23: "Told me I'm a chattel and he owns me as he's "married me—especially since Rosaline was born." Then there comes the final evening and the last serious scene on July 23.

[His Lordship referred to the evidence relating to this incident; the wife's evidence being to the effect that her husband assaulted her as alleged in paragraph 15 of the petition (set out above) when she refused to take a light for a cigarette which he was attempting to compel her to take; the husband's evidence, which in substance contradicted that of the wife, being to the effect that he struck his wife a "backhander" when she became hysterical as he was talking about Capper: and continued:] He may well have had Capper in his mind. Indeed, this fact may well be the reason for his having forced intercourse upon his wife during this period and for much of his ill-treatment of her in June and July, though I do not believe that Capper was constantly mentioned. It is, I think, likely that Capper was mentioned on July 23 during the altercation; but, as to what the husband did, I accept the wife's evidence. He did use violence to her on this occasion. It is perfectly true that, despite the husband's drinking, he is not a violent man. Apart from this occasion and the perhaps not very important occasion when he put his hands on her throat, he never used violence to her except in the course of compelling her to have intercourse. That this incident happened substantially as the wife has described, I have no doubt.

It had been arranged that on Sunday, July 25, the parties would go to an hotel where the wife was to sign a contract in respect of the sale of the house. The husband proceeded to get very drunk and had to be taken home by the doctor. Subsequently he vomited on the stairs.

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[His Lordship referred to the evidence relating to a discussion had between the parties and the husband's parents later that day, stating that he accepted the wife's evidence which was to the effect that in the course of the discussion the husband said that he was drinking because there was another man, and she told him that she could not go on and would have to leave him, that if she had a chance she would be glad to marry Capper, that she wanted her husband to give her a divorce and that she had lost all affection for him: and continued:] The upshot of the discussion was that the wife agreed to try again. This was the husband's last chance, arising out of the first occasion on which their troubles had been discussed in front of his parents. It is true that the wife did not mention violence or the fact that he had been having intercourse against her will. That does not affect my conclusion on this point: the main fault from which all the rest stemmed was his drunkenness and no doubt it was on that that she concentrated. The husband promised his parents that he would drink no more that night, and he said he could carry out his work at Sheffield the next day. But as soon as his parents left, out he went to the public-house—drinking again. And on the Monday he was too ill to go to work—as he had been on a number of previous Mondays after a week-end debauch. His explanation of his failure to go to work on the Monday was that he was suffering from a delayed nervous attack. There was at one time a suggestion that the wife voluntarily had intercourse on the Sunday night, but that suggestion was not seriously pressed, and I am satisfied that no such intercourse took place. His renewed drinking on the Sunday night and his failure to go to work on the Monday were the last straw for the wife. She left on that day, taking the child with her. It was submitted by Mr. Pigot that his failure to go to work was an odd "last straw," an odd culminating reason for her to leave. Had he gone to work that day she might have stayed. But, after all that she had had to go through, the husband's conduct on the Sunday evening and the Monday must have indicated to her that he was quite unwilling or quite unable to abide by any promises of amendment, and that, if she were to stay, it would be merely to expose herself to treatment similar to that which had been meted out to her in the past.

I am quite satisfied from the evidence of Dr. Stephens that on July 24 the wife was in a very serious nervous state. He described her as being near to a complete nervous breakdown. It is no doubt true that some part of this was due not to his treatment of her but to her belief that there was a prospect of better things with Capper. As I have indicated, the association with Capper was itself caused by the husband's conduct towards her. The husband was also near a breakdown; but he himself is the cause of this.

On the whole of the evidence in this case, I am abundantly satisfied that this charge of cruelty has been made out. The husband caused his wife great mental distress by his persistent

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drinking, despite warnings from both her and from others that she would not be able to stand it. In the last few months of the marriage, when she had been driven away from him by his conduct, he became worse. He attacked her with words, he insisted on intercourse when he knew that she did not want it. On two occasions he used violence to her, particularly on July 23. Even in 1954 there were three occasions when there was a chance that the marriage might be patched up, namely, on April 1, June 7 and July 25. On each of these occasions sooner or later he destroyed the chance by reverting to drink and treating her in a manner which undoubtedly did injure her and would have caused her further injury had she remained. On my finding of fact the issue of condonation is really disposed of. I am satisfied that from and after June 18, the wife never voluntarily had intercourse with her husband. The agreement for a reconciliation arrived at on July 25 was inchoate and, owing to the husband's conduct immediately afterwards, never became effective.

[His Lordship referred to the overtures, directed to a resumption of cohabitation, made by the husband to the wife after she left which she had rejected and, after stating that the husband was plainly incorrigible, concluded:] In the result, therefore, the wife has made out the petition and there will be a decree nisi, custody, and an order for costs.

Decree nisi.

Solicitors: *Berkson & Berkson, Birkenhead; H. G. C. Day & Co., Liverpool.*

[COURT OF APPEAL.]

* PENNEY *v.* BERRY.

C. A.

1955
July 15, 18.

Evershed M.R., Jenkins and Parker L.JJ.

[Plaint No. K. 602.]

Public Health—Nuisance—Cellar—Cellar-head in pavement—Projection after resetting by local authority—Obligation of frontager to "be "kept in good condition and repair"—Whether duty to abate nuisance created by local authority—Public Health Acts Amendment Act, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 35 (1).
Nuisance—Highway.

A local authority raised a pavement and reset in it a metal slab covering a cellar hole. Before the reconstruction the slab and the flagstones supporting it were in good condition, but after the slab had been reset it projected above the pavement. The plaintiff tripped over the projection, and brought proceedings against the frontager claiming that he had not fulfilled the obligation put on frontagers by section 35 (1) of the Public Health Acts Amendment Act, 1890 (the local authority having adopted that Act), to keep the cellar-head and supports "in good condition and repair":—

Held, that, although the cellar-head constituted a public nuisance, the nuisance was due to the lay-out of the pavement as

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reconstructed by the local authority and not to the condition of the cellar-head and supports; the frontager had no power or duty to abate the nuisance which the local authority had created and was not liable for the injuries sustained by the plaintiff.

APPEAL from Judge Maddocks sitting at Bury County Court.

On January 10, 1953, Catherine Penney was passing along a public highway known as Bolton Street, Ramsbottom, Lancashire, when she tripped over a metal slab set in the pavement which covered the cellar of 57 Bolton Street, the premises occupied by the defendant, H. Berry. The plaintiff brought proceedings against the defendant in respect of the injuries which she sustained and claimed £200 damages. The slab, which measured about 1 foot by 1 foot 3 inches, was laid in a concrete surround bedded on a ledge or rebate on the concrete. At the time of the accident the slab and the surround were in good condition and the slab was bedded down on the ledge but it projected about three-quarters of an inch above the level of the pavement. The county court judge found that in those circumstances the cellar head constituted a public nuisance, but he further held that the defendant was not responsible for the nuisance. The defendant had bought the house from his father in 1941, and at that time this slab had been more or less in this position, but set in a large flagstone. About 1950 the local authority raised the pavement 6 in. to 8 in. and in the course of doing that slightly altered the position of the opening into the cellar and fitted the slab into a concrete surround. The slab rested on a rebate in the concrete but the top was not flush with the pavement and projected at one side about three-quarters of an inch. The county court judge held that the defendant was under no obligation to abate the nuisance created by the local authority. He dismissed the plaintiff's claim and the plaintiff appealed.

H. A. Fisher for the plaintiff.
Philip Curtis for the defendant.

In addition to the cases referred to in the judgments the following were cited in argument: *Fisher* v. *Prowse* [1]; *Pretty* v. *Bickmore* [2]; *Hamilton* v. *St. George, Hanover Square* [3]; *Wimpey* v. *British Overseas Airways Corporation* [4]; *Nicholson* v. *Southern Railway Co.* [5]

EVERSHED M.R. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. This is an appeal from an order of Judge Maddocks dismissing a claim for damages for personal injuries

[1] (1862) 2 B. & S. 770.
[2] (1873) L.R. 8 C.P. 401.
[3] (1873) L.R. 9 Q.B. 42.
[4] [1955] A.C. 169; [1954] 3 W.L.R. 932; [1954] 3 All E.R. 661.
[5] [1935] 1 K.B. 558; 51 T.L.R. 216.

brought by the plaintiff, Mrs. Penney, against the defendant, who was the owner of premises No. 57, Bolton Street, Ramsbottom.

On January 10, 1953, the plaintiff was walking along the street outside the defendant's house when she tripped on what has been referred to, sometimes as a grating, or a cellar-head, or a coal-hole, consisting of a metal slab, about 1 foot by 1 foot 3 inches, with six holes in it and laid in a concrete surround bedded on a ledge or rebate on the concrete. It is, in fact, the cover of the opening into Mr. Berry's cellar used in connexion with his house. The county court judge found that, although that cover was properly bedded down on its ledge, in other words, that it was not sticking up by reason of some coal dust or dirt, nevertheless part of it, one side of it at any rate, projected about three-quarters of an inch above the pavement and in those circumstances the slab constituted a public nuisance and that the plaintiff tripped on it.

In those circumstances, the only question for this court is whether the county court judge was right in holding (as he did hold) that, although this was a public nuisance, the defendant was in no way liable either for its creation or for its continuation or adoption.

Mr. Fisher, appearing for the plaintiff, has put his case in this way. He refers the court to the well-known case of *Sedleigh-Denfield* v. *O'Callaghan* [1] in which the principle was affirmed whereby a party who, with full knowledge of the existence of a nuisance, fails to take any reasonable means to bring it to an end when he has ample time to do so, continues and adopts that nuisance. Of course, in that case the nuisance in question had arisen on private land. A trespasser had run a ditch on the defendants' land into a pipe or culvert. That was well known to the defendants and, in fact, they used the water that came from the culvert for their own purposes, but they failed to take any proper means of seeing that the culvert did not become blocked. As a result of it becoming blocked with leaves damage was done to the plaintiff's land.

In the present case there is no question of a nuisance having been created on land belonging to the defendant, and in cases such as this the general principle, as I understand it, is that there can be no duty on the owner of land adjoining the highway where the nuisance is, to abate the nuisance because the liability is, primarily at any rate, on the local authority, and unless he has some statutory power to do so the owner has no right to go onto the pavement and to abate the nuisance. As Shearman J. put it in *Horridge* v. *Makinson* [2]: "In my opinion the cases "shew that a liability is cast upon the owner of the house, in "respect of a nuisance, only when such owner has a duty to "abate the nuisance, and he fails to do so." I think I might

[1] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[2] (1915) 84 L.J.K.B. 1294, 1296; 31 T.L.R. 389.

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add that it is only when such owner has a duty and a power to abate the nuisance.

The way Mr. Fisher puts it in this case is that this local authority, having adopted the Public Health Acts Amendment Act, 1890, have by reason of section 35 put on to adjoining frontagers certain obligations; by subsection (1)—reading only the relevant words—it is provided that "All . . . cellars under "any street, . . . and all cellar-heads . . . and coalholes in the "surface of any street, and all landings, flags, or stones of the "path or street supporting the same respectively, shall be kept "in good condition and repair by the owners or occupiers of "the same, or of the houses or buildings to which the same "respectively belong."

It is quite clear, therefore, that there was an obligation on the defendant to keep this slab, which is a cellar-head or coal-hole, and all landings, flags or stones of this path or street supporting the same—which, as I read it, would certainly include the concrete surround and, possibly, adjoining flagstones—in good condition and repair.

To my mind, the only question in this case is what those words "in good condition and repair" are apt to include. Mr. Fisher, in a forcible argument, says that when one is considering the unit, the slab fitting into its concrete surround, one looks at the two together and asks: "Are they in good repair and "condition?" and he says that quite clearly if they are such as to constitute a public nuisance it cannot be said that they are in good condition.

Bearing in mind the obligation which this section is putting upon frontagers and bearing in mind that it is putting the obligation on the frontagers for the benefit of the local authority, I should not be astute to make those words include more than is necessary. It seems to me that if an adjoining frontager can be called upon, and called upon at once under the section, if Mr. Fisher is right, to remedy a nuisance recently created by the local authority, it would be putting an absolutely intolerable burden on the frontager. It seems to me that, using the words in their ordinary sense, one looks at this slab and asks: "Is it "in good condition?" One looks at the surround and the flagstones and asks: "Are they in good condition and repair?" Asking myself those two questions, it seems to me perfectly clear that each of them is in good condition and repair and that what is wrong, if I may use that expression, is the design or lay-out in which they were set when the pavement was reconstructed.

In my view, they were in good condition and repair; accordingly, there was no power or duty on the defendant to abate the nuisance. and the liability for the nuisance would be on the local authority alone. Most unfortunately for the plaintiff in this case, owing to the relevant statute of limitations, it is now too late for her to start proceedings against the local authority and,

accordingly, she has, in fact, no remedy. Sorry as I am for her, I am quite clear in this case that there is no liability whatever on the defendant.

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JENKINS L.J. I agree and find nothing I can usefully add.

EVERSHED M.R. I also agree. Unfortunately for the plaintiff, events have proved that this stone or grating is, or may be, dangerous. If it is a fact, as it seems it may be, that the plaintiff cannot now sue the local authority, the local authority would, no doubt, consider whether for the future they could not take some steps to put the matter right.

Appeal dismissed.

Solicitors: *Gregory Rowcliffe & Co. for Hall & Smith, Bury, Lancs; George Haworth & Chappell, Ramsbottom, Lancs.*

E. D.

[MANCHESTER SPRING ASSIZES.]

*GREGSON *v.* HICK HARGREAVES & CO. LD.

1955 *April* 21, 22, 23; *May* 3.

DONOVAN J.

Factory—Dust—Elimination—"All practicable measures"—Duty not absolute—Whether danger one of which employer had or ought reasonably to have had contemporaneous knowledge—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1).

The defendants had employed the plaintiff as a moulder in their iron foundry from 1934 to 1951. In January 1951 he was certified as suffering from silicosis, a condition which he had contracted by inhaling silica given off when the loam moulds were fractured. Up to the time when the plaintiff's condition was diagnosed the defendants did not know of the danger of the dust. They had provided throughout the period of the plaintiff's employment the then current safeguards against dust—when there was dust, masks were worn, and when the loam moulds were finally broken moulders were sent out of the shop away from the resulting cloud of dust. On a claim for breach of section 47 (1) of the Factories Act, 1937:—

Held that the duty under section 47 to take "all practicable "measures" to protect persons employed against inhalation of the dust was not absolute; it had been discharged by taking all practicable measures to overcome the dangers of which the defendants had contemporaneous knowledge; and it would be a wrong criterion to attribute retrospectively to the defendants knowledge which at the material times they lacked and could not reasonably have been expected to possess.

Ebbs v. *James Whitson & Co. Ld.* [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192 applied.

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

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The plaintiff contracted silicosis while employed as a moulder in the defendants' iron foundry. He claimed damages for breaches of sections 4 (1) and 47 (1) [1] of the Factories Act, 1937. The report is confined to the defendants' liability under the latter section.

The facts are fully set out in the judgment.

Fenton Atkinson Q.C. and *Godfrey Heilpern* for the plaintiff.
H. I. Nelson Q.C. and *C. M. W. Elliott* for the defendants.

The following cases were cited in argument: *Ebbs* v. *James Whitson & Co. Ld.*[2]; *Adsett* v. *K. & L. Steelfounders and Engineers*[3]; *Crookall* v. *Vickers-Armstrong Ld.*[4]

Cur. adv. vult.

May 3. DONOVAN J. The plaintiff, who is now 58, was employed by the defendants as a moulder in their iron foundry from 1934 to 1951. In January, 1951, he was medically certified as suffering from pneumoconiosis, and it is now agreed that he was then, and is now, suffering from that species of pneumoconiosis which is called silicosis. It is further agreed that this disability has arisen out of and in the course of his employment by the defendants. The plaintiff was away from his work from January to July, 1951, when he went back to work with the defendants. He was unable, however, to secure his old job as a moulder and is now employed as a storeman. Due to silicosis he is certified as being disabled to the extent of 20 per cent., and is compensated under the National Insurance (Industrial Injuries) Act, 1946, accordingly. He now claims that this state of affairs has been brought about by the defendants' breach of sections 4 and 47 of the Factories Act, 1937, which deal respectively with ventilation and with measures against dust. No allegation of negligence at common law is now made.

The defendants carry on their iron foundry at Bolton, where large castings are made. The moulds used for the purpose are built up of bricks and loam. Loam is moulding sand mixed with manure and is used wet. It becomes dry and hard when the mould is baked preparatory to casting. During certain of the moulding processes dust is given off. The present case has

[1] Factories Act, 1937, s. 47 (1): "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom . . ."

[2] [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.

[3] [1953] 1 W.L.R. 137, 773; [1953] 1 All E.R. 97n., 2 All E.R. 320.

[4] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.

revealed, it seems for the first time, that dust from loam may contain silica; that is, minute fractured particles of sand floating in the air which, breathed in over a long period, severely damage the lungs. This is what has happened to the plaintiff, and he says the cause of it is that the moulding shop was not adequately ventilated, as section 4 of the Act of 1937 requires; and that all practicable measures to prevent injurious dust being inhaled were not taken, as required by section 47 of the same Act.

Section 4 (1) requires that effective and suitable provision shall be made, first, for securing and maintaining adequate ventilation by the circulation of fresh air in each workroom; and secondly, for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health, generated in the course of any process or work in the factory. This latter requirement means that such fumes, dust and other impurities are to be rendered harmless, so far as practicable, by adequate ventilation: see *Ebbs* v. *James Whitson & Co. Ld.*[1]

[His Lordship referred to the facts bearing on the question of ventilation, held that the defendants were not in breach of section 4 (1), and continued:] Section 47 of the Act provides: "(1) In every factory in which, in connection with any process "carried on, there is given off any dust or fume or other impurity "of such a character and to such extent as to be likely to be "injurious or offensive to the persons employed, or any sub-"stantial quantity of dust of any kind, all practicable measures "shall be taken to protect the persons employed against inhala-"tion of the dust or fume or other impurity and to prevent its "accumulating in any workroom . . ." The subsection then goes on to deal with the provision of exhaust appliances, but no criticism is made of the absence of such appliances from this moulding shop. They have not been installed in any moulding shop in this country and it is considered by some that it would be quite impracticable to do so.

So far as dust is concerned, the subsection divides it into two categories: first, dust which is likely to be injurious or offensive; secondly, dust of any kind. The obligation to protect workmen against inhalation of dust likely to be injurious or offensive arises if such dust is given off to such an extent as to cause the likelihood of injury or offence to arise. In the case of some such dust, that extent may be small. The obligation to protect workmen against dust of any kind (that is, all dust, whether likely to be injurious or offensive or not) arises when a substantial quantity of dust is given off.

Dealing first with dust likely to be injurious or offensive, it is clear now that during the years the plaintiff was employed such dust was given off in the moulding shop. No one, however, knew it. The danger of silicosis in a moulding shop using ordinary moulding sand is a very recent discovery. The danger of silicosis

[1] [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.

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in a loam moulding shop is revealed for the first time by this case. Up to the time when the plaintiff's complaint was diagnosed the defendants did not know of the danger, and it is not, and could not be, suggested that they ought to have known. Neither they nor anyone else had reason to suspect that loam might give off injurious dust.

What, then, is their position under section 47 (1)? One construction of the section is that knowledge on the part of the employer is immaterial; *in fact*, the dust was likely to be injurious, whether he knew it or not, and consequently if he took no protective measures he failed in his duty. This was not the construction which commended itself to McNair J. and Singleton L.J. in *Ebbs* v. *James Whitson & Co. Ld.*[2] They took the view that an employer could not be expected to take "all "practicable measures" against something of which he was blamelessly ignorant. It would be my duty to follow this construction even if I did not agree with it, but I respectfully do agree with it.

In the present case, therefore, so far as dust, likely to be injurious or offensive, is concerned, the defendants cannot be held to be in breach of section 47 (1), because until after the plaintiff had contracted silicosis they neither knew or ought to have known that such dust was given off by the moulding process which they used.

With regard to the second category of dust dealt with by section 47 (1), namely, "a substantial quantity of dust of any "kind," the position is this: such a quantity of dust is given off in the moulding shop when the following operations are carried on: (i) The removal of certain steel grids embedded in the mould. This takes place after casting and while the mould is still warm. The removal of these grids breaks part of the mould and dust ensues. The heat of the mould causes this dust to rise vertically and most of it escapes through the roof windows. (ii) The breaking down of the mould by manual labour after casting has taken place and the mould is no longer required for similar castings. (iii) The tipping up by a crane of the heavy steel plate on which the mould was originally built up. This is the final stage of the breaking-up operation and it gets rid of the residue of the debris of the mould in one operation, on to what is called a dust ruck. All these operations take place in the moulding shop. The plaintiff contended that another operation, namely, the removal of certain easing bars from the mould after casting, gave rise to substantial quantities of dust, but, in the face of evidence to the contrary given by reliable witnesses for the defendants, I do not find this allegation established. I come to the like conclusion in the case of the very rare operation of making a channel through the mould, which operation was also alleged to create much dust.

[2] [1952] 2 Q.B. 877.

The measures which the defendants took to protect workpeople against inhaling the aforesaid dust were these. When the steel grids were being removed from the mould, masks were provided for and were worn by the men doing this job. To these masks a tube some 30 feet long was fitted, and the other end of the tube usually tied to a stanchion some five or six feet from the ground, the idea being that the worker should breathe uncontaminated air. So far as anyone could tell, this was the result. This mask and tube were primarily a protection against fumes which were released when the grid was taken away from the casting, though they served to protect against the inhalation of dust as well. Due to the heat, any one man could work only two minutes or so at this job and would then be relieved by another moulder who would wear the same mask, as a rule, as the man he relieved. While waiting to take their turns, the other moulders would stand around the job, and one of the plaintiff's contentions is that they were not protected at all while so waiting. I am satisfied that no such moulder was ever inconvenienced by dust while so waiting. There were no complaints. The dust, as I say, rose vertically with the heat and the waiting moulders were free to stand where they liked while awaiting their turn at the work of dislodging the grids.

As regards the breaking down of a mould when no longer required, this was done by labourers and not by moulders. The labourers were not made to wear masks, though they were available, nor were the labourers pressed to wear them. If the plaintiff had been a labourer who had had to do this work, different considerations might arise. But as a moulder the plaintiff was 60 to 70 yards from where this process, known as "knocking off," was done and there was nothing to suggest that any dust was reaching him and being inhaled by him.

With regard to the final tipping of the plate, this is the operation which gives off most dust. It takes place about twice a month, and when it was being done the doors were opened and the moulders were sent out of the shop until the resulting cloud of dust—which at times might fill the whole shop for a few moments—had dispersed. It was, whenever possible, done on a Saturday morning, when few moulders were in the shop.

The aforesaid measures appeared to have achieved their object. The plaintiff never complained to the defendants that he was inconvenienced by the dust in any way. Nor did any other moulders. No moulder ever went sick because of dust. No one ever contracted a complaint such as silicosis, giving rise to a suspicion that protection against dust in the foundry was inadequate. All the available evidence indicated the contrary. Here I should say that the plaintiff did allege that the atmosphere in the shop was dusty. "You could see the dust in the sun-"light," he said. This conflicts with the evidence given for the defendants and with my own observation on a sunny day. I cannot find it to be a fact. One other measure taken to keep

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the atmosphere as clear as possible was to damp the foundry floor at frequent intervals. The plaintiff now says, inter alia, that more masks should have been provided, and more persuasion used to induce him and others to wear them; and that the "knocking off" should have been done outside the shop, though due to its present lay-out, this would have meant reconstructing a substantial part of the works.

The truth in this unfortunate case is that for almost 70 years everyone thought that the dust had been adequately and effectively got rid of, and the moulders protected against inhalation until this case arose. Then, unhappily, the truth became known that some invisible dust must have remained in the atmosphere and was of such a kind that breathing it over a long period of years, albeit in small quantities, had produced silicosis in the plaintiff.

How, in these circumstances, do the defendants stand under section 47 (1)? Their duty was to "protect the persons em-"ployed against inhalation of the dust." The means which they were to employ to discharge that duty were "all practicable "measures." It is important in this case not to confuse the end with the means, and also to remember that this definition of the means makes the duty less than absolute. All the evidence available at the time, and all the knowledge at the disposal of the defendants indicated that the end had been achieved. No question arose, therefore, as to the adequacy of the means. The duty imposed by the subsection had, by all the indicia available, been discharged. In 1951, however, with the diagnosis of silicosis in the plaintiff, it became apparent for the first time that protection was incomplete. This new knowledge means that further and additional measures of protection must be sought, and all such as are practicable taken. But does it also mean that retrospectively the defendants must be treated as having failed in their duty? I think not. Otherwise the defendants would be penalised for not acting upon knowledge which nobody possessed, or for not being suspicious when there was nothing to arouse suspicion. There is really no criterion which can, in justice, be applied to test this matter except the knowledge which the defendants had at the time, or ought reasonably to have had. If, as I have held, an employer is not blameworthy under the subsection because he does not know that dust injurious in character is given off by some process, and shares this ignorance with the world, should I hold that he is nevertheless blameworthy if judged by all the knowledge available at the time, he had protected his workers against inhalation of dust of any kind? I do not think so; and if that view be right the question whether some other measures were available and practicable does not arise. The end had, to all appearances, been achieved.

For the future, of course, now that the defendants know the facts, the position will be different, and they are in fact actively

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considering what further measures to take. But in relation to this plaintiff I do not think they have transgressed the provisions of section 47 (1). I have said nothing so far about their duty to prevent dust from accumulating. There must always be some dust somewhere in a foundry, but the evidence does not establish that preventable accumulations of dust were permitted. Had the defendants been in breach of their statutory duty and had to pay compensation as being entirely responsible for the plaintiff's silicosis, I would have awarded him the sum of £1,750 as general damages. In his present condition he has to keep away from dust and avoid colds as far as possible, for his resistance to them is weakened. Otherwise he can work still, though his earning capacity is reduced. He is now earning £2 16s. 8d. a week less than he earned as a moulder, to which occupation he will never return. He suffers from shortage of breath and is now more easily fatigued than normally he would be. As it is, my judgment must be for the defendants.

Judgment for the defendants.

Solicitors: *W. H. Thompson; G. Keogh & Co., Bolton.*

[PRIVY COUNCIL.]

* NISBET SHIPPING CO. LD. . . . APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.†

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July 25.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Shipping—Limitation of liability—Crown—Warship in collision—Solely to blame—Crown not entitled to limit liability—Express statutory exclusion—Canada Shipping Act, 1934, *c.* 44, *ss.* 649, 712.

Shipping. Crown—Statute—Application to.

The Crown, on a claim for damages by the appellants for the loss of their steamship following a collision in February, 1945, with a Canadian ship of war, for which the latter was alone held to blame, was not entitled to limit its liability under the provisions of section 649 of the Canada Shipping Act, 1934, for there was nothing to prevent full effect being given to section 712 of the Act, which stated that the Act "shall not, except where "specially provided, apply to ships belonging to His Majesty." [1] The words "except where specially provided" emphasized that no implication without express words would suffice to bind, or to

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD RADCLIFFE, LORD TUCKER and LORD COHEN.

[1] By section 3 (4) of the Crown Liability Act, 1953, of Canada, section 649 of the Canada Shipping Act, 1934, now applies for the purpose of limiting the liability of the Crown in respect of Crown ships.

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confer a benefit on, the Crown, and the Act contained no such specific provision. There was no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction under section 19 (*c*) of the Exchequer Court Act (R.S.C. 1927, c. 34) as amended in 1938, applied to proceedings between subject and Crown the law which it applied between subject and subject, therefore it should apply even that law which by the terms of the statute enacting it was expressly excluded from application to the Crown.

The provision in section 16 of the Interpretation Act (R.S.C., 1927, c. 1) that "No provision or enactment in any Act shall affect, "in any manner whatsoever, the rights of Her Majesty . . . unless "it is expressly stated therein that Her Majesty shall be bound "thereby," appears to have no relevance to a statute which expressly enacted, as did the Act of 1934, how far the rights of the Crown should be affected.

Judgment of the Supreme Court of Canada [1953] 1 S.C.R. 480 reversed.

APPEAL (No. 30 of 1954), by special leave, from a judgment of the Supreme Court of Canada (April 28, 1953), affirming in part and reversing in part a judgment of the Exchequer Court of Canada (July 20, 1951).

The following introductory statement is taken from the judgment of the Judicial Committee: On February 13, 1945, there was a collision between H.M.C.S. *Orkney* and the S.S. *Blairnevis*, a vessel owned by the appellant company, Nisbet Shipping Co. Ld. On July 20, 1951, it was decided by Thorson J., sitting as President of the Exchequer Court of Canada, that *Orkney* was alone to blame for the collision and that the respondent was not entitled to limit liability under the provisions of the Canada Shipping Act, 1934. The latter part of that decision was on April 28, 1953, reversed by the Supreme Court of Canada (Rinfret C.J., Kerwin, Rand, Kellock, Estey and Cartwright JJ., dissentiente Locke J.), which held that the Crown was entitled to avail itself of section 649 of that Act. Against that decision the appellant company now appealed and the single question was whether the Crown was or was not entitled to claim the benefit of the provisions of that section.

Under the law of Canada limitation of liability for damages caused by the improper navigation of a ship rested for the purpose of this case solely on section 649, the relevant words of which were: "(1) The owners of a ship, whether registered in Canada or "not, shall not, in cases where all or any of the following events "occur without their actual fault or privity, that is to say— . . . "(iv) where any loss or damage is, by reason of the improper "navigation of the ship, caused to any other vessel, or to any "goods, merchandise, or other things whatsoever on board any "other vessel be liable to damages . . . to an aggregate amount "exceeding 38 dollars and 92 cents for each ton of the ship's "tonnage."

Section 712 provided that "This Act shall not, except where "specially provided, apply to ships belonging to His Majesty."

1955. June 27, 28, 29. *Russell McKenzie Q.C.* (Canada) and *Derek H. Hene* for the appellants.

F. P. Varcoe Q.C. (Canada), *Frank Gahan Q.C.* and *J. G. Le Quesne* for the Crown.

In addition to the cases referred to in the judgment, the following cases were cited: *Cayzer, Irvine & Co. Ld.* v. *Board of Trade* [2]; *Attorney-General* v. *De Keyser's Royal Hotel* [3]; *In re Silver Brothers Ld.* [4]; *The Queen* v. *McLeod* [5]; *Rex* v. *Schrobounst* [6]; *McArthur* v. *The King* [7]; *Mersey Docks* v. *Cameron* [8]; *Coomber* v. *Justices of Berks* [9]; *Madras Electric Supply Corporation Ld.* v. *Boarland* [10]; *The Queen* v. *Cruise* [11]; *Attorney-General* v. *Tomline* [12]; *Rex* v. *St. John Tug Boat Co. Ld.* [13]; *The Loredano* [14]; *Canada Steamship Lines Ld.* v. *Emile Charland Ld.* [15] and *Paterson Steamship Ld.* v. *Canadian Co-operative Wheat Producers Ld.* [16]

July 25. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above, and continued: This appeal raises a question of very great difficulty. It may well be (their Lordships do not think it necessary to determine this question) that, apart from section 712, the Crown could under the circumstances of the present case claim the benefit of section 649 and limit its liability accordingly. But section 712 provides that "This Act shall not, except where "specially provided, apply to ships belonging to His Majesty." Upon this section the appellant company relies, contending that the Act contains no special provision conferring upon the Crown the benefit of section 649 and that, accordingly, that section does not apply in respect of ships belonging to Her Majesty, and the Crown cannot limit its liability under it.

It is difficult to think of words more wide and comprehensive than those of section 712, the phrase "except where specially "provided" emphasizing that no implication without express words would suffice to bind the Crown or presumably to confer a benefit upon the Crown. But this difficulty has been met in two ways by the respondent. It has been urged in the first place that as a matter of construction the section does not apply to Her Majesty as the owner of a ship but only to the ships themselves. This appears to have been the contention urged before Thorson J., and was by no means abandoned before their Lordships. But it was urged in the second place—and this is the

[2] [1927] 1 K.B. 269, 294; 42 T.L.R. 163.
[3] [1920] A.C. 508, 526; 36 T.L.R. 600.
[4] [1932] A.C. 514, 522; 48 T.L.R. 238.
[5] (1882) 8 S.C.R. 1.
[6] [1925] S.C.R. 458.
[7] [1943] Ex.C.R. 77.
[8] (1865) 11 H.L.Cas. 443.
[9] (1883) 9 App.Cas. 61, 74.
[10] [1955] 2 W.L.R. 632; [1955] 1 All E.R. 753.
[11] (1852) 2 I.Ch.R. 65.
[12] (1880) 15 Ch.D. 150.
[13] [1946] S.C.R. 466.
[14] [1922] P. 209; 38 T.L.R. 516.
[15] [1933] Ex.C.R. 147.
[16] [1934] A.C. 538; 51 T.L.R. 5.

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argument which prevailed with the Supreme Court—that section 712 was in effect irrelevant to a claim by the Crown to avail itself of the provisions of section 649. This contention can only be understood against the background of the history of the Crown's liability for the tortious acts of its servants and specifically of its liability in respect of damage caused by the improper navigation of a ship.

Before 1887 in Canada, as in England, the doctrine respondeat superior did not apply to the Crown, which was therefore not liable for the tortious acts of its servants.

In that year it was enacted by section 16 of the Supreme and Exchequer Courts Act, 1887, that the Exchequer Court should have exclusive original jurisdiction to hear and determine amongst other matters "(*c*) every claim against the Crown arising out of "any death or injury to the person or to property on any public "work, resulting from the negligence of any officer or servant of "the Crown, while acting within the scope of his duties or "employment." This section has from time to time been amended in such manner as to enlarge the jurisdiction of the court, and paragraph (*c*) now reads "every claim against the "Crown arising out of any death or injury to the person or to "property resulting from the negligence of any officer or servant "of the Crown while acting within the scope of his duties or "employment." It is not questioned that these are apt words to give the court jurisdiction in the present case. It must, however, be noted that it was only by an amendment made in 1938, that is, after the Canadian Shipping Act, 1934, that such jurisdiction was given.

The Exchequer Court Act both in its original and amended form purported only to confer jurisdiction, but by a series of decisions, the authority of which cannot be questioned, it has been held that it not only conferred jurisdiction on the court but also imposed liability on the Crown: see, for instance, *City of Quebec* v. *The Queen*[1]; *Filion* v. *The Queen*[2]; *Rex* v. *Armstrong*[3]; *Gauthier* v. *The King*.[4] The question, then, is what is the measure of the liability which is not defined by the Act but is to be inferred from the creation of jurisdiction. It is not in dispute that at least those circumstances which give rise to a claim between subject and subject will support a claim by a subject against the Crown. From this it is an easy step to say that a subject is not entitled to any greater relief against the Crown than he would be against a fellow subject, and this is supported by reference to section 8 of the Petition of Right Act (R.S.C. 1927, c. 158) which provides that the statement of defence or demurrer to a petition of right may raise, besides any legal or equitable defences in fact or in law available under that Act, any legal or equitable defences which would have been available

[1] (1892) 24 S.C.R. 420.
[2] (1894) 4 Ex.C.R. 134.
[3] [1907] A.C. 500; 40 S.C.R. 229.
[4] (1916) 56 S.C.R. 176.

if the proceeding had been a suit or action in a competent court between subject and subject. Nor can it be ignored that, though the right to limit liability for damage is not part of the common law but in England and Canada alike is the creature of statute, it is a right almost universally established in the law of nations and of considerable antiquity. It would therefore be easily assumed that the Crown, assenting to the imposition of a new liability, would secure for itself the advantage at least of limiting it in a manner so generally conceded. This view is thus cogently stated by Rand J.[5]: "Where liability, then, on the same footing "as that of a subject, is established, giving a right to damages, "I can think of no more appropriate enactment to which that "basic rule of the prerogative could be applied than to a statutory "limitation of those damages." The basic rule to which the judge refers is that under which it is said that the Sovereign may avail himself of the provisions of any Act of Parliament.

These are the considerations which prevailed with the judges of the Supreme Court, with the exception of Locke J., with whose judgment their Lordships find themselves in agreement. They are weighty considerations but, as it appears to their Lordships, they do not explain why full effect should not be given to section 712. It is true that in 1934 that section, which was itself a re-enactment of section 741 of the Merchant Shipping Act, 1894, could have no operation in regard to any liability of the Crown, for it was only in 1938 that any relevant liability was imposed on the Crown. It does not, however, follow that, when that liability is imposed, as it is by the amending Act of 1938, the provisions of section 712 can be ignored. In the United Kingdom the same problem arose when under the Crown Proceedings Act, 1947, the Crown was for the first time made liable for the tortious acts of its servants, and it was by that Act specifically enacted that the sections of the Merchant Shipping Act, 1894, should apply to limit the liability of the Crown. And in Canada similar provision is now made by the Crown Liability Act, 1953.[6] It may be said that this latter Act can be regarded as having been passed ex majore cautela and it certainly cannot be treated as decisive of the meaning and scope of section 712 of the Canadian Shipping Act, 1934. But it is precisely the provision which, if the liability of the Crown had been established before 1934, would have been appropriately inserted in the Act of that year as a special provision excluding the operation of section 712, and the fact that it was not so inserted because the necessity for it was not then foreseen cannot deprive section 712 of any part of its meaning and effect. The right to limit liability is, as has

[5] [1953] 1 S.C.R. 480, 488.

[6] Crown Liability Act, 1953 (which received the Royal Assent on May 14, 1953 (after the date of the judgment of the Supreme Court in the present case)), s. 3 (4): "Sections "647 and 649 to 655 of the Canada "Shipping Act, 1934. apply for the "purpose of limiting the liability of "the Crown in respect of Crown "ships; . . ."

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already been said, derived solely from a section of an Act which unequivocally enacts that the Act shall not apply, except where specially provided, to ships of His Majesty. Where, then, can the Crown find that right? It appears to their Lordships that there is no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applies to proceedings between subject and Crown the law which it applies between subject and subject, therefore it should apply even that law which by the terms of the statute enacting it is expressly excluded from application to the Crown.

Upon this part of the case a final argument was based on section 16 of the Interpretation Act (R.S.C., 1927, c. 1), which enacts that no provision or enactment in any Act affects in any manner whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby. This provision, however, appears to have no relevance to a statute which expressly enacts, as the Act of 1934 does, how far the rights of the Crown shall be affected. In section 712 the relevant word is "apply," which appears adequately to cover any provision whether it creates an obligation or confers a benefit.

Their Lordships have so far proceeded upon the footing that Thorson J. was right in rejecting the argument that a distinction can be drawn between the words in section 712 "ships belonging "to His Majesty" and such words as "His Majesty" simpliciter. In their Lordships' opinion the judge took the correct view. An attempt was made at the bar to indicate those sections to which, if the distinction was valid, section 712 applied and those to which it did not. It soon appeared that the task was an impossible one. Nor, if such a distinction is made, does it appear at all clear why any part of Part XII of the Act, which is headed "Navigation—Collisions—Limitation of Liability," should not be properly described as provisions relating to ships belonging to His Majesty. In their Lordships' opinion this argument of the respondent also fails.

In the result, their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside and that of Thorson J. restored. The respondent must pay the costs of the appellant of this appeal and in the Supreme Court of Canada.

Solicitors: *Waltons & Co.; Charles Russell & Co.*

C. C.

[COURT OF APPEAL.]

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July 6, 7, 11.

Evershed M.R., Jenkins and Parker L.JJ.

* *In re* RUMBALL, DECD. SHERLOCK AND OTHERS *v.* ALLAN AND OTHERS.

[1954 R. No. 1593.]

Charity—Public—Bequest "to the bishop for the time being of the "diocese of the Windward Islands"—"To be used by him as he "thinks fit in his diocese"—Whether valid charitable trust. Will—Construction.

A testator gave part of the residue of his estate "to the bishop "for the time being of the diocese of the Windward Islands to be "used by him as he thinks fit in his diocese":—

Held, (1) that the gift was to the person for the time being holding the office of bishop of the named diocese by virtue of that office and was not a gift beneficially to the individual happening to hold that office at the date of the testator's death, and that, accordingly, the bishop for the time being took as a trustee.

(2) That the words following the description of the donee conferred a discretion on him limited by the charitable character of his office; the donor had not attempted to indicate or define the trusts on which the donee was to hold the property, and the final words "in his diocese" were only an expression of that which would have been implied; and that, accordingly, the gift constituted a valid charitable trust.

In re Garrard [1907] 1 Ch. 382; 23 T.L.R. 256; *In re Flinn* [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541 and *In re Spensley's Will Trusts* [1954] Ch. 233; [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178 applied.

Farley v. *Westminster Bank* [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491 and *Dunne* v. *Byrne* [1912] A.C. 407; 28 T.L.R. 257 distinguished.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

By his will dated September 23, 1949, Arthur Milton Rumball, who died on October 3, 1953, disposed of his residuary estate as follows: "Upon trust to divide the same into two equal parts "and to pay one of such parts to the guardians of the shrine of "Our Lady of Walsingham at Walsingham for the purposes of "their order and to pay the other part to the bishop for the time "being of the diocese of the Windward Islands to be used by "him as he thinks fit in his diocese."

By a proviso the testator declared that the gift to the guardians of the shrine at Walsingham was conditional upon his having been elected a guardian at the time of his death and that if not so elected he bequeathed to the guardians in lieu of that gift £100 free of duty and the whole of the residue to the "bishop "for the time being of the diocese of the Windward Islands to "be used by him as aforesaid."

A summons was taken out by the trustees of the will (and of a codicil dated February 14, 1953) to ascertain, inter alia,

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whether the gift in favour of the Bishop of the Windward Islands was apt to create a valid charitable trust.

Danckwerts J. held that the words were apt to create a valid charitable trust and Emmiline Sarah Wilson, the seventh defendant, representing the next-of-kin of the testator, appealed.

Charles Russell Q.C. and *F. G. King* for the first five defendants, pecuniary legatees, some of whom were also interested as next-of-kin.

Nigel S. Warren, for Mrs. Wilson, representing the next-of-kin.

D. S. Chetwood for the plaintiffs.

J. V. Nesbitt for the Right Reverend R. N. Shapley, the Lord Bishop of the Windward Islands.

Denys Buckley for the Attorney-General.

In addition to the cases referred to in the judgments, the following were cited in argument: *In re Bain* *; *In re Jackson* †; *In re Stratton* ‡; *In re Norman* §; *In re Eastes*.¶

EVERSHED M.R., having stated the facts, said: Questions of this kind are notoriously difficult, and no doubt the distinctions illustrated by the cases appear at times very fine. Thus, a gift to the vicar and churchwardens of a particular parish "for such "uses as they shall, in their sole discretion, think fit"; and a gift "to His Eminence the Archbishop of Westminster Cathedral, "London, for the time being to be used by him for such purposes "as he shall, in his absolute discretion, think fit" have been held to be good charitable gifts (*In re Garrard* [1] and *In re Flinn* [2]). But a gift to the Archbishop of Brisbane for such purposes "as the Archbishop may judge most conducive to the "good of religion in this diocese" has been held by the Privy Council to be bad (*Dunne* v. *Byrne* [3]). Again, a gift to a vicar "for parish work" has been held bad by the House of Lords in *Farley* v. *Westminster Bank* [4]; but a gift to a vicar to be used by him as he should think fit "for his work in the parish" was held in 1946 by Romer J. to be good [5]; and in *In re Beddy* in 1953,[6] where the words of the gift bore a resemblance (at least) to those in the present case—for they were a gift "to the "Roman Catholic prelate who shall be Archbishop of West-"minster at the time of my death, to use for such purposes in

* [1930] 1 Ch. 224; 45 T.L.R. 617.
† [1930] 2 Ch. 389; 46 T.L.R. 558.
‡ [1931] 1 Ch. 197; 47 T.L.R. 32.
§ [1947] Ch. 349; [1947] 1 All E.R. 400.
¶ [1948] Ch. 257; 64 T.L.R. 216; [1948] 1 All E.R. 536.
[1] [1907] 1 Ch. 382; 23 T.L.R. 256.
[2] [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541.
[3] [1912] A.C. 407; 28 T.L.R. 257.
[4] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.
[5] *In re Simson* [1946] Ch. 299; 62 T.L.R. 498; [1946] 2 All E.R. 220.
[6] Unreported.

" the diocese as he may choose "—Harman J., expressing himself as not willing to add to the fineness of the distinctions already made, held the gift to be bad.

In this notoriously difficult field some degree of fineness of distinction is, I think, inevitable. Where the question is that of the application of principles never finally stated and perhaps undefinable, which the courts have evolved from the examples given in the preamble to the Statute of Elizabeth, to an infinite variety of forms of gift, it is inevitable that some cases will be found very near the line on one side or the other. It may, therefore, be unprofitable to lament the facts of legal experience in this class of case. Nevertheless, I think it possible to derive from an analysis of the cases the essential characteristics of those principles, so far as they are relevant, with sufficient clarity to enable the court to determine on which side of the line the present case lies; and, although I have myself been conscious of changes of view during the argument, I have in the end, and particularly after hearing the argument of Mr. Buckley, to whom I would like to acknowledge my indebtedness, come to the conclusion that Danckwerts J. was right and that the present disposition does constitute a valid charitable trust.

I begin with the language of Lord Parker in *Bowman* v. *Secular Society*[7]: " the circumstances of the gift or the direc- " tions given or the objects expressed by the donor may be such " as to impose on the donee the character of a trustee." So, a gift to a person holding a particular office, such as that of vicar of a parish or bishop of a diocese or master of a school, may, and frequently in its context will, be held to impose on the donee the character of a trustee.

The matter was recently expressed thus by my brother Jenkins in *In re Spensley's Will Trusts*,[8] the most recent of the reported cases: " It will be seen that inevitably those two principles must " be liable to produce fine distinctions in particular cases, and it " may often be hard to decide on which side of the line a given " case falls. Is it a gift to a holder of an office of a charitable " character virtute officii, with merely superadded words confer- " ring wide powers of disposition? If so, on the principle followed " in *In re Flinn*,[9] the gift will prima facie be charitable by virtue " of the charitable character of the office. On the other hand, " is it a gift to a trustee bearing a charitable character or holding " a charitable office upon trusts which according to their terms " are not, or are not exclusively or necessarily, of a charitable " nature? If so, then the scope of the trust is not to be limited " by reference to the character of the trustee."

In the present case it was not contended otherwise than that the gift to the Bishop of the Windward Islands was intended to be a gift to him virtute officii and to impose upon him accordingly,

[7] [1917] A.C. 406, 437; 33 T.L.R. 376.

[8] [1954] Ch. 233, 244; [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178.

[9] [1948] Ch. 241.

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the character of a trustee; and, if the gift had stopped after the words "Windward Islands," so as not to include the final words in the clause, "to be used by him as he thinks fit in his diocese," the trusts would have been those exclusively appropriate to the office which he held. In this case, therefore, and in the other examples I have given, the trusts would accordingly, I apprehend, have been charitable trusts. If, therefore, in a gift of this character, there are no words added to the gift to the donee described by reference to his office, the trust would (where an intention not to make a gift to the donee for his own personal benefit is established) be implied by the law. The difficulties appear almost always to have arisen from general words which follow the gift, which may be words either of limitation or expansion.

The argument before us has been illustrated by a numerous list of reported cases, starting with *In re Garrard* [10] and ending with *In re Spensley's Will Trusts*,[11] to both of which I have referred; and in the future the present case may well make another link in the chain. I do not propose to travel through the cases again. The examples that I have given from them sufficiently, I think, illustrate the arguments and my judgment.

The conclusion that Mr. Russell and Mr. Warren, from their analysis of the cases and their explanation of the distinctions, seek to apply to this case is as follows. Once, they say, it is seen that the circumstances or context of the gift are such as to impose the character of a trustee upon the donee and that the trusts on which the donee holds are exclusively those properly belonging to or relating to his office, then it must follow that, if the words which follow the gift are general and unqualified—"for such purposes as he shall in his absolute discretion think "fit," and the like—the trusts must still be limited to the scope of the office held; for otherwise the gift would inevitably become repugnant in itself. The general words, that is, cannot be construed literally, because they would (if so construed) allow beneficial enjoyment by the donee, which, ex concessis, is already negatived; and the only other possible way to construe the words is to limit their significance by reference to the office of the donee. On the other hand (they say), when the words following the gift are not general and wholly unqualified, the antinomy, or, as they express it, the dilemma, is no longer presented. The presence of the limitation or qualification of itself negatives the unlimited discretion which would create the conflict with the donee's character as a trustee. It becomes, then, necessary to see, in such a case as the present, whether the words following the gift, not being entirely general, are, upon ordinary principles of construction, such as to comprehend non-charitable as well as charitable objects.

The argument has great force and cogency and, if it is correct,

[10] [1907] 1 Ch. 382. [11] [1954] Ch. 233.

it is obviously fatal to the validity in the present case of the gift in favour of the Bishop of the Windward Islands: for clearly the uses to which the bishop might, as a trustee, seek to apply the fund within the confines of his diocese would not be all charitable purposes. But on the whole, as I have already indicated, I prefer the explanation put forward by Mr. Nesbitt and Mr. Buckley. According to their argument, the true analysis of the cases is to this effect. The question is, upon the construction of the language used, whether the words following the gift are intended merely to indicate that, within the scope of the trusts properly appropriate to the nature of the office by which the donee is described, the discretion is entirely the donee's; or whether, by the added words, the donor is himself intending to state, or at least to indicate, the trusts upon which the donee is to hold the property. If the latter is the true interpretation then the further question of construction arises whether the trusts so indicated or stated comprehend non-charitable objects. But where the words following the gift to the donee are absolutely general, the first is the right inference to be drawn: that is, that the words are intended merely to indicate that, within the scope of the trusts already implicit in the gift, the discretion is the donee's; for otherwise the added words would permit the beneficial enjoyment by the donee of the fund disposed of.

The two arguments do not widely diverge but the difference between them, as will be seen, is vital in certain characteristics, and sufficient, in my judgment, to determine the present case. For, according to Mr. Nesbitt and Mr. Buckley, in cases like *Farley* v. *Westminster Bank* [12] and *Dunne* v. *Byrne*,[13] the language, from the point of view of validity as a charity, was such that the testator had not been content to leave the trusts as those implicit in the office of the donee, but had himself indicated the scope of the trusts—although he did so in the broadest possible sense and in such a way that within the general bounds of those trusts the discretion should be that of the donee.

For my part, I think this argument is the sounder. I come to that conclusion for two reasons. In the first place, I think that the argument more truly accords with the principle of the decision in *Farley's* case,[14] which was, as I have already mentioned, a case decided by the House of Lords. In Mr. Russell's and Mr. Warren's formulation, a qualification inserted in, or an addition made to, the words which follow the gift itself would (prima facie at least) be fatal, though, on the face of those words, they amounted to no more than a limitation. Such, indeed, is the present case, where the words of qualification added to the more general formula are "in his diocese," and are, therefore, as a matter of construction, merely effective to limit the operation of the trusts to the diocese as distinct from the whole of the world.

[12] [1939] A.C. 430.
[13] [1912] A.C. 407.
[14] [1939] A.C. 430.

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It seems, therefore, that the rule as worked out by Mr. Russell and Mr. Warren would be an automatic rule of thumb, so that any qualification of any kind would always be fatal to the validity of a gift of this kind as a charitable discretion. On the other hand, upon the view submitted by Mr. Nesbitt and Mr. Buckley, the real vice of any qualification or particularization, when added to the general formula, is that, on its true construction, it operates not as a limitation, but as an extension or expansion of what otherwise would be the scope of the trusts.

If *Farley* v. *Westminster Bank* [15] is taken as an example, the words which were there added by way of what I have called qualification were "for parish work." In this court, to take the language of Farwell J.,[16] those words "parish work" were construed as meaning "that which is sometimes compendiously "called 'good works' in the particular parish; that is to say, "the various activities which the vicar and churchwardens "promote and carry on in the parish for the good of the "parishioners not only for their religious good but for their good "generally, some of which, although benevolent, are not charit-"able in the strict sense of the word." In the House of Lords the matter was thus expressed by Lord Russell of Killowen, where, after stating the argument that the words "for parish "work" were limited to the work which the vicar and churchwardens were strictly appointed to perform (namely, the religious purposes of the parish), he said [17]: "For myself, I am unable "to put so narrow a construction upon the words . . . In my "opinion, upon the true construction of this will, the words in "brackets mean that the gift is not a gift for ecclesiastical or "religious purposes in the strict sense, but is a gift for the "assistance and furtherance of those various activities connected "with the parish church which are to be found, I believe, in "every parish, but which, unfortunately for the donees here, "include many objects which are not in any way charitable in "the legal sense of that word."

By making that addition of "for parish work," therefore, the testator was indicating that the trusts upon which the vicar and churchwardens should hold the fund were those expressed by Farwell J. and Lord Russell, and the vice of them was, as I have said, that they had enlarged what would otherwise have been implicit from the nature of the office of the donee, so as to comprehend non-charitable as well as charitable purposes. Lord Atkin stated that conclusion quite plainly [18]: "I am entirely "unable to accept that construction"; that is, the construction put forward by the respondents. "I think the words are quite "plainly enlarging words. They are words of definition, it is "quite true, but I think they were used for the very purpose of

[15] [1939] A.C. 430.
[16] Sub nom. *In re Ashton* [1938] Ch. 482, 503; 54 T.L.R. 491; [1938] 1 All E.R. 707.
[17] [1939] A.C. 430, 437.
[18] [1939] A.C. 430, 435.

" defining what the testatrix meant as the purpose for which the " money was to be applied."

There is, however, a further, and second, reason which seems to me also to support the view of Mr. Nesbitt and Mr. Buckley. If Mr. Russell and Mr. Warren are right, the result would appear to me, as I have already indicated, to be to bring into existence what I have ventured to call a rule of thumb method of determining this class of case; and prima facie I am disposed to reject, in a matter which in the end rests upon the construction of particular documents, anything in the nature of a rule of thumb method, and more particularly when its application would appear to offend against the plain logic and common sense of the matter. That such would be the effect of the rule I attempted to illustrate during the course of the argument by an example given, which, as Mr. Russell pointed out was not, as I presented it, appropriate, but which, as amended, is, I think, appropriate and illustrates the point I am seeking to make. I take the language in *In re Flinn*,[19] which was held to be a good gift, namely, to " the " Archbishop of Westminster . . . to be used by him for such " purposes as he shall in his absolute discretion think fit." Let it then be supposed that there were added to those words " other " than for the repair of the cathedral." The words I have added are not such as to imply that the earlier general formula included personal enjoyment by the archbishop or included purposes which were not charitable. The effect, on the face of the words, is merely to limit the general purposes to which the archbishop, in the exercise of his official calling, could apply the fund, and to limit them by the exclusion of one purpose only, namely, the repair of the cathedral. Yet, as I follow the argument of Mr. Russell and Mr. Warren, the addition of those words " other than " the repair of the cathedral " would render the gift inevitably and automatically invalid. It seems to me, on the other hand, that if the test of Mr. Buckley and Mr. Nesbitt's analysis is applied, the effect is that which it appears to be—namely, to exclude one, and one only, of the trusts implicit in the office of the archbishop, but not so as to substitute for those trusts some new and different trusts which the testator himself lays down or defines.

I must not be taken to be saying that the analysis which has been put before us is necessarily applicable in every case of this broad kind when the charitable or non-charitable character of a gift has to be determined. As I said a moment ago, all these questions in the end turn upon the construction and effect of the particular words used. But in the class of case in what I may call the *In re Garrard* [20] to *In re Spensley's Will Trusts* [21] category I think that the analysis points the way to the correct conclusion.

In the course of the argument we were referred to a New South Wales case of *In re MacGregor*,[22] where the essential words

[19] [1948] Ch. 241.
[20] [1907] 1 Ch. 382.
[21] [1954] Ch. 283.
[22] (1932) 32 S.R.(N.S.W.) 483.

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were "for diocesan purposes generally"; and Long Innes J. there held that that was a valid charitable gift. I do not, for my part, think that it much assists us in the present case, because the phrase "for diocesan purposes" was held by the judge, upon the evidence before him, to mean exclusively ecclesiastical purposes. What seemed from the report more striking was the reference in the argument before the judge in Sydney to a case which had been decided by Parker J., in 1911, *In re Van Wart.*[23] The official number of that case is 1910 V. 823. According to the reference, it appeared that Parker J. had required, in making his order, an undertaking on the part of the then cardinal archbishop that the property would, in his hands, be used by him "for diocesan purposes"; and it seemed that, if that were so, at any rate Parker J. also thought that "diocesan purposes" as such were exclusively ecclesiastical and, therefore, charitable.

In the circumstances, I thought it proper to send for the order from the public records office, and, in case this matter should come again before the courts, it may be useful if I state what in fact was the order, as it appears from the record. After a statement of the evidence which had been read, the order proceeded: "And the defendants, the Most Reverend Francis Bourne, "Roman Catholic Archbishop of Westminster, and the Very "Reverend Patrick Cooney, the Provincial of the Order of the "Friars Minor of St. Francis, by their counsel stating that they "respectively intend and hereby undertake to apply the gifts or "bequests of the third parts of the said testatrix's residuary "estate bequeathed to each of them respectively by the said will "for the purposes therein expressed, and the defendant His "Majesty's Attorney-General by his counsel expressing himself "satisfied with the said undertakings, this court doth declare "that upon the true construction of the said will the plaintiffs "ought to pay one-third part of the residuary estate of the said "testatrix to each of the defendants the Most Reverend Francis "Bourne and the Very Reverend Patrick Cooney on their sole "receipts and that the gift of the remaining one-third part "of the said residuary estate which became operative by virtue "of the said codicil is given to the defendants the Most Reverend "Francis Bourne and the Very Reverend Patrick Cooney in equal "shares for their own respective use and benefit free from any "trust and doth direct the same to be paid to them accordingly."

It will be seen, therefore, that, on the face of the order, it looks as though the view taken by Parker J. was that there was, as far as the relevant shares of residue were concerned, no effective trust at all; but that the bishop and his co-defendant in fact undertook to apply the funds according to the trusts or

[23] The Times, Feb. 17, 1911. The words used were "in trust . . . for "the Archbishop of Westminster for "the time being absolutely, and I "desire that he will employ . . . a "half . . . of such bequest for the "completion of the cathedral . . . and "the remainder in any way he likes "for other parochial purposes of his "diocese of Westminster."

purposes declared by the testator and that that undertaking satisfied the Attorney-General. The order went accordingly. The case quite obviously does not, therefore, give any assistance in the present case, save to the extremely limited extent that, if the purposes expressed by the will were described, or to the extent to which they were described, as " diocesan purposes " it might lend some slight support to the view that diocesan purposes were exclusively ecclesiastical; but beyond that, I think the case carries us no further.

My last word shall be about *In re Beddy*,[24] the case before Harman J., to which I earlier alluded. Having regard to the view which I reach in the present case, the question may be asked whether I am also of opinion that Harman J.'s decision ought not to be supported. In my view, it is unnecessary to express any conclusion upon that matter. The words are, I think, materially different. In this case the words are " to be used by him as he " shall think fit in his diocese ": in *In re Beddy* [24] the words were " to use for such purposes in the diocese as he may choose." These matters always being questions of construction, it might, I say no more, well be that the correct answer to *In re Beddy* [24] was that the words " for such purposes in the diocese as he may " choose " are substantially the same as, or at any rate not materially different from, the words in *Dunne* v. *Byrne*,[25] namely, for such purposes as the archbishop " shall judge most conducive " to the good of religion in the diocese." If that is so then, although the distinction is no doubt a fine one, it would follow that *In re Beddy* [26] was rightly decided, and that the decision of Danckwerts J. in the present case to the contrary effect involves no inconsistency with Harman J.'s decision.

However that may be, for the reasons which I have stated, I have come, on the whole, to the same conclusion as that reached by Danckwerts J., and I think, therefore, that this part of the appeal should be dismissed.

JENKINS L.J. The question we now have to decide is whether, as Danckwerts J. has held, the gift of residue to " the bishop for " the time being of the diocese of the Windward Islands to be " used by him as he thinks fit in his diocese " is a valid charitable gift.

It is not, and could not well be, disputed that the gift is to the person for the time being holding the office of bishop of the diocese named virtute officii, and not a gift beneficially to the individual happening to hold that office at the date of the testator's death.

Accordingly, it is not open to doubt that the bishop for the time being takes as a trustee and that, if the gift had been to the bishop for the time being of the diocese named simpliciter, without the addition of the words " to be used by him as he

[24] Not reported.
[25] [1912] A.C. 407.
[26] Not reported.

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"thinks fit in his diocese," it would have operated as a gift to the bishop for the time being on a charitable trust for ecclesiastical purposes. See, for instance, *Thornber* v. *Wilson*[27] and *In re Delany*.[28]

It follows that the gift in question is a valid charitable gift unless the addition of the words "to be used by him as he thinks "fit in his diocese" has the effect of converting what would otherwise be a valid charitable trust into a trust capable of including objects which are not charitable and, therefore, void for uncertainty.

Cases concerning gifts of this type have been only too often before the courts. The authorities were discussed in some detail in *In re Flinn*,[29] and their effect has been recently summarized by this court in *In re Spensley's Will Trusts*.[30] I, therefore, find it unnecessary to go into them all again. I think the principles to be applied are sufficiently stated in the following passages from my own judgment in *In re Spensley's Will Trusts*.[31]

I said[32]: "Vaisey J. founded himself on the principle "deducible from the cases summarized and followed in *In re* "*Flinn*.[33] I find it unnecessary to review those authorities at "length, because Mr. Warren, in the course of his argument on "behalf of residue, stated the principle deducible from them in "terms which, if I may say so, appear to me to be wholly "adequate, and from which Mr. Buckley, for the Attorney-"General, did not dissent. The principle deducible from those "authorities was thus stated by Mr. Warren: 'Where there is a "'gift to a person who holds an office the duties of which are in "'their nature wholly charitable and the gift is made to him "'in his official name and by virtue of his office, then, if the "'purposes are not expressed in the gift itself, the gift is assumed "'to be for the charitable purposes inherent in the office.'

"On the other hand, it is necessary also to bear in mind the "principle stated in such cases as *Dunne* v. *Byrne*[34] and *In re* "*Davidson*.[35] The principle deducible from those cases is of this "nature—to contrast it with the principle deducible from *In re* "*Flinn*[36] and the cases there followed it can appropriately be "introduced with a 'but'—'but where the purposes of a gift "'are plainly expressed in terms not confining them to purposes "'which are in the legal sense charitable, they cannot be confined "'to charitable purposes merely by reference to the character "'of the trustee. . . .' It will be seen that inevitably those "two principles must be liable to produce fine distinctions in "particular cases, and it may often be hard to decide on which "side of the line a given case falls. Is it a gift to a holder of an

[27] (1855) 3 Drew. 245; (1858) 4 Drew. 350.
[28] [1902] 2 Ch. 642, 646; 18 T.L.R. 741.
[29] [1948] Ch. 241.
[30] [1954] Ch. 233.
[31] [1954] Ch. 233.
[32] Ibid. 243.
[33] [1948] Ch. 241.
[34] [1912] A.C. 407.
[35] [1909] 1 Ch. 567; 24 T.L.R. 760.
[36] [1948] Ch. 241.

" office of a charitable character virtute officii, with merely super-
" added words conferring wide powers of disposition? If so, on
" the principle followed in *In re Flinn*,[36] the gift will prima facie
" be charitable by virtue of the charitable character of the office.
" On the other hand, is it a gift to a trustee bearing a charitable
" character or holding a charitable office upon trusts which
" according to their terms are not, or are not exclusively or
" necessarily, of a charitable nature? If so, then the scope of
" the trust is not to be limited by reference to the character of
" the trustee."

The question in the present case, therefore, is whether the words " to be used by him as he thinks fit in his diocese " are merely superadded words conferring wide powers of disposition, or are words imposing trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature. In other words, has the testator here left the purposes of the gift to be implied from the charitable character of the bishop's office, and merely added a provision to the effect that the bishop is to have full discretion in the application of the fund for those purposes, or has he defined the trusts on which the property is to be held in terms capable of including objects which are not charitable?

In my judgment, it is reasonably plain that this question should be answered in the former sense. The testator has not defined the trusts on which the fund is to be held. He has merely given the bishop for the time being an absolute discretion as to its application by the words " to be used as he thinks fit " and limited that discretion to the use of the fund in the area under the bishop's ecclesiastical charge by the final words " in " his diocese."

Were it not for those final words, the gift in the present case would not be distinguishable in any material respect from the gift upheld in *In re Garrard*,[37] and would even more closely resemble the gift upheld in *In re Flinn*,[38] which was in these terms: " To His Eminence the Archbishop of Westminster " Cathedral London for the time being I bequeath all the rest, " residue and remainder of my property of every nature and " kind . . . to be used by him for such purposes as he shall in " his absolute discretion think fit."

We were not invited, even if it were open to us to do so, to hold that *In re Garrard*[39] and *In re Flinn*[40] were wrongly decided. The burden of the argument for the next-of-kin was to the effect that the presence here of the words " in his diocese " sufficed to distinguish this case from those, and to bring it within the principle of *Dunne* v. *Byrne*.[41] So to hold would, to my mind, be carrying refinement of distinction too far. In *In re Garrard*[42] the gift was to the vicar and churchwardens for the

[36] [1948] Ch. 241.
[37] [1907] 1 Ch. 382.
[38] [1948] Ch. 241.
[39] [1907] 1 Ch. 382.
[40] [1948] Ch. 241.
[41] [1912] A.C. 407.
[42] [1907] 1 Ch. 382.

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time being of a specified parish "to be applied by them in such "manner as they shall in their sole discretion think fit," and Joyce J., after observing that a legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purpose in the parish, went on to say [43] that to his mind, "The words 'to be "'applied by them in such manner as they shall in their sole "'discretion think fit,'" merely directed that the particular mode of application within the charitable purposes of the legacy was to be settled by those individuals.

If the charitable purposes to be implied from a gift to the vicar and churchwardens for the time being of a parish, without more, are ecclesiastical purposes in the parish, and the words "to be applied by them in such manner as they shall in their "sole discretion think fit" merely indicate that those individuals are to settle the particular mode of application within the charitable purposes of the legacy (that is to say, "ecclesiastical "purposes in the parish"), I fail to see how the express addition of the words "in the parish" (which, if not expressed, would have been implied from a gift to the vicar and churchwardens for the time being simpliciter) could reasonably be held to alter the result.

So in this case a gift to the bishop for the time being of the diocese of the Windward Islands, without more, would have been a charitable legacy to him for ecclesiastical purposes in his diocese. The words "to be used by him as he thinks fit" merely direct that he is to settle the particular mode of application within the charitable purposes of the legacy (that is to say, ecclesiastical purposes in his diocese); and the addition of the words "in his "diocese" is no more than an expression of that which, if not expressed, would have been implied.

Accordingly, I regard this case as indistinguishable from *In re Garrard* [44] and *In re Flinn.* [45] It follows that, in my opinion, *In re Beddy,* [46] where a gift "to the Roman Catholic prelate who "shall be Archbishop of Westminster at the time of my death "to use for such purposes in the diocese as he may choose" was held to be distinguishable from *In re Flinn* [47] and void for uncertainty on the principle of *Dunne* v. *Byrne* [48] and *In re Davidson,* [49] cannot be supported so far as it is to be regarded as turning merely on the presence of the words "in the diocese." I express myself in that way because I prefer to reserve my opinion on the question whether the form of words used in *In re Beddy,* [50] taken as a whole, may not provide a valid ground for distinguishing it from the present case.

[43] [1907] 1 Ch. 382, 384.
[44] [1907] 1 Ch. 382.
[45] [1948] Ch. 241.
[46] Not reported.
[47] [1948] Ch. 241.
[48] [1912] A.C. 407.
[49] [1909] 1 Ch. 567.
[50] Not reported.

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For these reasons I agree that Danckwerts J. came to a right conclusion on this question, and, accordingly, that the appeal fails and should be dismissed.

PARKER L.J. I agree with both judgments, and there is nothing which I desire to add.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.; Bridges, Sawtell & Co.; Edwin Coe & Calder Woods for Urry, Woods & Pethick, Ventnor, Isle of Wight; Nicholl, Manisty & Co.; Treasury Solicitor.*

E. D.

[COURT OF APPEAL.]

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[R. No. 114.]

Factory — Dust — Elimination — "All practicable measures" — Substantial quantity of dust—No masks or exhaust appliances provided —Dust not known to be injurious until 1950*—Silicosis contracted by workman—Whether all practicable measures taken by employers —Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1).

Damages — Personal injuries — Life shortened — Loss of prospects of making provision for family.

From 1930 until 1952 the plaintiff was employed by the defendant company as an iron moulder, working with other men in one workroom. The last process in the moulding, known as "knocking "out," was carried out on the floor of the workroom and resulted in the emission of clouds of dust. About one half of each working shift was occupied by the process of knocking out, conducted by one or other of the men in the workroom, so that the plaintiff was exposed not only to the dust from his own operations but also from that of his fellow workmen. In 1946 the plaintiff became seriously affected with silicosis, and subsequently became dangerously and incurably ill as a result of his work, and lost the prospect of living the normal span of his life. He left the defendants' employment in 1952.

The defendants had not provided their workmen with masks, nor had they provided any exhaust appliances. It was not until 1950 that it became known that dust of the kind in question was liable to cause silicosis. During the relevant period there were a number of types of mask on the market to protect workers against the inhalation of dust, but only the one, known as mark IV, would have been effective against the dust in question.

On a claim by the plaintiff for breach of section 47 (1) of the Factories Act, 1937, Devlin J. held that the supply of mark IV

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masks was a practicable measure which should have been taken, and he awarded to the plaintiff £9,645 6s. 5d. Of that sum £7,000 was in respect of loss of earning capacity and £1,000 was in respect of the plaintiff's loss of the prospect of making some provision for his wife and dependents by reason of his shortened expectation of life:—

Held, (1) that having regard to the then state of knowledge the dust was not dust "injurious to persons employed" within the first branch of section 47 (1), since it could not be fairly regarded as likely to cause silicosis, but that, on the other hand, the dust was emitted in substantial quantities so as to fall within the second branch of the section.

(2) That the question whether the defendants had taken all "practicable measures" to protect persons employed against inhalation of the dust must be judged in the light of the state of the relevant knowledge at the date of the alleged breach of the statutory duty.

Adsett v. *K. & L. Steelfounders and Engineers Ld.* [1953] 1 W.L.R. 137, 773; [1953] 1 All E.R. 97; [1953] 2 All E.R. 320 applied.

(3) That the requirement of the provision of "exhaust appliances" in section 47 (1) was directed to the case where the dust or fume was emitted at some fixed point or points on a machine and was inapplicable to a case where there were no points which could be said to be the origin of the dust; and that the plaintiff had failed to establish any breach on the defendants' part of failure to provide exhaust appliances.

(4) That in the absence of any finding whether, when the mark IV mask became available ten years after the plaintiff had entered the defendants' employ, its use for the period during which it could be worn would have been effective, and of any finding whether its absence did more than aggravate a disease which had already been contracted, the case should be remitted for retrial upon the question whether the defendants had failed to comply with the statutory obligation under section 47 by the omission to supply masks and, if so, to what extent the damage which the plaintiff had suffered was properly attributable thereto, including the question whether, in the event, the absence of masks merely aggravated rather than caused the injury.

(5) That the sum of £1,000 damages for loss of prospects of making provision for the plaintiff's dependants should not have been included in the damages awarded.

Observations of Lord Simon L.C. in *Benham* v. *Gambling* [1941] A.C. 157, 167; 57 T.L.R. 177; [1941] 1 All E.R. 7 applied.

Harris v. *Brights Asphalt Contractors Ld.* [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 345 considered.

Decision of Devlin J. reversed.

APPEAL from Devlin J.

The plaintiff, Walter Richards, claimed damages for injury to his health, namely, silicosis, caused by the breach of statutory duty or the negligence of the defendants. The plaintiff did not proceed with his claim based on negligence. The breach of statutory duty alleged by the plaintiff was that the defendants had failed to take all practicable measures to protect him against the inhalation of the dust or to prevent its accumulation in the

factory premises in accordance with the provisions of section 47 (1) of the Factories Act, 1937.[1]

Devlin J., finding for the plaintiff, held that the provision of mark IV masks was a practicable measure which the defendants ought to have taken and awarded to the plaintiff £9,645 6s. 5d. damages made up as follows: £1,645 special damages, £200 for loss of expectation of life, £7,000 for loss of earning capacity during the remainder of his life (subject to a deduction), and the balance of £1,000 in respect of the loss of the plaintiff's prospects, during the period in which his life had been cut short, of making provision for his wife and other dependants.

The facts are fully set out in the judgment of Evershed M.R.

The defendants appealed.

F. W. Beney Q.C. and *Patrick O'Connor* for the defendants.
Marven Everett Q.C. and *Geoffrey Green* for the plaintiff.

The following cases, in addition to those mentioned in the judgment of Evershed M.R., were referred to in argument: *Marshall* v. *Gotham & Co. Ld.*[2]; *Wardlaw* v. *Bonnington Castings*[3]; *Roberts* v. *Dorman Long & Co. Ld.*[4]; *Watts* v. *Enfield Rolling Mills (Aluminium) Ld.*[5]; *Knight* v. *Demolition and Construction Co. Ld.*[6]; *Crookall* v. *Vickers-Armstrong Ld.*[7]

EVERSHED M.R. In this extremely difficult case I have felt myself forced to the conclusion that we should order a new trial. I need not say with what reluctance I have arrived at that conclusion, for it is a principle of our law that there should be an end to litigation and, as a corollary to that principle, that a plaintiff, who has failed at a trial to prove his case, should not be given a second chance to do so. But the present case is remarkable in three difficulties of most unusual character.

In the first place, the evidence upon which the judge primarily, if not exclusively, acted did not emerge in the ordinary course, but appears to have come out after final speeches had been delivered, and in one vital respect the evidence of the

[1] Factories Act, 1937, s. 47 (1): "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against the inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

[2] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

[3] 1955 S.L.T. 225.

[4] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

[5] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.

[6] [1953] 1 W.L.R. 981; [1953] 2 All E.R. 508.

[7] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.

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plaintiff's chief witness was in complete contradiction to what he had in terms said at the beginning of the case. In the second place, certain vital matters of fact do not appear to me to be the subject of express findings on the part of the judge, nor, so far as I am able to inform myself from the shorthand notes, was the evidence in every case directed to those points. Thirdly, in so far as evidence was directed to those points, it was, as I have already said, so directed after speeches, and would no doubt be apprehended in the light of those speeches; so that I have felt myself unable to reach a conclusion upon those matters to my own satisfaction. I should add that the judge may have been able in some degree to rely upon other cases of a somewhat similar character. For this judge is a highly experienced judge in these matters, and in those respects I am conscious of having no similar experience myself.

The result then is, on the one hand, that if the appeal were, or were in substance, to fail, it would have to be on the basis that the plaintiff had proved the essential matters of fact which I find it difficult to be satisfied that he did prove. On the other hand, if the appeal were to be allowed, it would be on the strict basis that, to judge from the shorthand notes, the plaintiff had failed to show a sufficient link between his injury and the actionable wrong alleged. I cannot exclude from my mind, first, that the plaintiff here was an employee of the defendants and, as such, contracted a deadly disease from which he has suffered the gravest injury. Secondly, that the subject-matter is one, as I have already indicated, which has been on several occasions before judges who have acquired much greater experience of such matters than I have. To allow the appeal in those circumstances might, to my mind, and in the very special circumstances which I have indicated, involve a real injustice. In view of the course which I think we should take, it would obviously not be desirable for me to say more than is strictly necessary in order to explain my judgment.

The defendants carry on business, as their name implies, as iron moulders. That business involved in the present case that several men in a single room, which was called Room " C " in their factory, on a floor of sand (save for a concrete alley-way), filled moulds with molten metal and then, when the moulds had somewhat cooled, opened them and took out the cooling forms. This last process is known as " knocking out " and involves, among other things, knocking off by ordinary physical and manual means adherent grains of sand from the forms or castings. This process is indubitably very dusty. Clouds of sand are emitted. Moreover, there is no synchronization among the men employed in the room and it may therefore be taken that approximately half of any working shift will be occupied by the process of knocking out conducted by one or more of the operatives in the room. It follows that, even if a man is not subjected to thick dust clouds

emitted from his own moulds, he is more or less involved in the clouds emitted by the operations of some of his fellow workers.

Until somewhere in the region of the year 1950, it was not appreciated by any competent person that the process which I have described, however uncomfortable, was dangerous to health in that it was liable to cause silicosis. It is now, and since the date I have mentioned, established beyond a peradventure that, in the process described, the grains of sand are fractured and that there are then emitted into the atmosphere minute fragments of silicon-dioxide, measured in terms of microns or one-thousandth parts of millimetres, which, if inhaled in sufficient quantities, produce, or are liable to produce, the deadly disease of silicosis.

When knocking out is going on the semi-gaseous and highly volatile fragments are present in quantities which were estimated as being between 7,000 and 8,000 per cubic centimetre. Their density falls fairly rapidly and in the space of, say, 15 to 20 minutes it is generally reduced to a degree probably below the danger level. As I have said, however, a man may be affected by clouds emitted, not by himself, but by his neighbours; clouds which for a time at any rate are lethally charged. All these matters of fact have lately become known, but before the year 1950 or thereabouts it was not at all appreciated that these dust clouds, however distasteful, were thus dangerous.

The plaintiff was a moulder in the defendants' employ from the year 1929 or 1930. According to the agreed medical report, by the year 1946 he had become seriously affected with silicosis and by 1948 he was spitting blood. In other words, as I understand the medical evidence, he had then become dangerously and incurably ill from the disease. At the date of the commencement of proceedings in the year 1954 (the plaintiff then being in the 40's) he had not only become largely incapacitated from his ordinary work, but he had also lost the prospect of living the normal span of his life. It was said that he then had about fifteen years of life to which to look forward. It was also proved that this disease, once contracted, cannot properly be eliminated, though perhaps it may be arrested. The evidence seemed to be that in an ordinary case it would take fifteen years, perhaps more, possibly in some cases less, of exposure to the lethal fragments of sand in order that a man in this occupation might become dangerously and incurably afflicted.

The plaintiff brought his action claiming damages based both on common law and on section 47 (1) of the Factories Act, 1937. In the circumstances, and having regard to the state of knowledge which I have indicated, he made no claim good under the common law and he does not now pursue that claim; but he succeeded under the Factories Act, 1937, and recovered by way of damages a total sum of £9,645 6s. 5d. The claim under the Factories Act, 1937, was formulated under several heads, of which two in the end became material at the trial.

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[His Lordship read section 47 (1), and continued:] The first thing to notice about section 47 (1) is the dichotomy, which the judge observed, between cases of the emission "of dust or "fumes of such a character as to be likely to be injurious" on the one hand, and "substantial quantities of dust of any kind" on the other hand. In my judgment, the dichotomy was correctly noticed by the judge. Having regard to the state of knowledge, it may be taken that the dust, with which we are here concerned, was not at any material date dust within the first branch of the section, since it could not fairly be regarded then as likely to cause silicosis. On the other hand, there is no doubt that the dust was emitted in substantial quantities, so that it fell within the second branch of the language which I have read.

From this it follows that, since the dust was in substantial quantities, there arose an obligation, from the date of the coming into operation of this section (namely, on July 1, 1938), to take, as stated by the section, "all practicable measures to protect "the persons employed against inhalation."

It is at this point the first difficulty arises. What is meant by the phrase "all practicable measures"? The matter was discussed by my brother Parker and by this court in *Adsett* v. *K. & L. Steelfounders & Engineers Ld.*[1] It will suffice for my purposes to take a short sentence from the judgment then given by Singleton L.J.[2]: "In deciding whether all practicable "measures were taken one must have regard to the state of "knowledge at the time, and particularly to the knowledge of "scientific people. It is easy to be wise after the event, but "I find it impossible to say, on my view of the section, that it "was shown that the defendants were in breach of the duty "imposed upon them by the section."

The nature of the obligation has been epigrammatically expressed as being that the measures taken must be possible in the light of current knowledge and according to known means and resources. It is clear then, in my judgment, that the matter must be judged in the light of the state of the relevant knowledge at the time of the alleged breach. Thus the fact that at some later date some method of protection has been discovered which was not at the date of the alleged breach dreamed of, even though all the individual materials therefor were known and available, will not suffice. On the other hand, I must not be taken to be saying that the state of knowledge, or absence of knowledge, within the limited scope of a particular industry, or branch of an industry, is by any means necessarily conclusive. It must be a question of fact and of the weight of all the material evidence in any particular case, to assess what was in truth known, or what ought to have been known, by the employers charged at the relevant dates.

[1] [1953] 1 W.L.R. 137, 773; [1953] 1 All E.R. 97; [1953] 2 All E.R. 320.

[2] [1953] 1 W.L.R. 773, 780.

I have said that at the relevant dates here (that is to say, when the Act came into force, and later until the time when the plaintiff had become incurably and fatally affected) it was not appreciated by anyone that the dust emitted in this iron moulding process was liable to produce silicosis. On the other hand, it seems equally clear (though the manner of proof was highly peculiar, as I have already indicated) that there were available and known methods of protecting workers against the inhalation of large quantities of dust, as such, namely, various forms of respirators and masks. Of these it is said that there were as many as twenty types. One of them has been called mark IV and has, indeed, figured in other similar cases in the courts. The fact is now known that of all the masks or respirators that were then available, mark IV was the only one (though the others might give relief from discomfort) which had any effectiveness whatever against the minute particles which were dangerous in the grains of sand.

The nature of the case now emerges. Though the dust was not thought likely to be injurious, still it was beyond question given off in substantial quantities. Therefore, it follows, the defendants were bound to take all practicable measures. They took, as the judge found, none. The plaintiff then says: "Among "these measures which were practicable must at least be "included the supply of mark IV masks which would have been "of some effectiveness against my injury. The defendants, "having therefore taken no steps, must be responsible for the ill "consequences, which, had they taken measures including the "supply of mark IV masks, would have been at least of some "protective quality." The discussion has involved considerations, amongst other things, of the onus of proof and of causation; and, having regard to the dates which I have already indicated, including the fact that when the Act came into force the plaintiff had been in the service of the defendants for eight years, exposed to this inhalation, there has also arisen the question of aggravation, assuming that at any material date the plaintiff had become, to some degree, afflicted with the disease.

Among the cases to which our attention was drawn were *Ebbs* v. *James Whitson & Co. Ld.*[3] in this court, and also the cases there mentioned and discussed, *Vyner* v. *Waldenberg Bros. Ld.*[4] and *Mist* v. *Toleman & Sons.*[5] I will not take up time by further references to those cases, for they are not, in my judgment, directly in point. The problem which arose in those cases was of this nature: if a plaintiff proves that, having been exposed to contact with fumes, he contracted a disease of the kind against which the relevant sections of the Act were designed to protect him by requiring that measures should be taken against the

[3] [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.
[4] [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R. 547.
[5] 62 T.L.R. 131; [1946] 1 All E.R. 139.

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inhalation of the fumes, then, if the defendants are to escape liability, they must show that the disease did not in fact result from that inhalation. In *Mist's* case,[5] on the other hand, the tuberculosis from which the plaintiff suffered was not a disease of the kind against which, through inhalation of dust, the Act was designed to give protection; and was not shown by the plaintiff in fact to have resulted from such inhalation. It might have done so and it might not. It was accordingly held in that case that he had failed to make good the first limb of the case which it was incumbent upon him to prove.

In the present case there is no doubt whatever that the disease of silicosis, which afflicted the plaintiff, did result from the inhalation of this dust emitted at the defendants' factory. But the question is: did it so result by reason of a failure on the defendants' part to do that which they were by the statute bound to do?

I have said, first, that the fact that dust caused the silicosis was not known until, say, the year 1950; and, secondly, that of the numerous masks or respirators which were known to give protection against dust as such, only mark IV was in fact later shown to have been effective against silicosis. Therefore, of all the possible means of protection, only the mark IV mask would have protected the plaintiff against the particular damage or aggravation of the damage which he has suffered. In other words, as Mr. O'Connor put it in the course of his reply: "Must "not the plaintiff show that the defendants' fault was a failure "on their part to supply, not any masks, but mark IV masks?"

The words in the section are "all practicable measures." But it cannot, I think, be sensibly supposed that it was the defendants' obligation to render available a sufficient supply of every mask of every known type. Has then the plaintiff shown that at the relevant dates—I take those dates to be 1938 to 1946—the mark IV mask was regarded by competent persons, including technicians qualified to speak upon these matters, as what I will call the best all-purpose mask; so that in the natural course of events an obligation to take all practicable measures would inevitably involve, or properly and naturally involve, a supply of mark IV masks? That seems to me to be the vital question. If the answer to that question is in the negative, then can it not be said that the plaintiff has failed to prove his case? The judge has, as I think, assumed that the mark IV mask had the kind of primacy at the date I have mentioned which I have described. But it is upon this point that I have found the evidence so unsatisfactory that I have been unable for myself, and upon reading that evidence, to reach a satisfactory conclusion.

Before I deal further with it I can at this point dispose of two other matters. It was also part of the case made good in the court below by the plaintiff that the defendants should have

[5] 62 T.L.R. 131.

provided exhaust appliances in pursuance of the obligation imposed by the last few lines in section 47 (1). Upon that matter the evidence—which I have already described as being in its nature unusual—was briefly as follows: In the second day the principal witness for the plaintiff, Mr. McKie, an engineer, went so far as to say this in answer to Mr. O'Connor in cross-examination. The question was: "Do you think any section "of the Factories Act had anything to do with it," to which he boldly answered: "No. I do not. I do not think it is a question "of any breach of statutory duty." Of course, whether or not there was a breach of section 47 was a matter for the judge and not for the witness; but I think that Mr. O'Connor was fairly entitled to assume that by that answer this expert witness, whom the plaintiff had called, was saying that there were in his view, in his experience, no "practicable measures" which ought to have been taken, and that the circumstances which are set out at the end of the paragraph, when applied to this case, excluded the practicability or duty of supplying exhaust appliances. So when the evidence for the defendants was called, not unnaturally none of it was directed to dealing with these—largely technical—matters of fact.

As I have said, the junior counsel who conducted the case on the one side and the other then proceeded to address the judge; and at the end of all—and who finally asked the judge for the necessary indulgence does not seem to me to matter—this same witness, Mr. McKie, was recalled and sang, as will be seen, a song of somewhat different tune. There was also recalled on the defendants' side their own expert, Mr. Ottignon, who, if anything, added, and added considerably in one respect, to the weapons which were put into the plaintiff's hands.

Upon this matter Mr. McKie made the following observations. In examination-in-chief Mr. Green asked: "If one used that "form of dust removal system, would it necessitate any altera-"tion of the system of work within the foundry itself, or could "the system go on as it is at the moment?" and then the witness, after being given an explanation of the question, said: "I think it is practicable to do it and I think it will be done some "time although I have not seen it yet." (Devlin J.:) "Would "it involve any alteration in the system of the foundry? (A.) I "do not think it would. (Q.) Would it involve any cost other "than the cost of putting in these devices? (A.) It would involve "no main structural alterations at all."

Then Mr. O'Connor, who might, I suppose, be somewhat surprised when he compared those answers with the earlier answer, asked questions which gave rise to the following evidence of the same day. He mentioned the size of this shop or Room "C" and said: "Of course a system of local exhaustion by "forced draught and trunking has been known a good many years. "For one thing it has been applied to several things under the "abrasive metal legislation that came into force in 1925, but as

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" far as foundries are concerned you have never heard of any such " apparatus being used, have you? (A.) Not in this type of " foundry. In the non-ferrous foundries they are quite common " round about the furnaces. (Q.) Not around the moulders? " (A.) They are over the moulders as well because the moulders " are near the furnaces. They empty very often straight from " the furnace into the moulds."

Then on the following page, the apparatus having been called a hood or hat, the witness was asked where he would place it, and he said: " It would come down on top of him "—that is, the workman. " When I say the hood, it would be perhaps a low " grid taking the dust sideways. I do not think you could take " it down, I think the main dust will fall there, but the main " thing is to induce a current of air downwards over the head " of the man to the grid, and I think that will be done some time. " I have never known it to be done, but if I had been designing a " foundry today I should certainly have put something of that " kind in . . . I know what its effect would be, there cannot be " any argument about that. It is practicable, it is possible, but " it has never been done." In re-examination he said: " I have " no doubt whatsoever that a dust exhaust system could be " installed which would prevent any or very little dust, at any " rate, 99 per cent. of the dust that a man normally inhales from " these processes reaching him."

Then, finally, Mr. Ottignon upon this point said, in answer to a question, that in a mechanized foundry you could do certain things, " but on a jobbing foundry the knock-out takes places over " the whole of the foundry floor. The whole of the floor is a work- " ing area and it takes place over the whole area. You must have " rows of continuous hooding. It can be done, there is no funda- " mental impossibility for it, but again you would have to have " double the space for moulding. You would want space for the " moulding and space for the extraction hood. There would be " the mould and there would be the extraction hood pulling the " dust." Then, in answer to the judge's question: " If it ran " the full length, you say, you wound want the space for the hood " and space for the boxes? " he said: " Yes; probably rather less " in that two moulders could work back to back, but certainly " you would need 60 per cent. more floor space."

It will be noticed from those answers, at any rate as I read them, that there seems to be no very clear distinction between a hood over the worker's head, which sucked the particles of dust out, and some rather different type of apparatus consisting of grids in the floor or grids in the floor together with some down draught which would push the dust particles down and sideways out of harm's way; and what the finally recommended conclusion was, as I have said, I am left in grave doubt about.

The judge upon this question said: " The two other measures " that have been suggested are, first of all, that there should " be what Mr. McKie called a hood. Again I do not think I need

" describe it more than to say that it is a method of extracting " air or creating an artificial draught immediately above the " place where the workman is employed which will draw out or " exhaust the dust very rapidly and remove it. Nobody has ever " heard of it being used in foundries but it is in fact a method " which has been used a long time elsewhere. It has been used " for getting rid of dust in the metal polishing trade. It is, in " fact, and has been for forty or fifty years, a well-known way of " getting rid of dust where it is thought important that dust " should be got rid of. It would not involve any structural " alterations in this foundry. It would not involve alteration in " the system of work except to this extent, that, of course, the " hood, which would be a pretty elaborate thing, would require " a good deal of space, and it would require about 50 or 60 per " cent. more floor space if the same amount of work was to be " done in the shop in this case as was in fact being done." Then later, having dealt with masks, he said: " I am satisfied that both " measures, including the hood measure, were practicable " measures."

As I have said, I feel great difficulty in following the evidence with its variation between hoods and grids into the summary in the judge's judgment; but in any case I venture to think, with all respect, that the judge has omitted to notice that the added obligation about exhaust appliances, unlike the first obligation for protection against inhalation, is qualified. Let me re-read the material terms of the section: " And where the nature of the " process makes it practicable exhaust appliances shall be pro- " vided and maintained as near as possible to the point of " origin of the dust or fume, so as to prevent it entering the air " of any workroom." I think that those words are plainly directed to the case where the dust or fume is emitted at some fixed point or points on a machine and the exhaust appliance is intended, therefore, to be fixed in such a manner that the dust, instead of being emitted into the atmosphere, is drawn off outside or elsewhere. I am not saying that it is necessarily limited to that particular case, but I do say that, in my judgment, it is inapplicable to a case where, for one thing, there are quite certainly no " points " which are definable and fixed which can be said to be the origin of the dust. The moulds are separate, loose objects which may be opened at any place on the floors. I further think that the earlier qualification " where the nature " of the process makes it practicable " is such, that on the evidence, as I understand it, the plaintiff did clearly fail in this respect to establish any breach on the defendants' part. I therefore think upon that matter, with all respect to the judge, that the plaintiff failed to make good his claim for a breach based on failure to supply exhaust appliances, and that that matter should now be taken against the plaintiff to have been finally disposed of.

I have earlier mentioned that the plaintiff also sought to make good breaches consisting of failure to do other things, for example,

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what has been called cold knocking out rather than hot, and mechanically knocking out instead of manual knocking out, and there were also one or two other matters. On all those other suggested breaches the plaintiff also failed, and no attempt has been made in this court to rehabilitate them. Those matters also are now out of the way. I will turn back, therefore, to this matter of the masks.

I have referred already more than once to the extraordinary course, through no fault of anyone—and I must not be taken to be casting blame on anyone—which the action took. After Mr. McKie had apparently repudiated any claim on the plaintiff's part to rely on the Factories Act, 1937, he also dealt with the matter of respirators. Mr. O'Connor's last question to him in cross-examination was: "You did say that masks could have been "used. You have never heard of anybody in these foundries "using masks, have you? (A.) I have never known of moulders "using them. I have heard of fettlers and cupola men, but never "a moulder. If you provided them I do not think they would "use them."

Notwithstanding that answer, however, I think it may fairly be said that the defendants did not establish that the supply of masks would necessarily have been futile because they would have been cast aside. Such was shown to have been the fact before my brother Parker in the *Adsett* case.[6] But I do not think here that the defendants, not having made any attempt by suggestion or exhortation to encourage their use, can be heard to say that the measures were not practicable, because the men would not in any circumstances use them.

But notwithstanding that limitation on the answer, it seems to me natural enough that Mr. O'Connor, upon this matter of masks, should also have left the point severely alone in his own later evidence, and so once more one comes to the speeches and the recall of Mr. McKie and Mr. Ottignon.

By way of contrast to what he had formerly said, Mr. McKie —in saying that I am not, of course, seeking to cast aspersions upon the integrity of Mr. McKie; I simply observe that he did, on this occasion, say this in cross-examination: "(Mr. O'Connor:) "You have never heard it recommended from 1930 to 1950 that "moulders should wear masks? (A.) I have not seen any recom- "mendation to that effect. (Q.) You say that they could have "worn a cotton gauze pad. Is that right? (A.) That is the only "thing one would normally wear, if they wore anything at all. "(Q.) Have you any idea whether it would be any good? "(A.) Yes. (Q.) I suggest that it would not catch any of the "dangerous particles? (A.) I believe it would; I am sure it "would."

Then I can pass, I think, to where Mr. Ottignon, on this matter, gave evidence thus: "Now, as to the efficacy of a mask,

[6] [1953] 1 W.L.R. 137.

" a cotton gauze pad, would that catch the small particles? " (A.) No; the cotton gauze pad is the simplest form of all pro- " tection. Better than that there are probably about twenty " proprietary brands of that, all with improved efficiency to " cotton wool, but only two of those are approved by the Factory " Inspectors' Department as being satisfactory under the new " regulations."

Then there is discussion about that. The new regulations he referred to were dated 1954. There was this discussion about the nature of the requirements. " (Q.) How long have those masks " been known which can catch small particles? (A.) One of " them, the least satisfactory, for a number of years, probably " fifteen years, and the other one, the most satisfactory, from " 1951 or 1952. (Devlin J.:) One has been satisfactory for " fifteen years? (A.) Possibly fifteen years. (Mr. O'Connor:) " Where did that originate? What is it called, ' mark IV '? " (A.) Yes. I do not know its origin. The other is the micro " filter. (Devlin J.:) What was it used for in the course of the " last fifteen years? (A.) All sorts of dusty operations, in quarry- " ing, odd foundry operations, cement work and pottery work."

In cross-examination on this matter Devlin J. asked: " When " do you say you have seen them worn? (A.) On light bench " work. (Q.) Mr. Green did put, ' For the whole time? ' and did " you agree? (A.) For a reasonable time. I have not seen them " worn the whole day. (Mr. Green:) The men in a foundry like " this would not want to wear them more than fifteen minutes at " a time? (A.) No; because although the knocking-out process " is not continuous with one man there is the man next door who " may be. (Q.) In other words, there is a hazard coming from " the next door neighbour? (A.) Agreed." Later: " Is he in a " position of danger, continuously from his neighbour's work? " (A.) One neighbour or the other during most of the day. " Knocking-out probably takes place four or five times within an " eight-hour day."

Cutting this matter short, what it came to, I think, is this: It was conceded that, owing to the heavy nature of the work, the workman could not wear the mask the whole time. But he could wear it for periods of fifteen or twenty minutes. Thus, at the very end of the evidence, Devlin J. asked two very pregnant questions. The first was this: " Then is not the position this: that while " you could not guarantee safety unless a man wore a mask the " whole time, if he wore a mask when he was actually doing his " own operation for a quarter of an hour it would give him a " measure of protection over the most dangerous period? (A.) " It would undoubtedly. (Q.) And would presumably be worth " doing? (A.) It would."

On that I turn to the judgment: " The fourth method, and " perhaps the simplest, is that the men should be equipped with " a mask. Mr. McKie said that a cotton gauze pad over the " mouth and the nose, such as was used in many industries,

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" would be quite sufficient. It would only require to be used " during the actual process, that is, I suppose, during the " five, ten or fifteen minutes in which the knock-out was " taking place, and this dust is being given off. The criticism " that was made against it was that the cotton gauze would not " in fact keep out the small particles which were the cause of " the damage in this case. Of course, one has to keep the thing " rather distinct in one's mind there. Nobody knew that these " small particles had in particular to be kept out; what had to be " done under the Act was to prevent the inhalation of dust. The " cotton gauze pad would, it seems to me, certainly have done " that, though it might be said that the failure of the defendants " to cause it to be used in this case did not really matter since, " in fact, it would not have kept out those particles that turned " out to be injurious. But there is in fact a mask which would " have done that. That is something which has also been known " for some time "—in the note it says about fifty, but I think it must be about fifteen years, " and it is called mark IV mask. " It is used in cement works where, for example, the cement is " being got out of paper sacks. The criticism which has been " made by the defendants' experts against masks generally was " that the mask was no good unless it restricts breathing, and if " it restricts breathing it cannot be worn for any prolonged period " when any manual work is being done. I think the answer to " that in this particular case is that it is not necessary that it " should be worn for a long period. It may be desirable but it is " not strictly necessary. The defendants' expert thought it could " be worn for twenty minutes to half an hour, and that would be " ample to cover the period of greatest danger. It is perfectly " true, of course, that dust may be given off by other moulders— " all the knock-out is not done at the same time—and to some " extent, even though the mask may be worn by the man himself, " he may be subject to dust while the other knock-out is going " on. But it seems to me that with a little adjustment in the " manner of doing the knock-out a great measure of assistance " could be obtained by wearing masks for a quarter of an hour " during the period of knock-out." Then the judge says, as I have earlier stated, that the supply of mark IV masks (I think he meant) was a practicable measure which ought to have been taken.

Without going too much into it, that finding is open to two criticisms. It seems to me, if I may say so, not fully to appreciate the vital dates and times (that is the fact that the plaintiff had already, when these masks became available, been in the defendants' employ, exposed to these lethal particles, for ten or more years); and also to neglect to pay sufficient attention (because the evidence does not seem to me to have sufficiently dealt with them) to the questions—in those circumstances and having regard to the nature of the work, would the wearing of a mark IV mask in any case for about fifteen minutes or twenty minutes while the man

was doing his own knock-out have been effective at all? Has its absence in any event done more than aggravate to some extent the disease which had already been contracted? Would it indeed have been any good in any event? And would it have been any good if it was only worn for a limited time?

The absence of precise findings upon these matters and of clear evidence directed to them, as I read the evidence, has caused me to reach the conclusion which I have stated at the beginning of my judgment. I have, as I also stated, wondered to what extent the judge may have assumed, perhaps from his experience elsewhere, that this mark IV mask was what I have called the best all-purpose respirator in the years to which he was directing his attention. Unless he so assumed, there is the difficulty: Why is it said that the defendants' breach lay in failing to supply those particular masks? It is for those reasons that I have reached the conclusion, unsatisfactory as it is, that upon this matter of the supply of respirators there should be a new trial.

There was one other separate question argued with which it is possible for me to deal finally, and I can do so shortly. The figure of damages, £9,645 6s. 5d., was made up as to £1,645 of special damages; a sum of £200 for loss of expectation of life; a sum of £7,000 for loss of earning capacity during the remainder of his life (subject to a deduction); and, as to the balance of £1,000, for what the judge I think has regarded, or certainly for what Mr. Everett contended to be, loss of his prospect, during the period which has been cut off from his life, of making some provision for his wife or other dependants.

In the course of his speech to us, Mr. Everett made it quite clear that as regards this £1,000 he was not putting his claim forward as being one of lost earning capacity during the lost years. What the plaintiff has lost, says Mr. Everett, is the prospect of making this provision for his family. In that respect the claim differs from a somewhat similar claim made and rejected by Slade J. in *Harris* v. *Brights Asphalt Contractors Ltd.*[7] The matter is put in this way by Devlin J.: "I must say a word about the effect of the reduced expectation "of life. The defendants rely upon that as I think in law they "are entitled to do. They are entitled to say that I must regard "him as a man whose prospects of earning will in any case be "diminished. I do not think the contrary has been argued by "Mr. Green, but I think that if the defendants rely on it the "plaintiff is also entitled to rely on it for another purpose. He "is entitled to ask for something more than an ordinary formal "estimate of loss under this head. What the plaintiff loses, and "it seems to me to be a real loss, is the prospect of making "provision for his wife and family. He is a married man. "There will be a time, a longer time than there should have

[7] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 345.

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"been, when they are left without the support of the wage "earner. If he had died, of course, they would have been able "to make a claim under the Fatal Accidents Act. I think it is "a proper claim to be taken into consideration in a case of this "sort under the head of expectation of life."

Then, having dealt with the other heads, including £200 for the loss of expectation of life in the ordinary case, loss of amenities, and so forth, he said: "I shall add to that, for the "reasons that I have given already, the figure of £1,000 . . . "I wish to make it quite clear that if I had not taken expecta- "tion of life into consideration at all the sum which I should "have awarded would have been higher and not lower, because "I should have taken a longer period of loss of earnings for the "benefit of the plaintiff. The sum that I have awarded, as it "were, in relation to the wife and family is small in comparison "because, of course, the loss of expectation of life takes effect "at the time when the earning power would have been diminished "anyway—indeed, for a large part of it the earning power might "have ceased—and because I think all I have to consider under "that head is the provision which he might reasonably have been "expected to make, if he had continued to live."

As appears elsewhere in the judgment, the sum was arrived at really by considering what he might have earned over and above what he might have spent. As regards the claim for lost earning power Mr. Everett conceded that, the judge having accepted the evidence that the expectation of life was X years, the lost earning capacity must be calculated accordingly; but he has also said that this claim for lost prospects of making provision for his wife is based upon authority, for example, the language used by Lord Wright in *Rose* v. *Ford*.[8] *Rose* v. *Ford*[8] was a case, it will be remembered, in which a young woman was seriously injured and in fact died four days after the injury.

Lord Wright, in discussing the various heads of damage, used the phrase[9]: "one of the fruits of continued life is general "provision for dependants." I am bound to observe here that there was no evidence at all, so far as I know, as to the circumstances or frugal habits of this plaintiff. But in any case, once the suggestion of the figure here discussed being in any sense lost earning capacity is out of the way, it seems to me that you are left with something which is either quite incapable of estimation at all as a piece of property belonging to the plaintiff, or is necessarily comprehended in the kind of general loss of happiness and amenities which is covered by the award given, and already given in this case, for loss of expectation of life. After all, if a man is prevented from making provision upon his death to somebody else, it is that somebody else who materially suffers, not the man himself—except to the extent that his conscience and mind may

[8] [1937] A.C. 826; 53 T.L.R. 873; [1937] 3 All E.R. 359.

[9] [1937] A.C. 826, 853.

be the less easy when he reflects upon his forthcoming incapacity. Where a death takes place soon after the accident, then such a claim might be made by the dependants, for the time which has elapsed would not bar it. In such cases there would be available a claim under the Fatal Accidents Act. But, in this case, and in many cases, it is, no doubt, true that the claim on the part of the dependants would have been barred by lapse of time. Still, it does not seem to me to justify the creation of a head of claim which I cannot think has any logical and sensible foundation, at any rate when it comes to estimation of the money's worth to the man himself at the time of the accident. Not only that, but it seems to me to be in conflict with what was laid down in the case of *Benham* v. *Gamblin* [10] in the House of Lords.

I will read one passage from the opinion of Lord Simon L.C. After referring to *Rose* v. *Ford*,[11] the noble Lord said [12]: "I "would further lay it down that, in assessing damages for this "purpose,"—that is, the loss of expectation of life—"the "question is not whether the deceased had the capacity or "ability to appreciate that his further life on earth would bring "him happiness; the test is not subjective and the right sum to "award depends on an objective estimate of what kind of future "on earth the victim would have enjoyed, whether he had justly "estimated that future or not. Of course, no regard must be "had to financial losses or gains during the period of which the "victim has been deprived. The damages are in respect of loss "of life, not of loss of future pecuniary prospects."

As I have indicated, it seems to me that the award of £1,000 under the head which I have mentioned is really not consistent with the principles that were then laid down in the speech of Lord Simon which I have read.

I should, in conclusion, mention the case (to which I rather think Devlin J.'s attention was not drawn) of *Harris* v. *Brights Asphalt Contractors Ld.*[13] It suffices to say that in that case Slade J. considered fully the possibility of a claim of this character, though it was based somewhat differently from the way in which the present case has been based. In *Harris's* case [13] what was suggested was that the plaintiff ought to be entitled to a sum which would somehow represent the earnings, or the net earnings less expenses, that he would have received and enjoyed had he lived during the years when, because of the accident, he would not be alive at all. Slade J., I think rightly in view of *Benham* v. *Gamblin*,[14] rejected that contention. But as I have also said, Mr. Everett does not base his claim in the present case upon parallel grounds and I need not therefore, I think, further discuss it, except to acknowledge the care with which Slade J. examined the various arguments which were there

[10] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7.
[11] [1937] A.C. 826.
[12] [1941] A.C. 157, 167.
[13] [1953] 1 Q.B. 617.
[14] [1941] A.C. 157.

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put forward including language which fell from members of this court in *Roach* v. *Yates*.[15]

For the reasons which I have stated, I think that the claim for £1,000 damages for loss of prospects of making provision for relatives should not have been included; but I think that in all the circumstances the case should be remitted for retrial upon the one question whether the defendants failed to comply with the statutory obligation under section 47 by the supply of masks, and, if so, to what extent the damage which the plaintiff suffered is properly attributable thereto, including under that head the question, of course, whether, in the event, the absence of masks merely aggravated rather than caused the injury.

JENKINS L.J. I agree, and find nothing I can usefully add to what my Lord has said.

PARKER L.J. I also agree.

Appeal allowed. Retrial ordered.

Solicitors: *Clifford-Turner & Co.; Beckingsales for William Bache & Sons, West Bromwich.*

B. A. B.

[15] [1938] 1 K.B. 256; [1937] 3 All E.R. 442.

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* MOTTURE *v.* MOTTURE.

Husband and Wife—Marriage—Foreign marriages—Proof—Evidence (France) Order in Council, 1937, *No.* 515.

Neither an official certified copy of the entry of a French marriage in the appropriate public register which has been issued more than twelve months before it is put in evidence, nor the livre de famille, is of itself, prima facie, evidence in England of a valid marriage.

PETITION for divorce.

The parties were married on October 17, 1949, at the Town Hall at L'Orient Morbihan in the district of Keryadu, France. On April 30, 1954, the husband filed a petition for divorce alleging desertion. The wife by her answer denied that she had deserted the husband and prayed for an order for restitution of conjugal rights. By an order of June 16, 1955, the prayer of the petition was stayed and the reply was struck out. The wife proceeded on her answer.

B. L. A. O'Malley for the husband.
H. S. Law for the wife.

Before the case for the wife was opened Karminski J. asked what evidence counsel proposed to adduce as to the validity of the French marriage.

H. S. Law.—An official certified copy of the entry of the marriage in the appropriate public register has been filed and I have available an expert in French law, M. Allemès, who will say that the certificate would be accepted by the French courts as prima facie evidence of the validity of the marriage.

KARMINSKI J. said that the evidence of an expert though not always required was necessary in the present case. The certificate of marriage, having been issued more than twelve months before, was expressly excluded from the provisions of the Order in Council for France made under the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933,[1] and was not, therefore, in itself prima facie evidence of a valid marriage.

Counsel, when seeking to prove the validity of foreign marriages accordingly to the Practice Direction of May 16, 1955,[2] should not overlook the limitations of the Order or that the livre de famille was not a document referred to in the First Schedule to the Order and, therefore, was never in itself prima facie evidence of a valid marriage.

[The validity of the marriage having been proved and the evidence heard his Lordship made an order for restitution of conjugal rights within fourteen days.]

Solicitors: *G. Howard & Co.; Rowe & Maw.*

E. J.

[1] Evidence (France) Order in Council, 1937, No. 515: "1. The "registers kept in France, whether "in the custody of *officiers de l'état* "*civil* (registrars) or in the custody "of *greffiers en chef* (clerks) of tri- "bunals, and containing such *actes* "*de l'état civil* (entries relating to "civil status) as are specified in the "first column of the Second Schedule "to this Order, shall be deemed to "be public registers kept under the "authority of the law of France and "recognised by the courts of France "as authentic records, and to be docu- "ments of such a public nature as "to be admissible as evidence of the "matters regularly recorded therein."

"3. Subject to any requirements of "the rules of court, a document which "purports to be issued in France as "an official copy of an entry in any "of the registers specified in Article "I of the Order, and which—(*a*) in "the case of a register in the custody "of an *officier de l'état civil*, purports "to be signed, and certified as in "conformity with the original, by "that officer or his deputy, and to "bear the seal or printed or stamped "emblem of the *mairie* (mayoralty), "or (*b*) in the case of a register in "the custody of a *greffier en chef* of "a tribunal, purports to be signed, "and certified as in conformity with "the original, by that officer or his "deputy, and to bear the seal or "printed or stamped emblem of the "*greffe* (record office) from which the "document was issued, shall, without "evidence as to the custody of the "register or of inability to produce it, "and without any further or other "proof, be received as evidence that "the register contains such an entry, "if the court is satisfied that the "document was issued not more than "twelve months before the date on "which it is sought to be used as "evidence, and was so issued in "response to a specific request for a "complete copy of the entry in "question (including the marginal "notes thereto, if any)."

[2] [1955] 1 W.L.R. 668.

[CHANCERY DIVISION.]

1955
July 26, 27.

Roxburgh J.

* PENFOLD *v.* PEARLBERG.

[1955 P. 936.]

Practice—Inspection—Land—Not in possession of party—Specific performance—Sale of leasehold property—Building still requisitioned and in possession of the local authority—Order for inspection—Jurisdiction—R.S.C., Ord. 50, *r.* 3.

A purchaser entered into a contract for the sale to her of certain leasehold premises. The particulars were stated to be as follows: "Lot 7. Practically rebuilt under War Damage Act. Requisi- "tioned by the local authority at a compensation rental amounting "to £67 10s. 0d. ann." The purchaser took no steps towards completion and the vendor commenced an action for specific performance. The purchaser, suspecting that the premises had not been "practically rebuilt," requested the vendor to allow her surveyor to inspect them before delivery of defence. The vendor having refused inspection until after close of pleadings, the purchaser took out a summons, asking for inspection, under Ord. 50, r. 3:—

Held, that the general power under Ord. 50, r. 3, to make an order for the inspection of property is not limited by the provision in the rule for authorizing persons to enter land in the possession of a party; and that, accordingly, in the present case an order should be made for inspection, subject to the consent of the requisitioning local authority; in the event of their refusal, they could be added as parties to the action, solely for the purpose of having the inspection authorized.

Coomes & Son v. *Hayward* [1913] 1 K.B. 150 considered.

PROCEDURE SUMMONS.

By a contract in writing contained in a memorandum dated January 27, 1955, Beatrice Pearlberg agreed to buy from William Penfold the leasehold premises known as No. 1 Aldershot Road, Kilburn, for the sum of £680. The particulars of the property were stated to be as follows: "Lot 7. Practically rebuilt under "War Damage Act. Requisitioned by the local authority at a "compensation rental amounting to £67 10s. 0d. ann."

The vendor, alleging that the purchaser had wrongfully refused and neglected to take any steps towards completion, commenced an action for specific performance. The purchaser considered that the premises had not been practically rebuilt under the War Damage Act, and a letter, dated July 1, 1955, was written by her solicitors to the vendor's solicitor as follows: "Our client is "advised that she should have an inspection made of the above "property as soon as possible for certain purposes concerning her "defence in these proceedings. We shall be glad to learn, "therefore, whether your client is prepared to afford facilities for "an inspection at a reasonable time and upon reasonable notice "being given of the surveyor's intention to visit."

The vendor's solicitor answered: "I duly received your letter "and my client is advised that your client should not be granted "facilities for inspection of the property until after the pleadings "are closed, when I shall be glad to give you the necessary "facilities for inspection."

The purchaser took out a summons under Order 50, r. 3,[1] for an order that she might be at liberty to inspect the property the subject-matter of the action.

The question before the court was whether an order for inspection could be made, having regard to the fact that the plaintiff was not in possession of the property.

Nigel Warren for the purchaser.
K. E. B. Kemp for the vendor.

Cases referred to in argument: *Reid* v. *Powers*[2]; *Garrard* v. *Edge*[3]; *Wilder* v. *Wilder*[4]; *Tudor Accumulator Co. Ld.* v. *China Mutual Steam Navigation Co. Ld.*[5]; *Coomes & Son* v. *Hayward*.[6]

ROXBURGH J. This is an interesting and, I think, important point, on which I must confess I have some doubt; but I propose to construe the rule in a manner which may perhaps be called robust, because I think that a great waste of costs might in this case and in other similar cases result if the rule is construed otherwise.

By a contract in writing contained in a memorandum dated January 27, 1955, the defendant agreed to buy from the plaintiff the leasehold premises known as No. 1 Aldershot Road, Kilburn, for the sum of £680. The premises are held under a lease dated November 12, 1885, for a term of 99 years from December 25, 1884, at the yearly rent of £8. A deposit was paid. In an action for specific performance the statement of claim alleges that the plaintiff duly delivered an abstract within the time limited, that the defendant did not deliver any requisitions within the time limited or at all, and that the defendant must be deemed to have accepted the plaintiff's title. The statement of claim further alleges that, notwithstanding repeated requests by the plaintiff's solicitor and in breach of the said contract, the defendant has wrongfully refused and neglected to take any steps towards completion; and it further alleges that the plaintiff at all material times has been and is now ready and willing to fulfil all his obligations under the said contract.

[1] Order 50, r. 3: "It shall be "lawful for the court or a judge, "upon the application of any party "to a cause or matter, and upon such "terms as may be just, to make any "order for the detention, preserva- "tion, or inspection of any property "or thing, being the subject of such "cause or matter, or as to which any "question may arise therein, and for "all or any of the purposes afore- "said, to authorize any persons to "enter upon or into any land or "building in the possession of any "party to such cause or matter . . ."

[2] (1884) 28 Sol.J. 653.
[3] (1889) 37 W.R. 501.
[4] (1912) 56 Sol.J. 571.
[5] [1930] W.N. 200.
[6] [1913] 1 K.B. 150.

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The particulars of the property in question are stated to be as follows: "Lot 7. Practically rebuilt under War Damage Act. "Requisitioned by the Local Authority at a compensation rental "amounting to" a certain sum. Nothing turns on that.

In those circumstances, no defence having been delivered, counsel tells me that the defendant suspects (I think that is the fair way of putting it) that the property was not practically rebuilt under the War Damage Act. If it was, the defendant, as far as I know, has no defence to the action, and presumably the defence will collapse. On the other hand, if it was not practically rebuilt, the action would appear certain to fail. In other words, the whole fate of the action is likely to depend on this question whether the premises were practically rebuilt under the War Damage Act; and once the premises are inspected, I should think that two competent surveyors, if they met together, could not possibly disagree on the subject. That is the sort of action with which I am concerned.

In those circumstances, the defendant's solicitors wrote to the plaintiff's solicitor as follows: [His Lordship read the two letters above set out, and continued:] It is to be noticed, and though it does not really affect the construction of the rule it does go very strongly to the merits or demerits of the resistance to inspection, that there is no suggestion that the plaintiff is not in a position to give inspection; on the contrary, there is a positive allegation that after the pleadings are closed, inspection will be given. That is how the matter stood when the defendant took out a summons asking for inspection under Order 50, r. 3.

At the hearing counsel took (and most properly took, because I do not think the point is an easy point) the objection that the plaintiff was not in possession of the property, and I think that that is well founded. The precise position of a requisitioning authority is always a question of some difficulty, but the one thing that I think is quite clear is that the requisitioning authority is in possession of the premises during the period of requisition, and I shall certainly assume, though there is no evidence on this point, that the premises are still requisitioned as they were stated to be at the date of the contract. It is said that I cannot do anything, notwithstanding the positive refusal of the plaintiff to give inspection now, unless I, by the pressure of my decision, compel the defendant to add the local authority as a party to the action, solely for the purposes of the inspection. There is no reason whatever to suppose that the local authority would raise any objection, and the whole of that procedure would, as far as I can see, be almost certainly a pure waste of money.

That there is no reasonable alternative I think is clear from *Coomes & Son* v. *Hayward*,[1] where the Divisional Court, in dealing with an unconditional order for inspection made by the registrar of a county court—and if I may say so, such an order

[1] [1913] 1 K.B. 150.

was plainly wrong, and I am not suggesting for a moment that I can make an unconditional order—made some observations which are, I think, obiter dicta so far as the present case is concerned, but which certainly do lead to the suggestion which emerges at the end of the judgment of Scrutton J. that the proper course would be to add the local authority.

I do not find myself bound by any authority to put such a narrow construction on Order 50, rule 3. It is, as I believe, in two separate parts; and, on what I conceive to be the true construction, I do not consider that the second part necessarily governs the first. The order says: "It shall be lawful for the "Court or a Judge, upon the application of any party to a cause "or matter, and upon such terms as may be just"—and I do stress that, "upon such terms as may be just"—"to make any "order for the detention, preservation, or inspection of any "property or thing, being the subject of such cause or matter, "or as to which any question may arise therein." Pausing there, it seems to me that I have the plainest possible authority for making the order which I propose to make. But then the rule goes on: "and for all or any of the purposes aforesaid, to "authorize any persons to enter upon or into any land or building "in the possession of any party to such cause or matter. . . ."

This is not land or building in the possession of any party, and it is therefore said that because of that consequential provision in the rule, the ambit of the general words which precede are restricted to land in the possession of the party. Nobody has ever so held. I quite agree that there are passages which suggest that perhaps, if the matter had been considered, it might have been so held; but in my view so to construe the rule is quite unnecessary and would do nothing but increase costs in a case like the present. There is not the slightest reason to suppose that the local authority would refuse to allow inspection. On the other hand, the plaintiff has deliberately refused it now, assuming for himself that he has the power to grant or refuse it, while his argument is based on the hypothesis that he has not power to do it and that, therefore, the order might be futile.

In my judgment, the proper course in such a case as this, where that is the attitude of the plaintiff, is to make an order for inspection subject to the consent of the requisitioning authority now in possession of the premises. Such an order is not futile. It may be that by reason of the term—and quite plainly, under the first part of the rule, I am entitled to impose terms—no inspection would ever take place under the order. Then no doubt it would be necessary, if the local authority refused, to add them as parties to this action, solely for the purpose of getting inspection, with the considerable possibility that they might have to pay the costs thereby incurred; but if, in fact, the order did not become operative, it would be because the condition precedent never took effect; it would not be because it was a futile order;

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and I have no reason whatever to assume that the order will not take effect, because I think there is every probability that the condition will be fulfilled.

As I have said before, I think that it is in the interest of saving costs that this kind of case should be within and not outside the scope of this rule, and I feel no difficulty in construing it in that way.

Order accordingly.

Solicitors: *Warren & Warren; W. A. L. Osborn.*

J. L. D.

[CHANCERY DIVISION.]

1955
July 28.

Wynn-Parry J.

* COPELAND *v.* HOULTON.

[1952 C. 3958.]

Legal Aid—Costs—Taxation—Consent order—Conveyancing work pursuant to terms of order—Whether conveyancing costs within ambit of legal aid taxation—Legal Aid and Advice Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *s.* 1 (5).

The plaintiff brought an action against the defendant, his daughter, seeking (a) a declaration that he was the beneficial owner of certain property standing in her name, and/or (b) an order that the property be conveyed to him, and/or (c) rectification of the existing conveyance. At the hearing the matter was compromised and a consent order in the Lord Tomlin form was made. The order provided, inter alia, "that it be referred to the taxing "master to tax as between solicitor and client in accordance with "the provisions of the Third Schedule to the Legal Aid and Advice "Act, 1949, the costs to which that Act applies incurred on behalf "of the plaintiff and the defendant respectively." The schedule to the order provided that the defendant would convey to the plaintiff the property in question subject to an existing mortgage, and paragraph 3 thereof provided that "the documents necessary "to carry out the foregoing terms shall be in such form as counsel "for the plaintiff and for the defendant shall agree and in default "of agreement as the judge shall direct."

On the taxation of the plaintiff's solicitors' bill of costs the taxing master disallowed the whole of the costs of conveyancing work under the order incurred in giving effect to paragraph 3 of the schedule thereto, on the grounds that costs of conveyancing work as such were not covered by the Act of 1949, "as at present "operated," and the costs were not therefore recoverable under the Act unless they came within Schedule 1 of Part 1 (1) (*c*) thereof, viz., "Proceedings in the Supreme Court of Judicature."

On an appeal from the taxing master's overruling of the plaintiff's solicitors objections to the taxation:—

Held, that the order was an order specifically designed to include every item of costs to which the Legal Aid and Advice Act, 1949, could apply; and that, as paragraph 3 of the Schedule to the order directed documents to be prepared for the purpose of carrying out

its terms, the costs in question were costs necessarily incurred in arriving at a compromise to bring an end to proceedings within the meaning of section 1 (5) of the Act,[1] so that conveyancing costs proper as regards quantum could properly be allowed on taxation. *Lancaster* v. *Lancaster* [1896] P. 75 (C.A.) 118 explained.

SUMMONS TO REVIEW TAXATION.

The plaintiff brought an action against the defendant, his daughter, seeking a declaration that he was the beneficial owner of certain property standing in her name and/or an order that it be conveyed to him, and/or rectification of the existing conveyance. Both parties were in receipt of legal aid. The matter was compromised at the hearing on May 10, 1954, and Upjohn J. made an order in the Lord Tomlin form which provided: "This "action and counterclaim coming on for trial this day before this "court in the presence of counsel for the plaintiff and for the "defendant and upon reading the pleadings two certificates dated "July 17, 1952, and August 25, 1953, granted to the plaintiff "and a certificate dated October 15, 1952, granted to the defendant under the provisions of the Legal Aid and Advice Act, "1949, and Upon Hearing what was alleged by counsel for the "plaintiff and for the defendant and the defendant by her counsel "admitting that she holds the above-mentioned property on trust "for the plaintiff.

"AND the plaintiff and the defendant by their counsel stating "that they have agreed to the terms set forth in the Schedule "to this Order

"THIS COURT DOTH ORDER that it be referred to the taxing "master to tax as between solicitor and client in accordance with "the provisions of the Third Schedule to the Legal Aid and Advice "Act, 1949, the costs to which that Act applies incurred on "behalf of the plaintiff and the defendant respectively.

"AND IT IS ORDERED that all further proceedings in this action

[1] Legal Aid and Advice Act, 1949, s 1: "(1) This and the three next "following sections provide for, and "(save as hereinafter mentioned) "relate only to, legal aid in connection with proceedings before courts "and tribunals in England and "Wales, not being proceedings in "which free legal aid may be given "under the enactments amended by "Part II of this Act. (2) Unless "and until regulations otherwise provide, the proceedings in connection "with which legal aid may be given "are any proceedings of a description "mentioned in Part I of the First "Schedule to this Act, except proceedings mentioned in Part II of "that Schedule. . . . (5) Legal aid "shall consist of representation, on "the terms provided for by this Part "of this Act, by a solicitor and so "far as necessary by counsel (including all such assistance as is usually "given by solicitor or counsel in the "steps preliminary or incidental to "any proceedings or in arriving at "or giving effect to a compromise to "avoid or bring to an end any proceedings)."

S. 2: "(2) Where a person receives "legal aid in connection with any proceedings— . . . (*b*) his solicitor and "counsel shall not take any payment "in respect of the legal aid except "such payment as is directed by this "Part of this Act to be made out of "the legal aid fund."

Sch. 1: "Proceedings for which "Legal Aid may be Given under "Section One. Part I. Description of "Proceedings. 1. Proceedings in any "of the following courts— . . . (*c*) "the Supreme Court of Judicature."

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" and counter-action except so far as may be necessary for giving " effect to the said terms and this order be stayed.

" AND the parties are to be at liberty to apply to enforce the " said terms.

" SCHEDULE.

" 1. The defendant will convey the above-mentioned property " to the plaintiff but subject to existing mortgage thereon in " favour of [a named building society] if necessary the plaintiff " will indemnify the defendant against all future liability to the " said building society in respect of the said mortgage. . . .

" 3. The documents necessary to carry out the foregoing terms " shall be in such form as counsel for the plaintiff and for the " defendant shall agree and in default of agreement as the judge " shall direct."

In due course the matter went to taxation. The solicitors for the plaintiff brought in their bill and, inter alia, they sought to have allowed a total sum of twelve guineas for the costs incurred in giving effect to paragraph 3 in the schedule to the order. The taxing master disallowed the whole of the item, he expressing no opinion as regards the question of quantum.

The plaintiff's solicitors thereupon made objections to the taxation in respect of that amount in the following terms: " We " sought to charge twelve guineas in respect of the conveyancing " work we were obliged to do for the plaintiff as a result of the " order and understood that this sum has been disallowed, first, " because legal aid does not apply to conveyancing, and, secondly, " because the work was not covered by the wording of the order. " We submit as follows:

" 1. The legal aid certificate covers the taking of proceedings " and everything necessary to bring those proceedings to a " conclusion.

" 2. The order of May 10, 1954, obliges the defendant to " execute a conveyance and the plaintiff to execute a second " charge and should, for example, either of the parties default, " or fail to reach agreement on the form of the documents further " proceedings could have been taken under the legal aid certificate " under the liberty to apply.

" 3. The exclusion of the conveyancing work in a case of this " nature leads to an absurd position: The plaintiff is ordered to " undertake certain conveyancing and to have perused certain " conveyancing documents offered to him by the defendant but " unless he is able or willing to pay for this out of his own pocket " he cannot have the order of the court completely enforced, " although, presumably, if for example the defendant defaulted " in tendering a draft second charge the plaintiff would be entitled " to use his legal aid certificate to apply to force the defendant " to tender such a charge. It is submitted that this position leads " to an absurdity and cannot be correct.

" 4. The prior authority of the area committee, if any was " required, was obtained prior to the conveyancing work being " undertaken, a solicitor carrying out work on the faith of that " authority should not be penalised.

" 5. The Law Society has a charge on the property recovered. " If the conveyancing work were not done the legal aid fund " might suffer. It was, therefore, necessary work from this point " of view arising out of the proceedings for which the legal aid " certificate was granted, and in our submission, apart from the " authority of the area committee, its costs should not be " disallowed.

" 6. If in the opinion of the taxing master the area secretary " has exceeded his authority then it is submitted that the " solicitors should be paid, but that representations should be " made by the Taxing Office through the Law Society to ensure " that there be no recurrence."

The taxing master, in his answers to the objections dated April 28, 1955, stated: " The costs of conveyancing work as such " are not covered by the Legal Aid and Advice Act, 1949, as at " present operative, and the costs under objections are not, there- " fore, recoverable under such Act unless they come within the " provisions of Schedule 1 of Part I (1) (*c*) thereof, viz., ' Pro- " ' ceedings in the Supreme Court of Judicature.'

" Legal aid certificates dated July 17, 1952, and August 25, " 1953, gave authority ' to take ' and ' to continue proceedings " ' that he [the plaintiff] is the owner of No. 26 Clarendon Villas, " ' Hove, and/or for the recovery of the said property and/or for " ' rectification of the conveyance of the property to his daughter " ' Marjorie Anne Houlton and further or other relief.'

" The action was settled on terms agreed between the parties " as set out in the schedule to the judge's order which latter " directed the costs of both parties to be taxed in accordance " with the provisions of the Legal Aid and Advice Act, 1949, with " liberty to apply.

" It has always been the practice of the Taxing Office that " the costs of working out an order under any basis of taxation " are not allowed unless otherwise so ordered by the trial judge " or unless specifically referred to in and forming part of the terms " of settlement as not being within the terms of the order. " (*Lancaster* v. *Lancaster.*[2])

" If, as in this case, there is liberty to apply and such an " application supervenes the costs, the costs thereof are dealt " with by the judge on the hearing thereof. That did not arise " in this case.

" It is noticeable that the solicitors do not seek to include in " their bill as a disbursement the costs of the [building society] " for fees, costs and stamp duty . . . which, if their arguments " on this objection are correct, they would be perfectly entitled

[2] [1896] P. 75, 118.

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" to and should include in the bill just as much as their own " profit costs.

" I therefore overrule this objection."

The plaintiff appealed.

The summons first came on for hearing on June 21, 1955, and was adjourned to enable the Law Society to instruct counsel if thought fit.

G. C. Raffety for the plaintiff.

A. L. Figgis for the Law Society, argued in support of the appeal.

Case cited in argument but not referred to in the judgment: *In re Lavey.*[3]

WYNN-PARRY J. This is a summons to review a taxation directed by an order made by Upjohn J. on May 10, 1954. It is a summons which raises a question of some importance.

The action was between the plaintiff, who was the father of the defendant, and the defendant, by which the plaintiff desired primarily to have a certain property conveyed to him by the daughter on the basis that he was the beneficial owner. In the event the matter was compromised at the hearing and a consent order in the Lord Tomlin form was made. That order recited that the plaintiff had been granted certain certificates under the provisions of the Legal Aid and Advice Act, 1949, which, of course, were necessary to lead up to the particular form of order for taxation. It recited an admission by the defendant daughter that she held the property in question on trust for the plaintiff, and then followed the usual recital: " And the plaintiff and the " defendant by their counsel stating that they have agreed to " the terms set forth in the schedule hereto and consenting to " this order." Then followed the order for taxation: " This " court doth order that it be referred to the Taxing Master to " tax as between solicitor and client in accordance with the " provisions of the Third Schedule to the Legal Aid and Advice " Act, 1949, the costs to which that Act applies incurred on " behalf of the plaintiff and the defendant respectively." It would be impossible to conceive of an order for taxation under that Act being framed in wider terms. The order then directed in the usual way that all further proceedings should be stayed except for the purpose of giving effect to the agreed terms, and liberty to apply was reserved.

The schedule containing the terms provided that the defendant would convey to the plaintiff the property in question subject to an existing mortgage and, should it be necessary, for an indemnity by the plaintiff to the defendant against future liability under the mortgage. With paragraph 2 I need not concern myself. Paragraph 3 is most important. It reads " The documents necessary

[3] [1920] 3 K.B. 625.

" to carry out the foregoing terms shall be in such form as " counsel for the plaintiff and for the defendant shall agree and " in default of agreement as the judge shall direct."

In due course the matter went to taxation. The solicitors for the plaintiff brought in their bill, and in the second of the two bills under the heading " Part II. Costs of conveyancing work " under the Order " they sought to have allowed a total sum of twelve guineas for the costs incurred in giving effect to paragraph 3 in the schedule to the order, which paragraph I have just read.

The master disallowed the whole of that item, expressing no opinion as regards the question of quantum. He based his refusal on the ground that " costs of conveyancing work as such " are not covered by the Legal Aid and Advice Act, 1949, as at " present operated and the costs under objection are not there- " fore recoverable under such Act unless they come within the " provisions of Schedule 1 of Part I (1) (*c*) thereof, viz., ' Pro- " ' ceedings in the Supreme Court of Judicature.' " He then went on to say: " It has always been the practice of the Taxing " Office that the costs of working out an order under any basis " of taxation are not allowed unless otherwise so ordered by the " trial judge or unless specifically referred to in and forming part " of the terms of settlement as not being within the terms of the " order." He referred to *Lancaster* v. *Lancaster*,[1] to which I shall refer later.

Section 1 of the Legal Aid and Advice Act, 1949, provides by subsection (1): " This and the three next following sections " provide for, and (save as hereinafter mentioned) relate only to, " legal aid in connection with proceedings before courts and " tribunals in England and Wales, not being proceedings in " which free legal aid may be given under the enactments " amended by Part II of this Act." Subsection (2) states: " Unless and until regulations otherwise provide, the proceedings " in connection with which legal aid may be given are any pro- " ceedings of a description mentioned in Part I of the First " Schedule to this Act, except proceedings mentioned in Part II " of that Schedule." If the matter simply rested on section 1 (2) and the First Schedule there might be something to be said, apart from a consideration of the authorities to which I shall later refer, for the view taken by the master. But it is essential in considering the scope of taxation under this Act to have regard to the language of subsection (5) of the same section: " Legal aid " shall consist of representation, on the terms provided for by " this Part of this Act, by a solicitor and so far as necessary by " counsel (including all such assistance as is usually given by " solicitor or counsel in the steps preliminary or incidental to any " proceedings or in arriving at or giving effect to a compromise " to avoid or bring to an end any proceedings)." That is clearly

[1] [1896] P. 75, 118.

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a definition section, and it states in perfectly clear language the matters in regard to which a legally assisted person is entitled to have representation by a solicitor and, if necessary, counsel.

I must also refer to section 2 (2), which provides: "Where "a person receives legal aid in connection with any proceedings— ". . . (*b*) his solicitor and counsel shall not take any payment "in respect of the legal aid except such payment as is directed "by this Part of this Act to be made out of the legal aid fund;". It will at once become apparent from a consideration of those words why this is obviously a case of some importance. Subsection (2) of section 1 by reference to the First Schedule indicates the proceedings in connexion with which legal aid may be given, whereas subsection (5) shows the extent or scope of the aid when it is afforded. Upon the language of subsection (5), and without going outside it, it is perfectly clear that a legally aided person is entitled to representation by a solicitor, inter alia, for the purpose of giving effect to a compromise to bring to an end any proceedings. That at once suggests that the intention is that legal aid shall not necessarily end as soon as judgment is given in proceedings. It also clearly suggests that, although a person by his legal aid certificate is given legal aid for the purpose of bringing proceedings for the specified purpose—in this case for the recovery of the property in question—that legal aid must cover representation for the purpose of bringing those proceedings to an end, not only by a judgment after a hostile hearing, but also where the proceedings are brought to an end, doubtless with considerable saving of costs, by a compromise arrived at between the parties which from its very nature, as is the case in practically every Lord Tomlin order, involves a working out of the terms in order to give effect to the agreement. In the present case it was clearly necessary that a certain amount of conveyancing should be done in order to work out the agreement between the parties, which agreement is scheduled to the order. That appears, as I have said, from paragraph 2 of the terms in the schedule.

Looking for the moment no further than the language of the Legal Aid and Advice Act, 1949, and the form of the order in this particular case, I should myself have come to the conclusion that the costs of conveyancing work under the order should be allowed in the taxation subject to any question of quantum. But as the taxing master has referred to and relied on *Lancaster* v. *Lancaster*,[2] it is, I think, necessary that I should consider one or two of the authorities.

Lancaster v. *Lancaster*[2] was decided in 1896, that is, some 21 years after *Krehl* v. *Park*.[3] In that case, in the Court of Appeal, James L.J. said: "I am of opinion that the counsel for "the respondents, the plaintiffs in the suit, are well founded in "saying that, according to the well-established practice of this "court, the costs of suit when given to a party are not confined

[2] [1896] P. 75; 118 (C.A.).

[3] (1875) 10 Ch.App. 334, 337.

" to the costs of suit up to the hearing, but include the costs of " all accounts and inquiries requisite for carrying out the decree: " nor are these latter costs costs for subsequent consideration. " That is the general rule, and it is very important that that " general rule should not be interfered with." The action in that case was an action for specific performance in which type of action it frequently is necessary that accounts and inquiries should be taken and made. I can see no difference in principle between such matters and the costs of a conveyance necessary to carry out the order even though it be a consent order in the Lord Tomlin form. In that same case Mellish L.J. said [4] this in a passage which has been quoted with approval from time to time subsequently: " The rule which appears to be established " is, that where costs of suit are given generally by the decree " at the hearing, the subsequent costs of working out the direc- " tions of the decree will be included."

As I read the judgments in *Lancaster* v. *Lancaster*,[5] that of the President and those of the Court of Appeal, the matter was decided on the basis that the costs in question could not be regarded as costs properly incurred in working out the order. Upon that basis there can be no conflict between *Lancaster* v. *Lancaster* [5] and the earlier case of *Krehl* v. *Park*.[6] It is quite impossible to imagine that such learned judges as considered the problem in *Lancaster* v. *Lancaster* [5] did not have clearly in their minds the rule as stated by the Court of Appeal in *Krehl* v. *Park*.[6] They were dealing with a very narrow and particular problem. All that they did, as I think, was to say that in that case, applying the general rule, the costs could not be allowed because they could not be regarded as costs of suit or costs of working out the order.

I return to the order and repeat what I have already said, that it would be difficult to find an order for taxation under the Legal Aid and Advice Act, 1949, in wider terms. I construe this order without limitation as being an order specifically designed to include every item of costs to which the Legal Aid and Advice Act, 1949, could apply, and in view of the fact that paragraph 3 of the schedule directs documents to be prepared for the purpose of carrying out the terms, in my view this case falls fairly and squarely within section 1 (5) of the Legal Aid and Advice Act, 1949, as being costs necessarily incurred in arriving at a compromise to bring an end to proceedings.

Therefore, on the question of principle I am against the decision of the master. In my view costs proper as regards quantum should be allowed to the plaintiff for the conveyancing

[4] Ibid. 339.
[5] [1896] P. 75, 118.
[6] 10 Ch.App. 334.

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work for giving effect to paragraph 3 of the terms in the schedule to the order.

Appeal allowed.

Solicitors: *Bridges, Sawtell & Co. for Robert Breach & Co., Hove; T. G. Lund.*

J. A. G.

[CHANCERY DIVISION.]

1955
July 28, 29.

Harman J.

* *In re* NANWA GOLD MINES LD. BALLANTYNE *v.* NANWA GOLD MINES LD.

[1953 N. No. 1735.]

Company—Capital—Increase—Invitation to apply for shares—Return of subscribers' money—"Should . . . conditions not be fulfilled . . . "moneys will be refunded and meanwhile . . . retained in a separate "account"—Conditions not fulfilled and scheme abandoned—Money subscribed not part of company's general assets—Subscribers entitled to return of their money—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 51.

The application form sent out by a company when inviting subscriptions for a further issue of capital contained a statement that if certain conditions were not fulfilled "application moneys will be "refunded and meanwhile will be retained in a separate account." A circular letter sent out with the form was to the same effect. The response to the application was inadequate, and shortly after the list was closed a debenture holders' action was started and a receiver appointed. The question to be determined on the summons was whether the money subscribed which was held in a separate account formed part of the general assets of the company, so that the subscribers ranked with the other creditors of the company, or whether it was returnable to the subscribers. It was conceded that the mere fact that money was kept in a separate account did not of itself create a trust:—

Held, that, on a true construction of the application form, and in the circumstances, the moneys were returnable to the subscribers, and did not form part of the general assets of the company.

Moseley v. *Cressey's Co.* (1865) L.R. 1 Eq. 405 distinguished.

Semble, that having regard to section 51 (3) of the Companies Act, 1948, even if there were no promise to keep the money in a separate account, the subscribers would similarly be entitled to the return of their money.

ADJOURNED SUMMONS.

This summons was taken out by the plaintiff in a debenture holders' action to enable the master to certify, in answer to the inquiry under an order of December 8, 1953, of what the property comprised in and charged by the debentures in question consisted and in whom the same was vested. The subject-matter of the present application was a sum of £3,472 18s. now standing to the credit of a joint account with Barclays Bank Ld. in the joint

names of the company, Nanwa Gold Mines Ld., and Messrs. Buckley Hall Devin & Co., their registrars. The question was whether this money ought to be treated as part of the general assets of the company, and could be validly claimed by the debenture holders' receiver, or whether it was the property of those who paid it to the company and ought to be repaid to them.

Nanwa Gold Mines Ld. was an old-established company, which by 1953 had come to the end of its resources, and had, for the time being, abandoned its workings. It still had, however, considerable concessions on the Gold Coast which appeared to promise a return, and the company's directors wished to make a last effort to turn those assets to profitable account. During June or July, 1953, the directors realized that the greater part of the company's capital had been lost, and proposed therefore to write it down drastically; but they also concluded that they would need some fresh money to be able to embark again on the operation of extracting gold. Consequently, on July 28, 1953, three documents were sent out to the shareholders, one a notice for a reduction of capital, combined with the usual increase to follow immediately upon it, the second a circular letter containing the views of the board, and the third a form of application for new shares. The circular letter signed by the chairman explained to the shareholders that the company proposed to resume operation and must have money for that purpose, and went on: "We have therefore "decided to resume surface mining as soon as possible and pro- "pose to raise the £50,000 needed by issuing 1,000,000 shares of "1s. each at par. I and my co-directors feel that we would not be "justified in proceeding with our proposals unless we have that "sum behind us and everything depends upon our being able to "raise it at once. We must warn you therefore that unless this "issue is fully supported we shall be unable to prevent the return "of the mine to the jungle. A form of application for shares is "enclosed. You will note that your application is conditional "upon the passing of the resolutions at the extraordinary general "meeting and the sanction of the court to the scheme because "such resolutions do not take effect legally until approved by "the court. . . . We have been advised that the likelihood "of the court's refusing to sanction the reduction . . . is very "slight. . . . Should the above conditions not be satisfied your "money will, of course, be refunded."

The form of application which shareholders were urged to fill up accompanied this letter. On the front of the form were these words: "The accompanying circular letter of the chairman should "be read in conjunction with this application form. It will be "noted that this issue is conditional on the passing of the resolu- "tions at the extraordinary general meeting of the company to be "held on August 20, 1953, and the subsequent sanction of the "court to the reduction of the company's capital. Should either "of these conditions not be fulfilled, application moneys will be

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" refunded and meanwhile will be retained in a separate account. " As soon as the above conditions are satisfied, the shares now " offered will be allotted and issued and will then be converted " into stock . . . and will rank pari passu in all respects with the " stock now issued of the company. . . . Application will be made " to the council of the Stock Exchange, London, for permission " to deal in and for quotation for the stock, into which the shares " now being offered will be converted." On the back was a form of application to be filled in by a shareholder, who had to send with it payment in full for the shares which he desired to obtain.

There was a poor answer to that proposal, and nothing approaching a million shares were applied for, although the lists were held open until September 21, 1953, a month longer than had been originally advertised. Some 91 persons did apply, however, and the money which they sent with their application forms was the subject-matter of the present dispute.

Before they sent out their circular and form of application the board took the precaution of consulting the council of the Stock Exchange about the issue, and were advised by that body that the money sent with the forms of application should be put into an account in two names: i.e., that not only should it be put into " a separate account," but that the separate account should have a name attached to it other than that of the company.

The writ in the debenture holders' action was issued on September 17, 1953, and the receiver was appointed on September 23, 1953. The scheme was formally abandoned by resolution of the board of January 7, 1954, because it was clear that nothing in the nature of £50,000 had been forthcoming, and having regard to the appointment of the receiver the scheme could not be carried out. Permission to deal was never obtained from the Stock Exchange, and the conditions of the offer were not fulfilled and, in accordance with the express terms of the application, the moneys were refundable. There was no doubt that the subscribers were entitled to a refund if they could obtain one, and the only question was whether those persons were entitled to a refund out of this separate fund, or whether they were mere creditors of the company. Every person who sent money to the company on this offer received a document in this form: " We have received with " thanks your cheque for the sum of £——, together with the " terms of the form of application and the circular to members " and note holders dated July 28, 1952." (For " 1952 " one should read " 1953 " in this print.)

Arthur Bagnall for the plaintiff, representing the debenture holders.

R. A. K. Wright for the company.

J. G. Monroe for an applicant to the share issue.

Cases cited in argument not referred to in the judgment: *In re Hallett's Estate* *; *In re Watson* †; *In re Drucker.*‡

HARMAN J., having stated the facts: The point is a short one. Is the relationship of the subscribers to the company that of creditor and debtor, or had they a lien on this fund or an equity against it so as to be able to attach it for the payment of their debt without allowing other creditors of the company to share with them? That depends on whether the relationship be that of debtor and creditor or of bailor and bailee; and the question turns, in effect, on the words in the form of application, "and meanwhile "will be retained in a separate account."

It was argued for the debenture holders that there was not enough here to create a bailment and no earmark on this account. If that be so, the application form is a very deceptive document; and it occurred to me in the course of the argument that if the persons who sent their money on the faith of this document had no lien on the separate account there was something very wrong with the law on this subject. Mr. Bagnall, for the debenture holders, contended with force that there was no lien, and that, however startling it might be, there was nothing to put these particular creditors ahead of any other creditors of the company: they were all people who had trusted the company and given them credit, and they must all share alike. He relied for that proposition first on *Moseley* v. *Cressey's Co.*[1] In that case the promoters of a company invited applications for shares by means of a prospectus which stated that deposits would be returned if no allotment of shares was made. Those words appear in the present case: "Should either of these conditions not be fulfilled, application "moneys will be refunded." It was held by Sir William Page Wood that such a ". . . statement did not bind moneys, consisting "mainly of these deposits, standing in a bank to the credit of the "company, with a trust or lien in favour of the depositors, as "against creditors of the company. . . ." He said[2]: "The plaintiffs say not only that these promoters are liable as for money "had and received, but that they have no authority to deal with it "otherwise than upon the trust by which it was to be returned "to the depositors. But if the object had been to create a lien "of this kind, the obvious way of doing so would have been to "have said in the prospectus that there would be a lien on the "deposits until the company was established, or that it was to "be set apart as a trust fund in the names of trustees, to be "returned in the event of the company not being established. "Nothing of that kind was done; nor was that the contract. The "contract was—'You are to pay so much per share when you "'apply for shares, and your deposits will be returned if no allot-"'ment is made'—not that the actual thing so deposited was to

* (1880) 13 Ch.D. 696.
† (1912) 107 L.T. 783.
‡ [1912] 2 K.B. 237.

[1] (1865) L.R. 1 Eq. 405.
[2] Ibid. 409, 410.

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"be paid back; for payment to the company's bankers to the "account of the company made the moneys ipso facto part of "the company's assets." Mr. Bagnall said that this was a payment to the company, and it was a simple payment to them and to no one else, and that made it part of the company's assets ipso facto.

A little later the Vice-Chancellor said[2]: "But, says Mr. "Karslake"—he was the counsel arguing—"these moneys were "not the moneys of the company until the plaintiffs got their "shares. But that is not so; they were not retained by the "promoters, they were paid in to the credit of the company at "their bankers. What was intended to have been done seems to "have been done; and there was no trust created, it was merely "a debt."

If, therefore, the words had been merely a promise to refund, that case would (supposing it to be right) have been an authority that no lien is created by such a transaction. But here I have not only those words, but the promise to retain the money "in a separate acount." What is the point of making such a promise? It seems to me quite clearly to be a representation that the money will be set apart; not in the company's ordinary coffers, but in a separate account. It is not a promise, of course, to put it into joint names, although that in fact was done. There is no evidence that any of the subscribers knew that there was any arrangement to put it into joint names, all they knew was that there was a promise to pay it into a separate account; and I cannot but think that the whole object of making such a promise was to indicate that it would be kept apart and separate, not mixed with the company's moneys, until the board saw whether the conditions were fulfilled. It seems to me that the promise to keep the money "in a separate account" distinguishes the present from *Moseley's* case.[3]

It is conceded that the mere fact that the money was placed in a separate account, so that one could point to it and say: "There "it is," would not of itself ex post facto create a trust. That appears from *Lister & Co.* v. *Stubbs*,[4] which shows that because A can point to some money in the hands of B and say: "That "is where my money went to," it does not follow that the position between them is other than that of debtor and creditor. The proceedings there were by way of a motion for interim relief in order to get an injunction to protect the investments in question pending the trial of the action, and that could only be done if the plaintiffs (as the court said) had an equity and were not merely creditors. It was held that they were merely creditors. But here it is not the fact of the money being in the joint account which is relied on, but the promise made in the document on the faith of which the application was made.

[2] L.R. 1 Eq. 405, 409, 410.
[3] L.R. 1 Eq. 405.
[4] (1890) 45 Ch.D. 1; 6 T.L.R. 317.

There appears to have been one case, *Mears* v. *Western Canada Pulp and Paper Co. Ld.*,[5] in which it was assumed that money paid on a void allotment was impressed with a trust, and could be the subject-matter of an interim injunction. That case does not help me because the point was obviously not argued, and nobody seems to have troubled about it one way or the other. I do not think that it is an authority for the proposition which Mr. Monroe was at pains to establish because nobody argued it.

There are some strangely conflicting observations on this subject in the books. Stiebel (3rd ed., p. 166) refers to it, and the author makes some rather ex cathedra observations, which he supports by *Stewart* v. *Austin* [6] which, with every respect to that most learned and painstaking author, does not really support his proposition. Palmer's Company Precedents (16th ed., Part I, pp. 11 and 144) mentions the matter, but a cursory reading of those passages makes them appear to have been the work of two separate authors who held diametrically opposite views on the question. I leave it there, it does not help, because one cancels the other out.

It is not, in my judgment, anything more than a question of construing the application form. But I ought not to leave the matter without mentioning the statutory provision which covers this kind of ground. Section 51 of the Companies Act, 1948, is (according to the side-note to the section of the statute) concerned with "Allotment of shares and debentures to be dealt in on stock "exchange"; and it refers to statements in prospectuses about applications for leave to deal with shares proposed to be allotted, and provides that the company shall repay the money where permission is refused. Subsection (3) provides that where money is sent in on a provisional application: "All money received as "aforesaid shall be kept in a separate bank account so long "as the company may become liable to repay it under the last "foregoing subsection; and, if default is made in complying with "this subsection, the company and every officer of the company "who is in default shall be liable to a fine not exceeding five "hundred pounds." That appears to be an attempt to erect, so to speak, by statute a kind of trust for applicants in a case of this sort. It is irrelevant here, because in this case the directors promised to do this very thing. No doubt that was only a compliance with the statute; but they did promise to do so, and I think that their promise is of contractual effect, so I need not consider whether, if there was no promise but only the statutory obligation, the position would be the same. I incline to think it would be so, and that the object of section 51 (3) was to provide protection for persons who pay money on the faith of promises of this kind.

I need not consider further section 47 of the Companies Act, 1948, which is the old minimum subscription section, that merely

[5] [1905] 2 Ch. 353; 21 T.L.R. 661. [6] (1866) L.R. 3 Eq. 299.

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provides for repayment if the minimum subscription is not reached. It was in connexion with the predecessor of that section that *Mear's* case [7] was decided; but about that I need say no more.

I am accordingly of opinion that the moneys in question are repayable to the persons who subscribed in answer to the circular dated July 28, 1953, and do not form part of the general assets of the company.

Declaration accordingly.

Solicitors: *Ballantynes; Frere, Cholmeley & Nicholsons: Corbin, Greener & Cook.*

I. G. R. M.

[7] [1905] 2 Ch. 353.

[PROBATE, ETC., DIVISION.]

1955
July 13.

Wallington J.

* O'DONOVAN *v.* O'DONOVAN.

Contempt of Court—Committal order—Infant—Breach of undertaking to return child to jurisdiction—Party out of jurisdiction—Summons not served—Committal order made.
Infant—Custody.

A committal order may be made against a party who is in contempt of court although he is out of the jurisdiction and he has not been served with notice.

EX PARTE APPLICATION for an order for committal.

On March 12, 1953, the mother obtained a decree nisi dissolving her marriage to the father which decree was subsequently made absolute. By an order of December 7, 1953, the custody of the two younger children of the marriage was granted to the mother and that of the eldest child M., a boy, to the father. The father undertook to send the boy to a suitable boarding school and to allow the mother reasonable access to him during the school holidays.

On medical advice the sending of M. to a boarding school was deferred and in June, 1954, the father obtained an order of the court permitting him to take the child on a three-months' visit to the United States of America, on his (the father's) undertaking to return him to school in England in the autumn. He failed to return the child.

The mother applied to the court for an order that the father should be committed to prison for contempt of court. His whereabouts were not known and it was not therefore possible to serve him with notice of the proceedings.

K. Bruce Campbell (*J. B. Gardner* with him) for the mother.

The father did not appear and was not represented.

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[WALLINGTON J. Have I any power to make a committal order against a man who is apparently outside the jurisdiction and who has not been served with notice of the application? What authority is there on the matter?]

K. Bruce Campbell. In *Favard* v. *Favard* [1] it was held that an order for a writ of attachment might be made ex parte. In that case the father, who had not been given the custody of the child, removed him to Scotland contrary to the order of the court. It had not been possible to serve the father in Scotland. The earlier cases of *Hyde* v. *Hyde* [2] and *In re Evans* [3] were referred to and the latter was followed. *In re Evans* was an administration action in which it was held that the defendant might be attached for disobeying an order of the court although he had not been personally served with the notice of motion for leave to issue the writ, the filing of the notice on the court file being sufficient according to the practice of the Court of Chancery.

Persons breaking undertakings such as that given in the present case frequently remain out of the jurisdiction. If no order for committal may issue, there being no possibility of service out of the jurisdiction, undertakings of this nature are rendered largely nugatory.

WALLINGTON J. Very well. You may have your order.

Solicitors: *Pothecary & Barratt.*

Note.—A similar order against the father of a child who had failed to hand over the child as ordered and had disappeared was made by Barnard J. in *Phillips* v. *Phillips* (Unreported, May 23, 1955), after his Lordship had been referred to *Favard* v. *Favard.*[1] The father was subsequently found in the jurisdiction and committed to prison.

E. J.

[1] (1896) 75 L.T. 664.
[2] (1888) 13 P.D. 166; 4 T.L.R. 586.
[3] [1893] 1 Ch. 252; 9 T.L.R. 108.

[CHANCERY DIVISION.]

* SANDERSON (INSPECTOR OF TAXES) *v.* DURBIDGE.

1955
July 26.

WYNN-PARRY J.

Revenue—Income Tax—Expenses—Meals—Moneys paid by local authority to local government officer for evening meal when working extra hours—Whether expenditure of money on evening meal incurred "wholly, exclusively and necessarily" in performance of duties of office or employment—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *rr.* 5, 9.

The respondent was a senior executive officer employed by Southgate Borough Council who looked after some of the council's

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committees. He had on occasion to work extra hours, involving feeding at a restaurant, in respect of which he received a cash meals allowance of 2s. 6d. for tea or 6s. for dinner. The council did not provide refreshments.

An assessment of £10 7s. to income tax in respect of an allowance for meals was made on the respondent for the year 1952–53, and an assessment of £14 3s. 6d. in respect of such an allowance for the year 1953–54.

The commissioners decided that the allowances were taxable but that, to the extent that the expenditure at a restaurant was greater than the cost which would normally have been incurred by the respondent for the same meals, there should be a deduction under the Income Tax Act, 1952, Sch. 9, r. 7. Accordingly, they reduced the assessments on him in respect of allowances by £5 for the year 1952–53 and by £7 for the year 1953–54. The Crown appealed:—

Held, allowing the appeal:

(1) That the respondent could not be said, when going out during the lunch hour to have lunch, to be engaged in the performance of the duties of his office so that he could claim in respect of the cost to him of any meal which he might eat;

(2) That there was no difference in principle between the nature of the interval for lunch and the nature of that for tea or dinner.

Ricketts v. *Colquhoun* [1926] A.C. 1; 42 T.L.R. 66; 10 T.C. 118 followed.

Nolder v. *Walters* (1930) 46 T.L.R. 397; 15 T.C. 380 and *Lomax* v. *Newton* [1953] 1 W.L.R. 1123; [1953] 2 All E.R. 801; 34 T.C. 558 distinguished.

APPEAL against decision of the General Commissioners for the purposes of the Income Tax for the Hundred of Edmonton.

The inspector of taxes appealed against a decision of the commissioners exempting from tax a part of the moneys paid to a local government officer for an evening meal when he worked extra hours. The officer (hereinafter called "the respondent") was employed by Southgate Borough Council (hereinafter called "the council") and his duties included evening attendances at council committee meetings. When he so worked in the evenings he had to buy either tea or dinner at a restaurant. No refreshments were provided by the council. He could claim from the council an allowance at a flat rate of 2s. 6d. for tea or 6s. for dinner, but not both; and he could claim the allowance for dinner only when he worked after 8.30 at night, and had actually to spend money before the allowance would be made, the council requiring a certificate of expenditure.

In the assessment to income tax made on the respondent under the Income Tax Act, 1952, for the year 1952–53 there was included an allowance for meals of £10 7s. and in that for the year 1953–54 one of £14 3s. 6d.

At a meeting of the commissioners held on July 28, 1954, the respondent appealed against both assessments. He contended that the allowances were not taxable or, alternatively, that, if they were, the actual expenditure on meals should be treated as a proper deduction under the Income Tax Act, 1952, Sch. 9, r. 7. The inspector of taxes contended that the allowances were taxable

as they were a perquisite or profit of the respondent's office or employment within the meaning of Schedule 9, r. 1, and taxable under Schedule E of the Act accordingly; and that the payment for meals could not be regarded as a proper deduction as it was not an expense incurred "wholly, exclusively and necessarily" in the performance of the respondent's duties within the meaning of rule 7.

It was agreed that the office or employment held by the respondent fell within rule 5 of the rules applicable to Schedule E as set out in Schedule 9.[1]

The commissioners found that the allowances made to the respondent were taxable but that, to the extent that the expenditure at a restaurant was greater than the cost which would normally be incurred by the respondent for the same meals, there should be a deduction in accordance with Schedule 9, r. 7. Accordingly, they reduced the assessments in respect of the allowances by £5 for the first year and £7 for the second.

The Crown appealed.

F. N. Bucher Q.C. and *Sir Reginald Hills* for the Crown.
Maurice Lyell Q.C. and *H. H. Monroe* for the respondent.

Cases cited in argument but not referred to in the judgment: *Cook* v. *Knott*[2]; *Machon* v. *McLoughlin*[3]; *Bentleys, Stokes and Lowless* v. *Beeson*[4]; *Great Western Railway Co.* v. *Bater*.[5]

WYNN-PARRY J. This is an appeal from the General Commissioners for the Hundred of Edmonton who found in the first place that the allowances made to the respondent, as referred to in the case stated, were taxable, with which conclusion the respondent does not quarrel. The commissioners went on, however, to say that to the extent that the expenditure at a restaurant was greater than the cost which would normally be incurred by the respondent for the same meals—those are, tea and dinner—there should be a deduction under the Income Tax Act, 1952, Sch. 9, r. 7; and they did in fact reduce the assessments. It is with that finding that the Revenue quarrel.

[1] Income Tax Act, 1952, Sch. 9, rules applicable to Schedule E, r. 5: "The tax under paragraph 1 of "Schedule E shall be paid in respect "of all the public offices and employ- "ments of profit within the United "Kingdom or by the officers herein- "after respectively described, namely "—. . . (*j*) offices or employments of "profit under any public corporation "or local authority. . . ."

R. 7: "If the holder of an office or "employment of profit is necessarily "obliged to incur and defray out of "the emoluments thereof the expenses "of travelling in the performance of "the duties of the office or employ- "ment, or of keeping and maintaining "a horse to enable him to perform the "same, or otherwise to expend money "wholly, exclusively and necessarily "in the performance of the said duties, "there may be deducted from the "emoluments to be assessed the ex- "penses so necessarily incurred and "defrayed."

[2] (1887) 4 T.L.R. 164; 2 T.C. 246.

[3] (1926) 11 T.C. 83.

[4] [1952] 1 T.L.R. 1529; [1952] 2 All E.R. 82; 33 T.C. 491.

[5] [1922] 2 A.C. 1; 38 T.L.R. 448; 8 T.C. 231.

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It is agreed that the office or employment held by the respondent falls within rule 5 of the rules applicable to Schedule E as set out in Schedule 9 to the Income Tax Act, 1952, sub-paragraph (*j*) of which reads: "Offices or employments of profit under any "public corporation or local authority." It is clear that the respondent is employed by a local authority.

The relevant rule is in these terms: [His Lordship read rule 7 and continued:] The courts from time to time have commented on the strictness and the limited nature of that rule in the various forms in which it has appeared in various taxing Acts for over a century. I do not think that I can do better with regard to this than quote the observations of Vaisey J. in the recent case of *Lomax* v. *Newton*.[1] At the opening of his judgment he says: "The respondent to this appeal on the part of the Crown is a "Major Newton, who was a Territorial officer, second-in-command "of the Territorial battalion of the York and Lancashire Regiment "stationed at Sheffield. He was represented at a hearing before "the General Commissioners for Income Tax by his Commanding "Officer, a Lieutenant-Colonel Webster. The claim of the respon-"dents was that certain items of expenditure had been incurred "by him, in the words of the statute 'wholly, exclusively, and "'necessarily in the performance of' his duties as an officer of "the said battalion, so as to bring him in regard to that expen-"diture within the provisions of rule 9 of Schedule E of the "Income Tax Act, 1918." Rule 9 was the rule then in force corresponding to rule 7 of the Act of 1952 which I have already read. "Before coming to the particular items, I would observe "that the provisions of that Rule are notoriously rigid, narrow "and restricted in their operation. In order to satisfy the terms "of the Rule it must be shown that the expenditure incurred was "not only necessarily but wholly and exclusively incurred in the "performance of the relevant official duties. And it is certainly "not enough merely to assert that a particular payment satisfies "the requirements of the Rule, without specifying the detailed "facts upon which the finding is based. An expenditure may be "'necessary' for the holder of an office without being necessary "to him in the performance of the duties of that office; it may "be necessary in the performance of those duties without being "exclusively referable to those duties; it may perhaps be both "necessarily and exclusively, but still not wholly so referable. "The words are indeed stringent and exacting; compliance with "each and every one of them is obligatory if the benefit of the "rule is to be claimed successfully. They are, to my mind, "deceptive words in the sense that when examined they are "found to come to nearly nothing at all." With the whole of that paragraph, and particularly the last sentence, I find myself in respectful agreement.

A number of authorities were referred to, not all of which I

[1] [1953] 1 W.L.R. 1123; [1953] 2 All E.R. 801; 34 T.C. 558, 561.

propose to consider. I think it right, however, to mention that this case on its facts cannot be said to be completely covered by any decided case, though I think, on consideration, that it is in the end clear which line of authority should cover it.

On the one side is the line of cases illustrated perhaps best by *Ricketts* v. *Colquhoun*,[2] the well-known case about the Recorder of Portsmouth. I do not propose to refer to the facts therein. The rule then in force, corresponding to rule 7 of Schedule 9 to the Income Tax Act, 1952, fell to be considered. In the course of the passage of the case through the various courts, observations were made by a number of their Lordships who had to consider it, emphasizing in different words, but in words of the same import as Vaisey J. used in *Lomax* v. *Newton*,[3] in the passage which I have quoted. For instance, in the course of his judgment in the Court of Appeal Pollock M.R. said[4]: "It is very easy by "a general description of the facts to suppose that a hard case "has arisen, but it is the duty of this court to adhere closely and "accurately to the actual words of rule 9, which are of general "application to all holders of offices which come within its "ambit. At the outset, therefore, you have to find whether "the holder is necessarily obliged to incur and defray expenses "out of his emoluments, and I attach importance to those "words 'necessarily obliged,' because I think they are to "be read as meaning that where an obligation is imposed "upon the holder of the office which ex necessitate of the office "compels him to make outlays it is in those cases, and after "you have fulfilled that condition, that you first begin to consider "what is the possible expenditure which it is possible may be "deducted." In the course of his speech in the House of Lords Lord Blanesburgh, whose speech had been preceded by those of Viscount Cave L.C. and Lord Buckmaster, both of whom animadverted on the strictness of the rule, said[5]: "Undoubtedly its "most striking characteristic is its jealously restricted phraseology, "some of it repeated to heighten its effect. But I am also "struck by this, that, as it seems to me, although undoubtedly "less obtrusively, the language of the rule points to the expenses "with which it is concerned being only those which each and "every occupant of the particular office is necessarily obliged to "incur in the performance of its duties—to expenses imposed "upon each holder ex necessitate of his office, and to such "expenses only. It says: 'If the holder of an office'—the words, "be it observed, are not 'If any holder of an office'—'is obliged "'to incur expenses in the performance of the duties of the "'office'—the duties again are not the duties of his office. In

[2] [1926] A.C. 1; 42 T.L.R. 66; 10 T.C. 118.

[3] [1953] 1 W.L.R. 1123, 1125; [1953] 2 All E.R. 801; 34 T.C. 558, 561.

[4] [1925] 1 K.B. 725, 731; 10 T.C. 118, 124.

[5] [1926] A.C. 1, 7; 10 T.C. 118, 135.

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"other words, the terms employed are strictly, and, I cannot "doubt, purposely, not personal but objective:". In the result, in that case, the recorder was held not to be entitled for income tax purposes to deduct from the emoluments of his office as recorder the cost of travelling in order to attend his quarter sessions, his hotel expenses or the cost of conveyance from his rooms to the court.

Two cases were particularly relied on for the respondent before the General Commissioners as well as in this court. The first is *Nolder* v. *Walters*.[6] The headnote (in Tax Cases) reads as follows: "An aeroplane pilot employed by a limited company "claimed deductions in the assessment of his remuneration to "income tax under Schedule E in respect of various items of "expenditure. Held, that no deduction could be allowed in "respect of (a) the upkeep of a motor-car to convey the pilot "between the aerodrome and his home, or (b) a telephone at "his home; but that a decision of the General Commissioners "allowing a deduction for an excess of actual subsistence expenses "when away from home on duty over subsistence allowance "granted by the company could not be disturbed as being "erroneous in law." The decision was the decision of Rowlatt J., and as always that very learned judge expressed the principle in such clear language that I desire to read a passage from the beginning of his judgment[7]: "It seems to me that, as a matter "of principle the rule to be applied in these cases is clear. What "the statute allows to be deducted are expenses of travelling in "the performance of the duties of the office, or employment, or "money wholly, exclusively, and necessarily expended in the "performance of the duties. As regards the latter branch, it "seems quite clear that what is to be allowed to be deducted are "expenses 'wholly, necessarily', and so on, incurred in doing the "work of the office. 'In the performance of the duties' means "in doing the work of the office, in doing the things which it is "his duty to do while doing the work of the office." Later in his judgment Rowlatt J. came to deal with that part of the case on which in the end he did not disturb the decision of the General Commissioners. He said[8]: "Then I come to the other part of "the case. Some offices and employments do involve the duty "of travelling. It is not a question of getting to the place of "employment, but the employment may be actually to travel, as "in the common case of the commercial traveller, and, as some "people say, in the case of the Member of Parliament. The "duties may actually be to travel, and this gentleman's duty is "to travel; therefore both, I should have thought, under the "general words of the latter part of the section, and, I think, "under the head of travelling expenses, he is allowed the expenses "of so travelling. The Solicitor-General and Mr. Hills very

[6] (1930) 46 T.L.R. 397; 15 T.C. 380.

[7] 15 T.C. 380, 387.

[8] Ibid. 388.

" fairly agree, and I think it always has been agreed, that when " you get a travelling office, so that travelling expenses are " allowed, those travelling expenses do include the extra expense " of living which is put upon a man by having to stay at hotels " and inns, and such places, rather than stay at home. Of course " his board and his lodging in a sense, eating and sleeping, are " the necessities of a human being, whether he has an office, or " whether he has not, and therefore, of course, the cost of his " food and lodging is not wholly and exclusively laid out in the " performance of his duties, but the extra part of it is. The " extra expense of it is, and that is the quite fair way in which " the Revenue look at it." It is against the background of what I have just read that it seems to me the next passage in this judgment has to be regarded. " In this case, therefore, he would " be entitled to charge something for the extra expense which he " is put to by having to go and spend all the day, and often the " night, away from home, because that is part of his duty; and " then it comes to the question really of quantum."

The other case relied on, to which I have already referred, was *Lomax* v. *Newton*,[9] because Vaisey J., having decided that the commissioners were wrong with regard to a number of the expenses which they had allowed, then came to the fifth item, which was claimed in the following words: " ' amounts paid for " ' hotel accommodation at conferences and exercises in excess " ' of detention and ration allowances, Harrogate, 4 days, £3; " ' Buxton, 3 days, £3.' " Vaisey J. said: " This is explained " as being the actual cost to the respondent over and above the " ration and detention allowance granted. No doubt his attend- " ance at these conferences and exercises was compulsory, and " he had no choice, I am told, of the hotels at which he had " to put up, and no doubt the supplementing of the prescribed " allowances is a serious burden on a Territorial officer. The case " of *Nolder* v. *Walters*,[10] comes rather near to this point." The learned judge then read the headnote, and continued: " My chief " difficulty as regards this item is the paucity of the evidence. " The commissioners have, however, found as a fact that this " was expenditure necessarily, exclusively and wholly incurred " in the performance of the respondent's duties, and I cannot say " that they were wrong in bringing this fifth item within the rule. " *Bolam* v. *Barlow*,[11] and *Ricketts* v. *Colquhoun*,[12] may be rather " difficult to reconcile with *Nolder* v. *Walters*,[13] but I decide this " matter on the ground that I must not disturb a finding of fact " which was a possible finding both as to quantum and otherwise. " I am by no means sure that I should myself have decided this " point as the commissioners did. While I feel bound to regard " this item of £6 as having been admitted on a finding of fact " which I cannot disturb, I venture to recommend that, as a

[9] [1953] 1 W.L.R. 1123, 1126; 34 T.C. 558, 563.

[10] 46 T.L.R. 397; 15 T.C. 380.

[11] (1949) 31 T.C. 136.

[12] [1926] A.C. 1.

[13] 46 T.L.R. 397.

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" precedent in other cases, it should be applied with very great " caution." I might add that, as appears from the latter part of Rowlatt J.'s judgment, he in the case of *Nolder* v. *Walters* [14] had a similar hesitation in coming to the decision which he did.

In the judgment in each of those cases there is clearly a suggestion that judges who are invited to follow these cases should only do so with considerable hesitation. I must say I share that view, particularly after the detailed analysis which Mr. Bucher made of the various judgments and opinions in *Ricketts* v. *Colquhoun*.[15]

In the case before me there is a finding in these words: " On " occasions when he "—that is the respondent—" had to work in " the evenings he had to buy either tea or dinner at a restaurant. " No refreshments were provided by the council." Mr. Lyell's proposition, on which he relied, was expressed in these words: " Extra living expenses which the master requires the servant to " incur in the particular place where the duty has to be done are " to be allowed and were allowed in those two cases "—that is *Nolder* v. *Walters* [16] and *Lomax* v. *Newton* [17]—" as wholly, exclu- " sively and necessarily incurred in the duty of the office." To support that proposition he submitted that the proper construction of the finding which I have just read was that the respondent, in his capacity as servant of the council, was under some compulsion to buy either his tea or his dinner at a restaurant. I do not for myself so read the language employed by the commissioners. I quite agree that the first part of the sentence indicates compulsion as regards occasions when he had to work in the evening; that is, on occasions when, by the terms of his employment, he was properly called on by the council as his employers to work in the evenings. But so far as the second part of the sentence is concerned, " he had to buy either tea or dinner at a restaurant," those words signify no more to my mind than that the commissioners were satisfied that, if he desired to have tea or dinner, he would have to purchase such a meal at a local restaurant, the reason being provided by the next following sentence, namely, because " no refreshments were provided by the council."

It is, I think, instructive, as Mr. Bucher suggested, to consider in this regard the view expressed by Warrington L.J. in his dissenting judgment in *Ricketts* v. *Colquhoun*.[18] In the course of his judgment he said: " Now I think, and I understand on this " the Attorney-General agrees, that the words ' necessarily ' and " ' necessary ' in the rule do not mean necessary and necessarily " in the abstract, but they mean necessary in regard to the " circumstances of the individual concerned, the holder of the " office, and in regard to the ordinary usages of mankind at this " time in the history of the world." Later he says: " And, in " the same way, if there are other expenses in this case, such

[14] 46 T.L.R. 397.
[15] [1926] A.C. 1.
[16] 46 T.L.R. 397.
[17] [1953] 1 W.L.R. 1123.
[18] [1925] 1 K.B. 725, 735; 10 T.C. 118, 128.

"as the hotel expenses, if they are necessarily, wholly and "exclusively incurred by reason of the fact that without incurring "them he cannot perform his duties, then it seems to me that a "deduction ought to be allowed in respect of them."

That really, to my mind, is what is sought in this case to be said on behalf of the respondent. I do not think that his case can be put any higher than that language with which many people have had great sympathy, but that view, as is clear, did not find favour either with the majority of the Court of Appeal or with any of their Lordships in the House of Lords. I repeat the words of Lord Blanesburgh: "In other words, the terms employed "are strictly, and, I cannot doubt, purposely, not personal but "objective."

Against that background of authority I turn to consider quite shortly what to my mind is the crucial point in this case. The claim does not concern a period before the respondent commences to perform his duties at the beginning of any day. Nor does it concern a period after he has ceased to perform those duties. It concerns a period in the course of that day, and the question is, when being ordered to remain late he takes advantage of the permission, if that is the correct word, or of his right, if it be a right, given to him to go out and have either tea or dinner, is he during that period engaged in the performance of the duties of his office or employment? I put this example during the course of the argument, and I repeat it in my judgment. It is quite clear (and it could not be argued to the contrary) that the respondent could not be said, when he goes out during what may conveniently be described as the lunch hour to have lunch, to be engaged in the performance of the duties of his office so that he could make any claim in respect of the cost to him of any meal which he might eat during that day. In the case of what I might call a normal day he will go home at the end of the normal working hours, and again he cannot make any claim for any meal which he eats when he gets home. In the case of what I may call the exceptional day, when under the terms of his employment he is required to stay late in order to attend committee meetings, he is obviously engaged in the performance of the duties of his office or employment when he is attending on the committee, just as he can be said to have been engaged in the performance of his duties during the period from after he reports in the morning up to the time he goes out to lunch, and during the period after lunch until he either goes home or, on an exceptional evening, goes out to have tea or dinner. But, having regard to the term of his employment that when required he must stay late, I can see no difference for myself in principle between the nature of the interval for lunch and the interval for tea or the interval for dinner. In my judgment this case is to be found on analysis to be completely covered by the ratio decidendi of the majority of the Court of Appeal and the House of Lords in *Ricketts* v.

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Colquhoun,[19] and it is not a case which can be said to come within the judgment of Rowlatt J. in *Nolder* v. *Walters* [20] or that of Vaisey J. in *Lomax* v. *Newton*.[21] Both those cases, I think, are to be regarded, as the authors of the judgments would each wish them to be regarded, as somewhat in the nature of exceptions.

For these reasons, in my judgment this appeal must succeed.

Appeal allowed.
Case remitted to commissioners to adjust assessments.

Solicitors: *Solicitor of Inland Revenue; Gwylym T. John.*

K. R. A. H.

[19] [1925] 1 K.B. 725; [1926] A.C. 1; 10 T.C. 118.
[20] 46 T.L.R. 397.
[21] [1953] 1 W.L.R. 1123.

[CHANCERY DIVISION.]

1955
Mar. 2;
April 6.

Upjohn J.

* *In re* MANNERS, DECD.
PUBLIC TRUSTEE *v.* MANNERS AND OTHERS.

[1947 M. 951.]

Will—Construction—"Children"—Whether limited to children in esse—Gift of share of residuary estate to "my grandchildren, the "children of my son E. J. M."—Distribution to be "when the "youngest is 21 years of age."

A testator by his will directed that his residuary estate be divided into four equal parts and gave, inter alia, "one equal part "to my grandchildren (the children of my son E. J. M.) to be "administered towards their maintenance and education until the "youngest is 21 years of age and then distributed equally among "them." E. J. M. had three children, one of them born after the testator's death, all of whom were under 21 at the date of this summons. The summons raised, inter alia, the question whether the one-fourth share was held for the two children born during the testator's lifetime, or for them and such children of E. J. M. as might come into existence before the youngest such child for the time being attained the age of 21 years, or for them and all other children of E. J. M. whenever born:—

Held, (1) that the gift to the grandchildren being immediate and vested, there was a clear rule of construction that the class of grandchildren who took was confined to those in esse at the date of the testator's death—a rule to be departed from only where the testator had clearly indicated a contrary intention;

(2) that the direction to distribute the share when the youngest was 21 years of age, and to apply the income for maintenance in the meantime, was not a sufficient indication that the testator intended a larger class to take;

(3) that, accordingly, the one-fourth share was held in trust for the two children born in the testator's lifetime.

Per curiam: If this construction defeated the testator's intention, that was because he had not used language sufficiently explicit to displace the rule, which, as it was so firmly entrenched, it would be a mistake to try to whittle it away and so make it "incoherent "and capricious in its effect": see *per* Evershed M.R. in *In re Bleckly, decd.* [1951] Ch. 740, 751; [1951] 1 T.L.R. 902, 908; [1951] 1 All E.R. 1064, 1070.

Smith v. *Jackson* (1823) 1 L.J.(o.s.)Ch. 231 followed; *Mainwaring* v. *Beevor* (1849) 8 Hare 44; *Armitage* v. *Williams* (1859) 27 Beav. 346; and *In re Pilkington* (1892) 29 L.R.Ir. 370 distinguished.

ADJOURNED SUMMONS.

By his will, dated July 28, 1944, Henry James Manners (hereinafter called "the testator") gave pecuniary legacies, including £5,000 to buy an annuity, and gave the balance of the £5,000 after purchase of the annuity "to my grandchildren, that "is, the children of my son Eric James Manners." He divided his residuary estate into four equal parts and gave ". . . one "part to my grandchildren (the children of my son Eric James "Manners) to be administered towards their maintenance and "education until the youngest is 21 years of age and then "distributed equally among them." At the date of the will the son had two children. On April 5, 1947, the testator died, both of the son's children being then under 21 years of age. On March 25, 1948, both children still being infants, the Public Trustee, as executor and trustee of the will, took out this summons for the determination of questions of construction arising thereon. In October, 1948, the summons came before the court and, in June, 1949, Wynn-Parry J. made declarations on the first three questions which it raised and which are not material hereto.

Question 4 was, whether the class of children of Eric James Manners to whom the sum of £5,000 or the balance thereof remaining after the purchase of the annuity was given consisted of (a) the two children born in the testator's lifetime, or (b) them and any other other children of Eric James Manners who might be born after the date of the summons. Question 5 was, whether one-fourth of the testator's residuary estate was held in trust for (a) the two children born during the testator's lifetime, or (b) for them and such other children of Eric James Manners as might come into existence before the youngest such child for the time being attained the age of 21 years, or (c) for the two children born in the testator's lifetime and all other children of Eric James Manners whenever born: and, in each alternative, whether the interests of the two born in the testator's lifetime and of any other grandchildren in that one-fourth share were or were not contingent on his, her or their attaining the age of 21 years.

Questions 4 and 5 Wynn-Parry J. directed to stand over as long as the two children born during the testator's lifetime were

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both alive and under the age of 21 years, and no other grandchild of the testator had been born: and he directed also that all further proceedings be stayed, except as against the two born during the testator's lifetime.

On September 17, 1950, a third child was born to Eric James Manners. On April 5, 1955, this summons, to which the third child was added as a defendant, came before the court for the determination of questions 4 and 5, the two children born in the testator's lifetime being still under 21 years of age.

D. H. McMullen for the trustees and the unborn children.

Mark Nesbitt for the two children born in the testator's lifetime, by their guardian ad litem, Eric James Manners.

R. W. Vick for the third child.

Cases cited in argument not referred to in the judgment: *In re Chartres* [1]; *Hughes* v. *Hughes*.[2]

Cur. adv. vult.

1955. April 6. UPJOHN J. read the following judgment: The testator, Henry James Manners, died on April 5, 1947. His will, dated July 28, 1944, gave rise to a number of questions of construction, and an originating summons was issued in 1948 to determine those questions. The summons was heard in 1949, when it appeared that two of the questions, Nos. 4 and 5, raised what were then future questions, and they were ordered to stand over generally. The other questions were determined, and proceedings against all the defendants except the third and fourth defendants, Delene Cheryl Manners and Roy Axel Manners, have been stayed. The third and fourth defendants are the children of the testator's son, Eric James Manners, and they were both born in the testator's lifetime. Since his death, Eric James Manners has had further issue, namely, a son, Max Manners, who was born on September 17, 1950, and who has been added by amendment as a defendant to the originating summons. His birth makes it necessary now to determine questions 4 and 5. None of the children has attained the age of 21 years.

By his will the testator made a number of pecuniary bequests, among them one in this form: "I give and bequeath "£5,000 to purchase an annuity of £250 per annum less tax for "Amelia Martha Manners; the balance of this £5,000 after the "purchase of this annuity of £250 per annum less tax I give and "bequeath to my grandchildren, that is the children of my son "Eric James Manners."

Question 4 on the summons asks whether the balance of the sum of £5,000, after providing for the annuity, ought to be held for the defendants Roy Axel Manners and Delene Cheryl Manners,

[1] [1927] 1 Ch. 466. [2] (1807) 14 Ves. 256.

or whether the class includes Max and any other after-born children of Eric James Manners.

It is conceded that, as the gift of the balance is an immediate gift, the class is closed at the death of the testator, and that Max and any later-born children of Eric James Manners are excluded, and I shall declare accordingly.

The testator divided his residue into four equal parts, and his directions with regard to one part give rise to a question of difficulty. The relevant terms of the will are as follows: " . . . " one part to my grandchildren (the children of my son Eric " James Manners) to be administered towards their maintenance " and education until the youngest is 21 years of age and then " distributed equally among them." Question 5 of the summons suggests that there may be three possible ways of considering this gift. The question is in these terms: " 5. Whether on the " true construction of the will of the testator one-fourth share of " his residuary estate is held upon trust (a) for the defendants " Roy Axel Manners and Delene Cheryl Manners, or (b) for the " said defendants and such other children of the defendant Eric " James Manners as may come into existence before the youngest " such child for the time being living attains the age of 21 years, " or (c) for the said defendants and all other children of the " defendant Eric James Manners whenever born. . . ." No one has been found to support alternative (b), and the whole argument has been directed to alternatives (a) and (c). Mr. Nesbitt, for the two older children, submitted in the first place that the testator had provided his own dictionary, as he had used similar words in the gift of the legacy, and he could not have intended a different class to take a share of the residue.

I feel unable to accept this submission. In the gift of residue the testator has attached certain directions as to maintenance and distribution not attached to the legacy, and I cannot assume he necessarily intended the same class to take.

Secondly, Mr. Nesbitt argued that on the true construction of the will there is a clear immediate absolute gift of corpus which must be construed as a gift then in esse at the testator's death. There is a superadded direction postponing the time of payment, and in accordance with well-settled principles in such a case the court will reject the superadded direction which merely postpones the enjoyment of the gift. See *In re Couturier*,[1] where the broad principle laid down by Page Wood V.-C. in *Gosling* v. *Gosling* [2] is cited with approval.

Mr. Nesbitt relied very strongly on *Smith* v. *Jackson*.[3] It was a decision of Sir John Leach V.-C. and, except for the interposition of life interests in residue to the testator's widow and daughter and the survivor, the terms of the relevant codicil were indistinguishable from the present case. Sir John

[1] [1907] 1 Ch. 470.
[2] (1859) John. 265, 272.
[3] (1823) 1 L.J.(o.s.)Ch. 231.

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Leach said [4]: "Here the time of payment is when the youngest "shall attain the age of 21. The testator must mean the "youngest of the children who are to take; and the real question "is whether the gift is confined to great-grandchildren living at "the death of Mary Jackson, or includes all great-grandchildren "at whatever time born." Later on he said [5]: "No person can "doubt, that if the gift in the codicil had stopped at these words "'in trust for all and every the child and children of my said "'granddaughters,' there would have been a clear vested "interest in the children living at the death of the testator's "widow. The codicil, however, does not stop here; it goes on to "direct payment when the youngest shall attain the age of 21. "But if there be a present interest given in general words, it is "not the less a vested interest because the payment is referred "to a future time. This is the general principle; according to "it, there would be a vested interest in all the great-grand-"children living at the death of Mary Jackson; and this general "principle must prevail unless there be found in the instrument, "that is to receive a construction, something declaring a con-"trary intention." He concluded his judgment in these words [6]: "The principle on which I proceed is—that, unless something is "found to control the general principle of construction, the "direct words of bequest in the codicil give a vested interest to "the great-grandchildren living at the death of the survivor of "the widow, Mary Jackson, and the daughter, Mary Smith; and "that to control this vested interest, a clear expression of particu-"lar intention must be found. In this codicil, however, far from "finding anything in the other clauses to control the general "principle, all the directions are in favour of it. Therefore, the "great-grandchildren living at the death of the survivor of the "widow and daughter must be held to have taken a vested "interest at that time; and, consequently, after-born children "are excluded."

That decision is not mentioned in the latest editions of Theobald or Hawkins on Wills, and is treated as inconsistent with the later authorities in a footnote on p. 1680 of the eighth edition of Jarman on Wills. I must refer to those authorities, in none of which was *Smith* v. *Jackson* [7] cited.

The first is *Mainwaring* v. *Beevor*.[8] The relevant gift was that as soon as all and every the testator's grandchildren attained 21 the subject-matter of the gift was to be divided among such grandchildren. Later the testator declared that each of his grandchildren on their severally attaining the age of 21 years should take vested interests under the will. That is sufficient to distinguish that case from this, for the gift to grandchildren was not vested at the testator's death. Wigram V.-C. came to the conclusion that as a matter of construction a child born after

[4] 1 L.J.(o.s.)Ch. 231, 233.
[5] Ibid.
[6] Ibid. 234.
[7] 1 L.J.(o.s.)Ch. 231.
[8] (1849) 8 Hare 44.

the death of the testator was included in the class of those who took, and held that there could be no artificial closing of the class when the youngest in esse at any time attained the age of 21 years so as to exclude after-born grandchildren.

The next case is *Armitage* v. *Williams*.[9] In that case there was a gift to the children of M. A. Williams and R. Williams (who were brother and sister) on their attaining the age of 21 years. At the date of the death of the testator neither M. A. Williams nor R. Williams was married. Lord Romilly M.R. held that the class must remain open to include all the children of M. A. Williams and R. Williams born at any time, and there could be no artificial closing of the class when the first child attained the age of 21 years. That case is clearly distinguishable, for the decision was in accordance with another well-known rule, namely, that where no one in the class is alive at the death of the testator the class remains open, even where the gift is an immediate vested gift.

The last authority is an Irish case, *In re Pilkington*.[10] In that case a testator directed that his residue should accumulate until the children of " A " by his wife " B " should arrive at the age of 21 years each, and then the whole of the proceeds to be divided share and share alike between them. There was a gift over if none of the children attained 21. Porter M.R. held that there was a gift to all the children of " A " and " B," whether born in the lifetime of the testator or not. That conclusion was reached (rightly or wrongly) largely because the testator referred to the children of " A " and " B " and did not include the children by another mother. The Master of the Rolls also held that each child's share should be vested on the child attaining 21 years of age.

The real controversy in that case was whether the rule in *Andrews* v. *Partington*[11] applied. Having reached the conclusion on the true construction of that will that after-born children took, the Master of the Rolls necessarily came to the conclusion, supported by *Mainwaring* v. *Becvor*[12] and *Armitage* v. *Williams*,[13] that the class was to remain open until all the children had attained the age of 21 years, and there could be no closing of the class when the oldest attained the age of 21. That case is, therefore, plainly distinguishable from the present case.

Mr. Vick, for the youngest child, relied on the last three cases which I have mentioned in support of his submission that where there is a gift to be distributed when the youngest child attains 21 years of age, it matters not whether the gift is vested or contingent, for the testator is indicating an intention to benefit all the children, whenever born, and that the ordinary rule closing the class at death is displaced. He further submitted that although this was an immediate gift, yet the possession or

[9] (1859) 27 Beav. 346.
[10] (1892) 29 L.R.Ir. 370.
[11] (1791) 3 Bro.C.C. 401.
[12] 8 Hare 44.
[13] 27 Beav. 346.

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enjoyment is postponed until the youngest child attains 21 years of age. Therefore, although the share of residue vests in those in esse at the death, the class remains open to let in any after-born children. He referred me to *Oppenheim* v. *Henry*.[14] In that case the testator made a gift to his grandchildren to be distributed at the expiration of 20 years from his death. Page Wood V.-C. held that gift vested in those grandchildren living at the death of the testator and those born afterwards but before the period of distribution.

Those cases are not easy to reconcile, but each of them depended essentially upon the true construction of the words used by the testator, and they do not form a sure guide to other cases. The real problem—and I find it a difficult one—is to ascertain the class of grandchildren who take. It is conceded that the gift is immediate and is vested. That, in my judgment, is the cardinal point in this case. In these circumstances, there is a clear rule of construction that the class is confined to those in esse at the date of the death, which is only to be departed from where the testator has clearly indicated a contrary intention. So strong is the rule that it is equally applicable to a gift to "all" the children of "A," although, as has often been pointed out, the apparent intentions of the testator may thereby be defeated. Moreover, although the authorities are conflicting, the better opinion seems to be that in a gift of personalty the rule is equally applicable to a gift to all the children of "A" "begotten and to be begotten." See the authorities discussed in Jarman on Wills, 8th ed., vol. 3, pp. 1690 *et seq.*, and the opinion of Williams J. in his book Williams on Executors and Administrators (1879), 8th ed., p. 1094, quoted with approval in *Dias* v. *De Livera*.[15]

That being the general rule, the question is whether the direction to distribute the share when the youngest is 21 years of age, and to apply the income for maintenance in the meantime, is a sufficient indication that the testator intended a larger class to take. I do not think that it is. As Leach V.-C. pointed out, the testator must mean that the gift is distributable when the youngest of the children who are to take attains the age of 21. The direction as to distribution and maintenance throws no light on the question what class is to take and who are to be maintained in the meantime. Distribution takes place when the youngest taker, whoever he may be, attains 21 years of age. It is quite different from a case where a testator directs his estate to be accumulated for a fixed period, as in *Oppenheim* v. *Henry*.[16] In my judgment, the children to take must be ascertained in accordance with the rule I have mentioned, for there is insufficient context to displace it. Therefore, the gift vests in the two older children; it will be distributable by the

[14] (1853) 10 Hare 441.
[15] (1879) 5 App.Cas. 123, 134.
[16] 10 Hare 441.

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testator's direction when the younger of those attains 21 years of age, and they alone will be maintained thereout in the meantime. However, on the principle stated earlier in this judgment, the elder on attaining 21 years of age can call for his share. That construction may defeat the testator's real intention, but, if it does, that is because, in my judgment, he has failed to use sufficiently explicit language to displace the rule of construction. It is, in my judgment, a mistake to try and whittle away so firmly entrenched a rule and thereby to make it "incoherent and capricious in its effect," to borrow the words of Evershed M.R., when considering the analogous rule in *Andrews* v. *Partington*.[17] See *In re Bleckly*.[18]

I propose to answer the summons in the sense of paragraph 5(a).

Declaration accordingly.

Solicitors: *W. J. Woodhouse & Co.; Drysdale, Lamb & Jackson; Stuart Hunt & Co.*

K. R. A. H.

[17] 3 Bro.C.C. 401.

[18] [1951] Ch. 740, 751; [1951] 1 T.L.R. 902, 908; [1951] 1 All E.R. 1064, 1070.

[COURT OF CRIMINAL APPEAL.]

*REGINA *v.* PHILLIPS.

C. C. A.

1955 *June* 20.

Lord Goddard C.J., Devlin and Donovan JJ.

Road Traffic—Disqualification—Driving while disqualified—Sentence of imprisonment—Period for which disqualification should be imposed—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 7 (4).

Where a court imposes a sentence of imprisonment on an offender for a motoring offence and also disqualifies him from driving, the period of disqualification should exceed that of the imprisonment, because, as disqualification dates from conviction, if the periods are the same, the disqualification will be operative only for the period during which the offender earns remission of his prison sentence.

The appellant pleaded Guilty to three offences of driving while disqualified and was sentenced to 12 months' imprisonment and disqualified from driving for 12 months. On appeal against sentence:—

Held, that, in all the circumstances, the disqualification should be increased to a period of three years.

APPEAL against sentence.

Gordon William Phillips pleaded Guilty at the County of London Sessions, before the deputy chairman, to three offences of driving a motor-car while he was disqualified, contrary to

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section 7 (4) of the Road Traffic Act, 1930. He was sentenced to 12 months' imprisonment and was disqualified from driving for 12 months.

He appealed.

The appellant appeared in person.

The Crown was not represented.

LORD GODDARD C.J. Parliament has treated driving when disqualified as a very serious offence. It is one of the offences in the Road Traffic Act, 1930, for which it is prescribed that a sentence of imprisonment shall be passed unless, having regard to the special circumstances of the case, the court comes to the conclusion that a fine will suffice. That cannot be suggested here. If, for example, a sudden emergency arose owing to a man's wife or child being ill and he wanted to drive a car to fetch a doctor, that might be a special circumstance, but in the ordinary case the court is not given a discretion but must impose imprisonment, as was done in the present case.

The reason why the court gave leave to appeal was that quarter sessions not only sentenced the appellant to 12 months' imprisonment, but also disqualified him for 12 months. That has been done more than once and it is time that courts should realize that it is not the least use disqualifying a man merely for the period during which he is going to be in prison. Of course he will not be able to drive in prison, and to sentence a man to 12 months' and to disqualification for 12 months is only disqualifying him for the very short period of his remission. For instance, if he is sentenced to imprisonment for 12 months, he will get a remission of one-third and it means that the disqualification will only be effective for four months. That is not enough for such a serious offence. For that reason the court gave leave to appeal and they want it to be remembered that when courts are disqualifying persons from driving it is useless merely to disqualify for the period for which they are passing the sentence. Unfortunately as the law stands at present, though it may be that the Road Traffic Bill now before Parliament may make an alteration, the disqualification must date from the conviction. Therefore, if a man is convicted and sentenced to 12 months' and disqualified for 12 months the disqualification will be running all the time he is in prison.

The court thinks that this is a very bad case. They do not alter the sentence of imprisonment, but the disqualification will be for three years, to date from conviction.

Sentence varied.

C. J. E.

[CHANCERY DIVISION.]

* *In re* ANDREWS, DECD. ANDREWS *v.* SMORFITT.

1955 *Oct.* 4.

Wynn-Parry J.

[1954 A. 1648.]

Family Provision — Child — Daughter unmarried — Departure from paternal home to live as wife of married man—Testator under no moral obligation to maintain daughter after departure from home —Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *s.* 1 (1) (*b*).

The plaintiff left home in 1911 and went to live as the wife of a man who was then, and who remained, a married man. She had continued to live with him ever since, and had never married; her evidence was that by reason of ill-health she was now unable to work. Her father by his will, made in 1953, made no provision for her. She asked that an order under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, should be made for her out of the net estate of the testator; she claimed to be entitled as an unmarried daughter and as a dependant incapable of maintaining herself within the meaning of section 1 (1) (*b*) of the Act of 1938:—

Held, that after the plaintiff left home to set up a permanent relationship with the man, although not legally married to him, the testator ceased to have any moral obligation to maintain her or to make any provision by his will for her maintenance, whether she claimed as an unmarried daughter or as a dependant incapable of maintaining herself, and that her claim therefore failed.

ADJOURNED SUMMONS.

Edward Andrews, by his will dated July 15, 1953, made no provision for the plaintiff, Alice Harriet Andrews, who was one of his three daughters then living. The testator died on August 24, 1953. The plaintiff took out the present summons under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, asking that reasonable provision be made for her maintenance out of the net estate of the testator, on the ground that she was an unmarried daughter of the testator and a dependant incapable of maintaining herself within the meaning of section 1 (1) (*b*) of the Act of 1938.[1]

The plaintiff was born on August 29, 1886. In 1911 she left the parental home and went to live as the wife of a Mr. Phillips, who was then, and at all material times remained, a married man.

[1] Inheritance (Family Provision) Act, 1938, s. 1 (1): "Where, after "the commencement of this Act, a "person dies domiciled in England "leaving—. . . (*b*) a daughter who "has not been married, or who is, by "reason of some mental or physical "disability, incapable of maintaining "herself; . . . and leaving a will, "then, if the court on application by ". . . any such . . . daughter . . . "(in this Act referred to as a 'depen- "'dant' of the testator) is of opinion "that the will does not make reason- "able provision for the maintenance "of that dependant, the court may "order that such reasonable provision "as the court thinks fit shall . . . be "made out of the testator's net estate "for the maintenance of that depen- "dant . . ."

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She had never married and had ever since continued to live with Phillips, by whom she had six children. The testator became estranged from the plaintiff when she left home, but subsequently he was reconciled with her. She stayed with him on a number of occasions and at times looked after him. In 1951 she and one of her sons looked after the testator for a time while he was ill. The testator accused them of stealing a number of articles during that visit. The plaintiff and her son strenuously denied the theft, and said the testator had given them the articles. She stated in a letter written on her behalf that she would return the articles if the accusations of theft were withdrawn.

Her evidence was that in 1951, before the quarrel, the testator had shown her a will in which she was included as a beneficiary with her two sisters. She was now in bad health and unable to work, Phillips was also unable to work on account of ill-health, and they were in receipt of national assistance. Her children, by reason of their own difficulties, were unable to assist her financially.

Edward Grayson for the plaintiff.
C. A. Settle for a beneficiary under the will.
Norman Lermon for the executor of the will.

Cases referred to in argument: *In re Borthwick* [2]; *In re Inns* [3]; *In re Joslin*.[4]

WYNN-PARRY J. Before the passing of the Inheritance (Family Provision) Act, 1938, a testator had under English law an unqualified right to dispose of his property by will, and unless his disposition was so capricious as to lead to the conclusion that he could not be treated as being of sound testamentary capacity, there was no means of qualifying or in any way frustrating the provisions of his will. The Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, constitutes an invasion of that unqualified right of disposition and it is, therefore, but natural that in exercising the jurisdiction conferred upon them by these Acts the courts have on numerous occasions been careful to point out that the jurisdiction is one which should be exercised only with great circumspection and only to a limited extent. It is clear, partly from the decided cases and partly from a perusal of section 1 of the Act of 1938, that a most important, if not the most important, consideration which the court should have in mind is the extent to which, if at all, the testator was under a moral obligation to the person claiming relief.

In the present case the plaintiff, who is 69 years of age, is a

[2] [1949] Ch. 395; [1949] 1 All E.R. 472.
[3] [1947] Ch. 576; 63 T.L.R. 439; [1947] 2 All E.R. 308.
[4] [1941] Ch. 200; 57 T.L.R. 293; [1941] 1 All E.R. 302.

daughter of the testator. She has not in fact been married and, therefore, on the strict words of section 1 (1) (*b*) of the Act of 1938, she is a person who is entitled to bring an application such as this. According to the evidence, she is now suffering from physical disability and is incapable of maintaining herself and, therefore, on an equally strict reading of section 1 (1) (*b*), she is, for that reason also, in a position to invoke the jurisdiction of the court; but she cannot be successful in an application based on either of the two grounds in subparagraph (*b*) unless it is demonstrated that in all the circumstances the testator was under some moral obligation to her, with the result that by excluding her entirely from his will, as the testator did in this case, he has failed to make reasonable provision for her maintenance.

The relevant facts in this case lie within a narrow compass. The plaintiff left the parental home as long ago as the year 1911; she left in order to set up house with a Mr. Phillips, and but for the circumstance that he was then, and has over the period ever since remained, a married man, she would have married him. She left the parental home quite clearly to set up a permanent home with Mr. Phillips, and no doubt relying on him to provide her with the companionship and the protection, financial and otherwise, which she would have had a right to expect from him if they could have been and had been joined in wedlock. In my view, it necessarily follows that from the time when it could be postulated that she had set up this permanent relationship and home with Mr. Phillips then, notwithstanding that she was not legally married to him, her father ceased to have any moral obligation with regard to her maintenance, and he ceased to have any moral obligation to provide for her by his will. The same reasoning must apply to a consideration of the second part of subparagraph (*b*) of section 1 (1) of the Act, and I approach a consideration of the events to which I am about to refer on the basis that, as I find, the testator had long ceased to have any moral obligation for either of the reasons mentioned in subparagraph (*b*) of section 1 (1) to provide for this daughter.

The evidence shows that after some lapse of time a reconciliation was effected between the father and the daughter, and upon a number of occasions she stayed with him and upon a number of occasions looked after him; and it is clear that, at any rate, in the early part of the year 1951, the then intention of the testator was to leave his estate, at any rate so far as the residue was concerned, equally among his three daughters. His position then, so far as this Act was concerned, was, as I find it, one in which he was completely free either to give effect to that intention or to alter it.

In the spring of 1951 very strong differences arose between the testator, on the one hand, and the plaintiff and her son on the other. As a result of a visit which the plaintiff and her son paid to the testator it was said and maintained by the testator for the rest of his life that the plaintiff and her son had removed

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from his home a number of chattels without his authority or consent and refused to return them, and he made the serious charge against them of having deliberately stolen them. The plaintiff and her son, both of whom have given evidence in this case, strenuously deny that, and say that such items as they admit to removing from the testator's home were given to them by him, and that in effect they would have been willing to return them had he modified his attitude by withdrawing the very serious suggestion that the plaintiff and her son had stolen them. I think that it is only fair to the plaintiff and her son to say that whether or not (on which I make no observation) they were well advised to take up the attitude which they did take, it appears to me that there was a considerable amount of exaggeration on the part of the testator, and I certainly do not believe that the plaintiff and her son, as the testator suggested, deliberately robbed him while he was ill in bed, thinking that he would not recover and that, therefore, they might safely get possession of the chattels before other members of the testator's family. It seems to me, on the view which I have already expressed of the testator's moral obligations towards the plaintiff in 1951, that none of those matters are relevant. If they were at all relevant, they would only serve to show why the testator took the attitude which he did. But, as I have come to the conclusion that at the time he made his will he was in fact under no moral obligation to the plaintiff, he was entitled, however mistaken may have been his belief as to what the plaintiff and her son had done, to order his testamentary disposition exactly as he pleased.

It amounts, therefore, to this, that in my opinion I have no right in this case to interfere with the testator's will and to re-make that will, as I should have to do if I interfered, by including something in the nature of a legacy for the plaintiff.

For those short reasons this summons fails and must be dismissed.

Summons dismissed.

Solicitors: *Victor Mishcon & Co.; Cunliffe & Airy for Kirby, Son & Atkinson, Harrogate.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1955
May 25, 26.

Jenkins and Morris L.JJ.

* GREENSLADE AND ANOTHER *v.* SWAFFER AND OTHERS.

SAME *v.* WORLD'S PRESS NEWS PUBLISHING CO. LD. AND ANOTHER.

Libel—Pleadings—Innuendo—Application to strike out—R.S.C., Ord. 19, *rr.* 6 (2), 27; *Ord.* 25, *r.* 4.
Practice—Pleadings—Striking out.

In the first action the plaintiffs, a reporter and news editor respectively on the staff of the "Sunday Chronicle," claimed damages for libel in an article appearing in the "World's Press News and "Advertiser's Review," a weekly journal which had a large circulation in journalistic circles, and pleaded that the words complained of meant and were understood to mean "that each of the plaintiffs "was an incompetent journalist and/or . . . instrumental in causing "the editor of the 'Sunday Chronicle' to pay a wildly extravagant "price for the publication rights of a series of newspaper articles ". . . and/or one whose efforts in collecting material for publica-"tion in the 'Sunday Chronicle' merited ironic and derisory "comments in journalistic circles." The defendants requested and received from the plaintiffs particulars pursuant to R.S.C., Ord. 19, r. 6 (2), of the facts and matters on which they relied in support of the meanings alleged in the innuendo.

Five weeks after the first article there appeared in the issue of the same journal a headline which read "Webb tells court he "arranged for Comer to write for the 'S. Chronicle.'" In the second action the plaintiffs pleaded the same innuendo as in the first action and, in giving particulars under R.S.C., Ord. 19, r. 6 (2), referred to the article which was the subject of that action, stated that they would rely on the facts given as particulars in the first action, and alleged that the headline in the subsequent issue of the periodical was intended to refer readers back to the earlier article and to assure them that the words therein used, with the meanings ascribed to them in the innuendo, were true and justifiable.

The defendants applied in both actions to strike out all the words of the innuendoes after "incompetent journalist" under R.S.C., Ord. 19, r. 27, and R.S.C., Ord. 25, r. 4:—

Held, (1) that the first action was not so plain and obvious a case that recourse should be had under the rules for striking out the pleading.

(2) That the headline which appeared five weeks after the first article could not reasonably be calculated to refer readers back to the first article and to confirm the words therein contained and that the innuendo should therefore be struck out.

APPEALS from Havers J.

In the issue of the "World's Press News and Advertiser's "Review" dated October 22, 1954, the following article appeared:

"Duncan Webb has made a rod for his own back! As an

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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" immediate consequence of the scoop he obtained by persuading " Billy Hill to confess that he is the King of the Underworld, he " has been inundated with offers of their life-stories from other " self-styled underworld kings. All, of course, want money. The " trouble is that Webb has, for professional reasons, made friends " of these people for years. Failure to please them involves the " risk of losing invaluable contacts and sources of information." Then there was a heading, " Too many Crime Scoops," and the article continued: " A few weeks ago the leader of the gang " which planned to rob London Airport of £1,000,000 worth of " gold bullion came out of Dartmoor after serving six of his nine- " years' sentence. ' I would like to help you,' said Webb, ' but " ' what can I do? How can I run your yarn while we are " ' publishing Billy Hill's, the greatest of all crime stories?' " Then another old-timer, Jack Spot, a lieutenant of Billy Hill, " reminded Webb that he had promised him his story some years " ago. ' If it's time for Billy to tell his,' he said, ' it's past time " ' for me to cash in, and get out, while the going is good.' " Other offers have pestered Webb so much that he has been " obliged to introduce his underworld acquaintances to other " newspapermen. ' If I don't do something for them,' he told " me, ' they'll probably sell their loyalty elsewhere. And after " ' I've shown them how to treat newspapermen to their own best " ' advantage!' " There was then the heading, " Had to Help " a Rival," and the article continued: " So Webb has now intro- " duced Jack Spot to an old friend, Jack Greenslade of the " ' Sunday Chronicle,' and, so pleased is Greenslade's editor to " get the life story of anyone in the underworld known to Webb " that he has offered Spot the record sum of more than £4,000 for " it. The irony of this situation is that Spot had told Webb, " ' Sure, I can't help accepting that offer. But I'm not going to " ' let you down. I'll have to save enough for you for later on, " ' when you want another underworld story.' Yes, Webb is now " so overwhelmed with the life stories of ex-criminals that he has " been forced to farm them out to opposition papers in order to " hold on to his contacts and the chance of further scoops, he " hopes, in the years to come."

The plaintiffs in the first action, Greenslade and Mellor, were respectively a crime reporter and news editor on the staff of the " Sunday Chronicle," and the defendants, Hannen Swaffer, Beverley's Ld., World's Press News Publishing Co. Ld., and Weal, were the author of the article, and the printers, publishers and editor of the " World's Press News and Advertiser's Review." The plaintiffs pleaded that " The said words meant and were " understood to mean that each of the plaintiffs was an incom- " petent journalist and/or one who was instrumental in causing " the editor of the ' Sunday Chronicle ' to pay a wildly extrava- " gant price for the publication rights of a series of newspaper " articles and/or one who had taken steps to induce the editor to " feature a series of articles which would not contain all the

" information which it would purport to contain and/or one whose " efforts in collecting material for publication in the ' Sunday " ' Chronicle ' merited ironic and derisory comments in journalistic " circles."

The plaintiffs, at the defendants' request, having provided particulars under R.S.C., Ord. 19, r. 6 (2), the defendants issued a summons to strike out all the words complained of after " incompetent journalist " under R.S.C., Ord. 19, r. 27, and Ord. 25, r. 4. On April 6, 1955, Master Diamond dismissed the application, and on April 28, 1955, Havers J. allowed the defendants' appeal from the master's order. The plaintiffs now appealed.

In the issue of the " World's Press News and Advertiser's Review " dated November 26, 1954, there appeared a report of proceedings in a magistrate's court beneath the headline: " Webb " tells court he arranged for Comer to write for ' S. Chronicle.' "

The plaintiffs in the second action were the same as in the first action, and the defendants were the publishers and editor of the review. The plaintiffs pleaded an innuendo in the same terms as in the first action, and added that " Comer " and " Webb " referred to in the headline in the second issue were respectively the " Jack Spot " and the " Duncan Webb " referred to in the first article. It was alleged in the pleadings that the headline in the second issue was intended to refer readers back to the earlier article and was a further assurance to such readers that the words used therein, together with the meaning ascribed to them by the plaintiffs in the innuendoes, were true and justifiable.

On March 28, 1955, Master Diamond ordered, upon a summons by the defendants, that the words in the innuendo after " incompetent journalist " should be struck out, and on appeal to Havers J. it was ordered that the whole of the innuendo should be struck out. The plaintiffs now appealed.

W. A. Fearnley-Whittingstall Q.C. and *I. C. Baillieu* for the plaintiffs in both actions.

Neville Faulks for the defendants in both actions.

The following cases were referred to in argument: *Kemsley* v. *Foot* [1]; *Davy* v. *Garrett.* [2]

MORRIS L.J. These are two appeals which we have heard together from orders made by Havers J. in two libel actions. The questions which were in issue were whether certain words in the statements of claim should be struck out. There was a publication on October 22, 1954, of an article in a journal called " The " World's Press News."

[His Lordship here read the article complained of, and continued:] On October 22, 1954, a writ was issued by Greenslade and

[1] [1951] 2 K.B. 34; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331.

[2] (1878) 7 Ch.D. 473, 486.

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Mellor, both journalists, the first plaintiff being a crime reporter on the "Sunday Chronicle" and the second the news editor of that newspaper. The action was brought against the writer of the article, the printers, the publishers and the editor of the journal. In the statement of claim, which is dated November 19, 1954, the words complained of are set out and an innuendo is pleaded in this way: "The said words meant and were understood to "mean that each of the plaintiffs was an incompetent journalist "and/or one who was instrumental in causing the editor of the "said 'Sunday Chronicle' to pay a wildly extravagant price for "the publication rights of a series of newspaper articles and/or "one who had taken steps to induce the said editor to feature a "series of articles which would not contain all the information "which it would purport to contain and/or one whose efforts in "collecting material for publication in the 'Sunday Chronicle' "merited ironic and derisory comments in journalistic circles."

Shortly after that date there was published in the same journal, in the issue of November 26, 1954, an account of certain proceedings which had taken place in a magistrate's court under the heading "Webb tells court he arranged for Comer to write for "'S. Chronicle.'"

The statement of claim in the first action, the only action to which I have so far referred, having been delivered, application was made for particulars. Before 1949 it was not the practice to order particulars of the facts and matters relied on to support a plea that words complained of were used in a sense other than their ordinary meaning; but it is now provided by R.S.C., Ord. 19, r. 6 (2), as follows: "In an action for libel or slander "if the plaintiff alleges that the words or matter complained of "were used in a defamatory sense other than their ordinary "meaning, he shall give particulars of the facts and matters on "which he relies in support of such sense." The defendants in the first action asked for certain particulars including particulars of the facts and matters relied on in support of the allegation that the words complained of were used in a defamatory sense other than their ordinary meaning, specifying the same. Full particulars were delivered in the early part of December, 1954.

In December, 1954, a second action was brought by the same two plaintiffs against the publishers and the editor of the "World's Press News." In that action the words which were complained of were merely the words of the heading above referred to, i.e., "Webb tells court he arranged for Comer to "write for 'Sunday Chronicle.'" The innuendo pleaded was exactly the same as the innuendo pleaded in the first action. Particulars were delivered in the statement of claim on the facts relied on to support the innuendo, and those particulars incorporated the particulars given under the statement of claim in the previous action. Subparagraph (5) of the particulars was expressed as follows: "The plaintiffs contend that such headline "is intended to refer readers back to the earlier article and is a

" further assurance to such readers that the words used therein " together with the meanings ascribed to them by these plaintiffs " are true and justifiable." The statement of claim in the second action was delivered on February 12, 1955. An application was made thereafter in this action in the following terms: " An " application on the part of the defendants in the said action for " the striking out from the plaintiffs' statement of claim all the " words in paragraph 5 thereof "—that is, the paragraph pleading the innuendo—" after the words ' incompetent journalist ' under " Ord. 19, r. 27, and Ord. 25, r. 4, of the Rules of the Supreme " Court." That application was heard by Master Diamond on March 28, 1955, and the application succeeded. On April 1, 1955, a similar application was made to the master in the first action, and again it was an application for the striking out from paragraph 5 of the statement of claim in that action of all the words after the words " incompetent journalist." On April 6 that application failed. The defendants then gave notice of appeal against the refusal of the master of their application in the first action; and the plaintiffs gave notice of appeal in regard to the master's order in the second action. The plaintiffs were then out of time, but they asked for an extension of time. Both those appeals came before Havers J. on April 28. As to the first action the judge allowed the appeal. As to the second action Havers J. gave leave to treat the summons in that action as amended as if the application had been to strike out the whole of paragraph 5, and ordered that the whole of paragraph 5 be struck out. Though the more extended view of the matter that commended itself to the learned judge was formed by him without the prompting of a submission from Mr. Faulks, whose contention had been in support of the limited objective, Mr. Faulks does agree that if his contentions were correct they logically did result in going the whole distance and not only the partial distance set out in the application which was made. If any further submissions were available to Mr. Baillieu directed to the question whether the judge should make an order going beyond what had originally been asked for, then I think there was opportunity to put them; but I think the position really was that all the submissions had been fully put to the learned judge, and it became a question for him as to what conclusions he formed as a result of them. Because of his conclusions, the amendment to which I have referred was made.

The two applications were made both under Ord. 19, r. 27, and under Ord. 25, r. 4. It is, I think, well established (as is set out in the Annual Practice (1955 ed.) at p. 366 in the notes to Ord. 19, r. 27) that " the court is not to dictate to parties how " they should frame their case. . . . But that rule is, of course, " subject to this modification and limitation, that the parties must " not offend against the rules of pleading which have been laid " down by the law; and if a party introduces a pleading which " is unnecessary, and it tends to prejudice, embarrass, and delay

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" the trial of the action, it then becomes a pleading which is " beyond his right." Ord. 25, r. 4, provides: " The court or a " judge may order any pleading to be struck out, on the ground " that it discloses no reasonable cause of action or answer, and " in any such case or in case of the action or defence being shown " by the pleadings to be frivolous or vexatious, the court or a " judge may order the action to be stayed or dismissed, or judg- " ment to be entered accordingly, as may be just." In the notes to that rule in the Annual Practice, at p. 421, there is a reference to the well-established principle that " It is only in plain and " obvious cases that recourse should be had to the summary " process under this rule."

In regard to the first action, I have formed the view that the decision of the master was correct and that no part of paragraph 5 of the statement of claim should have been struck out. Having arrived at this view, I think it is undesirable that I should say anything beyond what is essential. No defence has yet been filed. We do not know and we are not concerned in any way with the nature or the merits of the issues which may be raised. The particulars under paragraph 5 in the first action alleged that certain facts were generally known to the readers of the " World's " Press News ": for example, in paragraph 4, " That it was the " duty of the first-named plaintiff under the direction of the " second-named plaintiff to collect such material," that is, material for publication of the kind referred to in paragraph 3. In paragraph 7, " That the best news editors and reporters are " those who can collect the best material on the best terms "; paragraph 9, " That both the plaintiffs had been actively engaged " in the search for material for this series of articles for approxi- " mately two years before the publication of the article com- " plained of." If all, or indeed, some of the facts alleged, are proved, I feel unable to say that it would not be open to a judge or jury to say that the words complained of are defamatory of the plaintiffs because they bear the meanings alleged in paragraph 5 of the statement of claim. All that it is necessary to say is that there is no case for striking out. I may add that even as matters at present stand it would be open to a judge or jury to hold that the words complained of bear the meaning that the plaintiffs are incompetent journalists, and it might be said that the words at present struck out merely denote the type of incompetence said to have been meant. But it is not necessary further to consider the question as to how matters would stand if the words struck out remained excluded. In my judgment, they should not be excluded, and, as to the first action, I would allow the appeal.

In regard to the second action, to test the matters raised, I think it is useful to consider what would happen if there were a trial with a jury. If words in their natural and ordinary sense are innocent or meaningless, then a judge must leave it to a jury to say whether they constitute a libel on a plaintiff if there is evidence of facts which would reasonably induce the persons to

whom the words were published to understand them in a secondary and defamatory sense. We are not concerned in these proceedings with any question as to whether the words in their natural and ordinary sense are capable of a meaning defamatory of the plaintiffs. It may be common ground that they are not. The issue here really is whether, assuming complete proof of all the facts relied on, it can reasonably be said that any case is or could be set up. The words of the alleged libel are those which I have read, "Webb tells court he arranged for Comer to write "for 'S. Chronicle,'" that is to say, the "Sunday Chronicle." It certainly seems at first blush a startling suggestion that those words referred to and defamed Greenslade and Mellor. Then, in paragraph 5, it is said that the words bear the meanings alleged, and particulars are given which incorporate the particulars in the first action. In particular, I think it is necessary to have in mind subparagraph (5): "The plaintiffs contend that "such headline is intended to refer readers back to the earlier "article and is a further assurance to such readers that the words "used therein, together with the meanings ascribed to them by "these plaintiffs, are true and justifiable."

I think it is common ground that the word "intended" in that passage should be read in the sense of "calculated." It is therefore said that this headline is calculated to refer readers back to the earlier article. There is no reference to the earlier article, so clearly a reader of the words of the headline who had not read the earlier article would not be referred back. But even if an assiduous reader by a reading of the headline of November 26 had his memory stirred in regard to the first article (which, incidentally, had appeared some five weeks earlier), I do not think there is anything in the second words, the words of the headline, calculated to assure him of the truth of the earlier words with their innuendoes. I cannot accept the view that the words of the headline constitute a confirmation of the earlier published words with their alleged meaning that the plaintiffs were incompetent journalists who had caused their editor to pay an extravagant price for deficient and inadequate material. The words of the headline do not seem even remotely to suggest this. The theory is that there is some sort of relation back and that these words of the headline constitute a kind of repetition or reaffirmation of the first words with their innuendoes. Though I greatly admire the acumen and ingenuity which have inspired that suggestion, I say with the utmost respect that it seems to me to be altogether too far-fetched. I do not think that it is sufficiently acceptable to raise a reasonable case, and I consider therefore that Havers J. was correct in ordering that paragraph 5 of the statement of claim be struck out. I would, therefore, as to the second action, dismiss the appeal.

JENKINS L.J. I agree, and I have only to add as regards the second action a word about the course taken by the judge in

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suggesting that the reference in paragraph 5 to the incompetence of the plaintiffs as journalists should be struck out, although the summons had not asked that those words should be struck out and they had not been struck out before the learned master. In my view, that departure from strict procedure should not be allowed to affect the result in this case. The judge was, I think, right in the view which he took that the whole of the innuendo alleged in paragraph 5 must stand or fall together, that is to say if the remainder of the paragraph could not be supported the reference to the incompetence of the plaintiffs as journalists could not be supported either. That being so, I think the course he took, which was taken in the presence of both counsel, was properly taken, with a view to saving costs, for it followed from the learned judge's decision (which in my view was right) that if a fresh summons had been taken out to strike out the opening part of paragraph 5 it would have been a foregone conclusion that the order would have been made. I have nothing to add apart from that on either case. For the reasons my brother has given, I think that the first appeal should be allowed and the second appeal dismissed.

Appeal in first action allowed.
Appeal in second action dismissed.

Solicitors: *Galbraith & Best; Swepstone, Walsh & Son.*

[QUEEN'S BENCH DIVISION.]

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Oct. 7.
Glyn-Jones J.

* ADAMS *v.* WAR OFFICE.

[1953 A. No. 2349.]

Crown Proceedings—Liability of Crown in tort—Pension—Death of soldier on duty—Certificate by Minister of Pensions that death attributable to service—Refusal by Minister to award pension to parents of soldier—Action in tort by parent on behalf of estate—Liability of War Office—Crown Proceedings Act, 1947 (10 & 11 *Geo.* 6, *c.* 44), *s.* 10—*Royal Warrant of May* 24, 1949 (*Cmd.* 7699), *arts.* 37, 65.

The Minister of Pensions issued a certificate to the effect that insofar as the death of a soldier who was killed while on duty by a shell which burst amongst troops taking part in an exercise was due to anything suffered by him as a result of the accident, "his "suffering that thing has been or will be treated as attributable to "service for the purposes of entitlement to an award under the "Royal Warrant relating to the disablement or death of members "of the force of which he was a member." An application for a pension by the parents of the soldier under the Royal Warrant was refused by the Minister. In an action by the soldier's father, as administrator of his son's estate, against the War Office, alleging negligence and claiming damages on behalf of the estate, himself and his wife, under the Fatal Accidents Acts, 1846 to 1908, the Law Reform (Miscellaneous Provisions) Act, 1934, and the Crown

Proceedings Act, 1947, in which the War Office relied on section 10 [1] of the Crown Proceedings Act, 1947, as a bar to the claim, and the father contended that his claim could not be defeated by the issue of a certificate by the Minister of Pensions which was followed by a refusal to grant any compensation or award:—

Held, that the issue by the Minister of Pensions of a certificate that the death of the soldier was attributable to service had the effect of entitling his parents to claim under the Royal Warrant, and entitling them, provided that the conditions of the warrant were satisfied, to a pension, and, therefore, the certificate was a certificate of "entitlement" within the meaning of section 10 (1) (*b*) of the Crown Proceedings Act, 1947, although the Minister had decided that the parents did not satisfy the conditions of the Warrant. Accordingly, the War Office were entitled to rely on section 10, and the father's claim at common law was barred.

PRELIMINARY POINT OF LAW.

On August 7, 1952, the plaintiff's son, Albert George Adams, deceased, a class "Z" reservist in the armed forces of the Crown, was killed by the bursting of a live artillery shell fired from a gun by a member or members of the armed forces of the Crown, while he was on duty and engaged in an exercise at West Down Ranges, Bulford.

On July 29, 1953, the plaintiff, as administrator of his son's estate, and suing on behalf of his wife, himself and the estate of the deceased, issued a writ against the War Office, claiming, under

[1] Crown Proceedings Act, 1947, s. 10: "(1) Nothing done or omitted "to be done by a member of the "armed forces of the Crown while on "duty as such shall subject either him "or the Crown to liability in tort for "causing the death of another per- "son, or for causing personal injury "to another person, in so far as the "death or personal injury is due to any- "thing suffered by that other person "while he is a member of the armed "forces of the Crown if—(*a*) at the "time when that thing is suffered by "that other person, he is . . . on "duty as a member of the armed "forces of the Crown . . . and (*b*) the "Minister of Pensions certifies that "his suffering that thing has been or "will be treated as attributable to "service for the purposes of entitle- "ment to an award under the Royal "Warrant . . . relating to the dis- "ablement or death of members of "the force of which he is a member. "(2) No proceedings in tort shall lie "against the Crown for death or "personal injury due to anything "suffered by a member of the armed "forces of the Crown if . . . (*b*) the "Minister of Pensions certifies as "mentioned in the preceding sub- "section; . . . (3) . . . a Secretary "of State, if satisfied that it is the "fact:—(*a*) that a person was or was "not on any particular occasion on "duty as a member of the armed "forces of the Crown . . . may issue "a certificate certifying that to be "the fact; and any such certificate "shall, for the purposes of this sec- "tion, be conclusive as to the fact "which it certifies."

Royal Warrant dated May 24, 1949 (Cmd. 7699), art. 37: "Pensions to "Parents. (1) Subject to the follow- "ing provisions of this article, the "parent of a member of the military "forces may be awarded a pension if "he is in pecuniary need by reason "of old age, or infirmity, or other "adverse condition which is not of "a temporary character . . . (2) In "determining whether and to what "extent a parent is in pecuniary "need, the Minister [of Pensions] "shall take into account the extent "to which the member . . . sup- "ported the parent, and the extent "to which the member, if he had not "died, would have been likely, in the "opinion of the Minister, to support "the parent . . ."

Art. 65: "Administration of this "warrant. This . . . warrant shall "be administered by the Minister "and, except as otherwise pro- "vided by statute, the Minister shall "be the sole interpreter of this . . . "warrant . . ."

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the Fatal Accidents Acts, 1846 to 1908, the Law Reform (Miscellaneous Proceedings) Act, 1934, and the Crown Proceedings Act, 1947, on behalf of his wife, himself and his son's estate, damages in respect of the injuries to, and the death of, his son which he alleged were caused by the negligence of the War Office, their servants or agents, and various particulars of the alleged negligence were set out in the statement of claim.

On August 25, 1953, after the issue of the writ but before delivery of the statement of claim, the Ministry of Pensions issued a certificate, dated August 25, 1953, headed "Crown "Proceedings Act, 1947, s. 10," [1] as follows: "In so far as the "death of Private Albert George Adams, No. 14429365, Royal "Berkshire Regiment (T.A.) is due to anything suffered by him "as a result of the accident on the 7th day of August, 1952, I "hereby certify . . . that his suffering that thing has been or "will be treated as attributable to service for the purposes of "entitlement to an award under the Royal Warrant relating to "the disablement or death of members of the force of which he "was a member."

The plaintiff and his wife applied for a parent's pension under the Royal Warrant of 1949, but in February, 1954, the Minister of Pensions notified them that in the circumstances the conditions for an award were not fulfilled.

On April 12, 1955, the Secretary of State for War certified under section 10 (3) of the Crown Proceedings Act, 1947, that all persons responsible or taking part in the exercise on August 7, 1952, in the course of which the plaintiff's son was killed by a shell, were on duty as members of the armed forces of the Crown, and that at the time that the plaintiff's son met his death he was on duty as a member of the armed forces of the Crown.

By their defence, the War Office, relying on the provisions of section 10 of the Crown Proceedings Act, 1947, contended that they were not liable in law for any of the matters complained of in the statement of claim.

The plaintiff, in reply, contended that the refusal of the Minister to grant an award or make any compensation to him both before and after the issue of the certificate of August 25, 1953, nullified and rendered void the certificate, and that, in the circumstances, the War Office were liable in law for the matters complained of, and that his claim could not be defeated by the issue of a certificate by the Minister of Pensions which was followed by a refusal to grant any compensation or award.

By consent of the parties the issue of law raised by the defence whether the plaintiff's claim at common law was not barred by the certificate of August 25, 1953, and section 10 of the Crown Proceedings Act, 1947, was set down under R.S.C., Ord. 27, r. 2, for hearing as a preliminary point of law.

Rodger Winn for the War Office.

R. F. Levy Q.C. and *J. E. S. Ricardo* for the plaintiff.

The following cases were referred to in argument: *Harris* v. *Minister of Pensions* [2]; *Jennings* v. *Minister of Pensions* [3]; *Adams* v. *Naylor* [4]; *Billings* v. *Reed* [5]; *Reg.* v. *Christchurch Inhabitants* [6]; *Goldsmid* v. *Lewis* [7]; and *Giovanni Dapueto* v. *James Wyllie & Co.* [8]

GLYN-JONES J. The plaintiff, William Henry Adams, sues the War Office in his capacity as the administrator of the estate of his deceased son, Albert George Adams. He claims damages for the benefit of the estate and for himself and his wife by way of compensation to them for the financial loss they have suffered by the death of their son, who was killed when he was serving as a class "Z" reservist in a territorial battalion which was engaged in an exercise on the ranges at Bulford. A shell burst among troops taking part in that exercise and the plaintiff's son was killed. The plaintiff claims that his son's death was caused by the negligence of somebody who allowed that shell to be fired among troops taking part in the exercise.

The War Office rely in their defence on the provisions of section 10 of the Crown Proceedings Act, 1947, as excusing them from liability to pay damages in an action such as this, and the question of law raised by that plea has been properly set down for hearing as a preliminary point because if I decide the point in favour of the War Office it obviously brings this action to an end.

[His Lordship read section 10 (1) of the Crown Proceedings Act, 1947, and continued:] By subsection (3) the Secretary of State may certify that "a person was or was not on any par-"ticular occasion on duty as a member of the armed forces of the "Crown." In this case, the Secretary of State for War has certified that all persons taking part in the exercise in which the plaintiff's son was killed "were on duty as members of the armed "forces of the Crown"; and that certificate is not challenged in any way. Nor can it be challenged, for by subsection (3) the certificate is "conclusive as to the fact which it certifies."

The Minister of Pensions issued a certificate dated August 25, 1953, that is, shortly after the issue of the writ in this action, in the following terms: "In so far as the death of Private Albert "George Adams . . . is due to anything suffered by him as a "result of the accident on the 7th day of August, 1952, I hereby "certify, on behalf of the Minister of Pensions, that his suffering "that thing has been or will be treated as attributable to service "for the purposes of entitlement to an award under the Royal "Warrant relating to the disablement or death of members of "the force of which he was a member." That certificate is signed by an officer authorized by the Minister of Pensions. No

[2] [1918] 1 K.B. 422; 64 T.L.R. 52; [1948] 1 All E.R. 191.
[3] February 2, 1953 (unreported).
[4] [1946] A.C. 543; 62 T.L.R. 434; [1946] 2 All E.R. 241.
[5] [1945] K.B. 11; 61 T.L.R. 27; [1944] 2 All E.R. 415.
[6] (1848) 12 Q.B. 149.
[7] (1836) 3 Bing.N.Cas. 46.
[8] (1874) L.R. 5 P.C. 482.

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point is taken, nor, as I understand it, could be taken, on the fact that the certificate is signed by an authorized officer rather than by the Minister himself.

The War Office say that the provisions of section 10 are satisfied and that, therefore, the negligent act, if any, which caused the death of the plaintiff's son does not subject either the negligent soldier or soldiers, or the War Office or the Crown, as the superiors of those soldiers, to liability in tort for causing the death of the plaintiff's son. Mr. Levy says that that is not so, because, notwithstanding the certificate, the Minister of Pensions has in fact refused to award any pension to the mother or father of the soldier, and he says that the only certificate which would satisfy the meaning of section 10 (1) (*b*) of the Act is a certificate which binds the Minister to decide that the parents should be paid some pension, however small. He says, therefore, that since the certificate which was issued is not a certificate which binds the Minister to pay a pension, it is not a certificate that declares that the parents or one or other of them are or is entitled to be paid something by way of pension, and it is not a valid certificate under subparagraph (*b*). Notwithstanding Mr. Levy's very careful and clear argument, I have come to the conclusion that my judgment on this point of law must be in favour of the War Office. The issue by the Minister of Pensions of a certificate the effect of which is that the death of the son of the plaintiff is attributable to service has, in my opinion, the effect of entitling the plaintiff or his wife to make their claim under the Royal Warrant and entitling them, if upon that claim they or either of them satisfy the conditions of the warrant, to be paid a pension.

Under article 65 of the Royal Warrant the Minister of Pensions is the sole judge as to whether or not the plaintiff or his wife satisfies or satisfy the conditions of the warrant, and he has decided apparently that neither of them does. I do not think that that means that the certificate which was issued by the Minister was not a certificate within the meaning of subparagraph (*b*), for, once the Minister certifies, as he has done, that for the purpose of entitlement to an award under the Royal Warrant the death of the plaintiff's son would be treated as attributable to service, it follows, in my opinion, that one or other or both of the parents become or will become entitled to a pension if the conditions of article 37 of the warrant be satisfied.

That disposes of this point of law, and I do not think that I should serve a useful purpose if I continue to discuss the arguments that have been addressed to me. It seems to me that the language of these subsections is quite clear, and I have said what I think they mean.

Judgment for the defendants.

Solicitors: *Treasury Solicitor; Gouldens.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

*MILLER'S CASH STORES LD. *v.* WEST HAM CORPORATION.

1955
Oct. 13.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

Shop — Early closing — Registered shop — Local order providing for Thursday closing—No provision for registered shops—Application of order to registered shops—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 1, 53 (1) (13), 76 (2).

By an order made by a local authority under the Shops Act, 1912, it was provided that all grocers' shops in the borough should be closed for the weekly half-holiday at 1 p.m. on Thursday, provided that any shopkeeper might substitute Saturdays for Thursdays on affixing a notice to that effect in his shop. The appellants, who carried on the business of grocers in the borough and were registered under section 7 of the Shops (Sunday Trading Restriction) Act, 1936, and subsequently under section 53 of the Shops Act, 1950, as being the occupier of a shop who was a person of the Jewish religion, closed the shop on Wednesdays at 1 p.m., affixing notices to that effect in the shop. On an information charging the appellants with a breach of the order made by the local authority, the appellants contended that, since the order did not contain a proviso that registered shopkeepers might substitute Fridays for Thursdays the order did not apply to the shop:—

Held, that the order depended for its validity on the Act and since the Act provided, in the case of registered shops, for the substitution of Friday for Saturday it followed that the order should also be so read; accordingly, the order applied to the appellants' shop and they were guilty of an offence.

CASE STATED by West Ham justices.

On November 19, 1954, an information was preferred on behalf of the town clerk of West Ham Corporation against the appellants, Miller's Cash Stores Ld., that they did unlawfully, being the occupiers of a grocer's shop at Romford Road, Forest Gate, E. 7, fail to close the shop on September 23, 1954, being a Thursday, contrary to the West Ham Grocers', General Shopkeepers' and Provision Dealers' Half-holiday Order, 1912.

On February 3, 1955, at the hearing of the information, the justices found the following facts:—

(a) That in pursuance of the powers conferred on the council by the Shops Act, 1912, the order provided that all shops in the borough of West Ham in which the retail trade or business of a grocer, general shopkeeper or provision dealer was carried on, and to which the order applied, should be closed for the weekly half-holiday at 1 p.m. on Thursday throughout the year, provided that any shopkeeper might substitute Saturdays for Thursdays on affixing a notice to that effect in his shop. (b) That the appellants carried on the retail trade or business of a grocer at their address. (c) That at all material times since the passing of the Shops (Sunday Trading Restriction) Act, 1936, the appellants' shop had been registered in accordance with section 7 of that Act,

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and since the date of the repeal of that Act, in accordance with the terms of section 53 of the Shops Act, 1950.[1] (d) That at all material times the closing hours of the shop were: Wednesdays, after 1 p.m.; Saturdays, all day; and Sundays, after 1 p.m. (e) That the appellants affixed notices in the shop to the effect that the shop would close after 1 p.m. on Wednesdays and all day on Saturdays. (f) That the shop was open after and had failed to close at 1 p.m. on Thursday, September 23, 1954.

It was contended on behalf of the borough council that by opening the shop on the Thursday the appellants had failed to comply with the order and had thereby contravened the terms of section 1 of the Act of 1950.[1]

It was contended for the appellants that since the order contained no proviso that any shopkeeper whose shop was registered in accordance with the terms of section 53 of the Act of 1950 might substitute Fridays for Thursdays, on affixing a notice to that effect in his shop, the order did not comply with the terms of sections 1 and 53 of the Act, and that the order was, therefore, a nullity as regards, and did not apply in respect of, the shop.

The justices were of opinion (a) that the order was validly made under section 4 (2) of the Shops Act, 1912; (b) that the terms of section 7 (13) of the Act of 1936 amended section 4 (2) of the Act of 1912 with respect to registered shops; (c) that the Act of 1950 repealed both the Acts of 1912 and 1936, but provision for registration was continued by section 53 of the Act and the order continued to be operative by section 76 (2) of the Act; (d) that with regard to shops registered in accordance with section 53, any shopkeeper otherwise subject to the terms of the order might substitute Fridays for Thursdays for the weekly half-holiday, notwithstanding the order, by affixing a notice to that effect in his shop; (e) that non-compliance with the order subject to the proviso created by section 53 was a contravention of section 1 of the Act of 1950; (f) that the terms of the order subject to section 53 applied in respect of the appellants' shop,

[1] Shops Act, 1950, s. 1: "(1) "Every shop shall be closed for the "serving of customers not later than "one o'clock in the afternoon on one "weekday in every week. (2) The "local authority may, by order, fix "the day on which a shop is to be "so closed . . . Provided that—(i) "where the day fixed is a day other "than Saturday, the order shall pro-"vide for enabling Saturday to be "substituted for such other day as "respects any shop in which notice "to that effect is affixed by the "occupier."

S. 53: "(1) Subject to the provi-"sions of this section, the occupier "of any shop who is a person of the "Jewish religion shall be entitled, "upon making to the local authority "an application . . . to have the shop "registered under this section by the "local authority, and so long as the "shop is so registered then—(*a*) the "shop shall be closed for all purposes "connected with trade or business on "Saturday . . . (13) As respects any "shop which is for the time being "registered under this section, this "Act shall have effect as if—(*a*) in "section 1 (1) . . . the references "to weekdays were construed as "references to weekdays other than "Saturdays; (*b*) throughout section "1 (2) 'Friday' were substituted for "'Saturday.'"

and as the appellants had failed to affix a notice in their shop to the effect that Fridays would be substituted for Thursdays their failure to close at 1 p.m. on Thursday, September 23, 1954, constituted a contravention of section 1 of the Act of 1950. The appellants were fined 5s., and appealed.

Ronald Bernstein for the appellants.
A. G. F. Rippon for the borough council.

No cases were referred to in argument.

LORD GODDARD C.J. This is a case stated by justices for the Borough of West Ham, before whom the appellants, Miller's Cash Stores Ld., were summoned on an information which charged that they "did unlawfully being the occupier of the "grocer's shop at the said address of the appellants, fail to close "the said shop on September 23, 1954, being a Thursday, con-"trary to the terms of the West Ham Grocers', General Shop-"keepers' and Provision Dealers' Half-day Holiday Order, 1912."

The history of the legislation governing the closing of shops can briefly be stated as follows: A Shops Act was passed in 1912 which provided for local authorities making orders for the compulsory closing of shops one half-day a week. In consequence of that Act, many local authorities, including West Ham, issued orders with regard to closing. The West Ham order, which was made on September 24, 1912, required grocers to close at 1 p.m. on Thursdays, and added, because the Act so provided: "That "any shopkeeper may substitute Saturdays for Thursdays on "affixing a notice to that effect in his shop." That was a privilege given by the Act because it is well known that in many towns the big stores prefer to close on Saturdays rather than on other days in the week.

That remained the law until the year 1936, when the Shops (Sunday Trading Restriction) Act, 1936, was passed in which, among other things, provision was made to meet the case of the occupier of a shop who was a person of the Jewish religion, or, in the case of a shop occupied by a company, where the majority of directors were persons of that religion. That Act provided that such an occupier could have the shop registered by the local authority and so long as it was registered the shop should be closed on Saturdays and could substitute Friday as the closing day, notwithstanding there was another day mentioned in the order. The Act of 1936 was repealed by the Shops Act, 1950, which was a consolidating Act, and it is with that Act that we are now concerned. [His Lordship read section 1 (2) and continued:] Section 53 reproduces the sections of the Act of 1936 with regard to Jewish shopkeepers. Having provided for the registration of the shopkeepers, it provides: "(13) As respects "any shop which is for the time being registered under this

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Lord Goddard C.J.

" section, this Act shall have effect as if . . . (*b*) throughout " section 1 (2) ' Friday ' were substituted for ' Saturday.' "

Section 76 of the Act of 1950 repealed, among others, the Act of 1912 and the Act of 1936, and all the orders which had been issued up to date were made under the Act of 1912. Section 76 provides: " (2) Nothing in this repeal shall affect any instru- " ment made or other thing whatsoever done under any enactment " repealed by this Act or under any enactment repealed by the " Shops Act, 1912, and every such instrument or other thing " shall continue in force and, so far as it could have been made " or done under this Act, shall have effect as if made or done " under the corresponding provision of this Act." One of the provisions it could have made and which, therefore, must be deemed to have been made is that, in respect of a registered shop, " Friday " should be substituted for " Saturday."

Mr. Bernstein's main point is that he says that the order is invalid because it does not contain a provision that, in respect of registered shops, Friday should be read instead of Saturday, but I think when one has taken all these sections together and especially in view of the words of section 76 (2), it is clear that what Parliament means is that wherever a Jewish shop has been registered as such " Friday " must always be read instead of " Saturday." There is no difficulty about it then because the order means: " Provided that any registered shopkeeper may " substitute Friday for Thursday on affixing a notice to that effect " in his shop." I dare say if the local authority had occasion to make fresh orders they would see fit to put it in, but it has to be remembered that the orders in these cases always depend upon the Act, and if in regard to registered shops " Friday " must be substituted for " Saturday " where it appears in section 1 (2), it follows that an order made under section 1 (2) must be so read. One must remember that the information is one for breach of the Act because the order is made under the Act and the penalties are imposed by the Act. One can quite see the point made by Mr. Bernstein, but in my opinion it is not a sound point. For these reasons—it was not an easy case for the justices —I think that the justices came to a right decision in law, and this appeal fails.

ORMEROD J. I agree and have nothing to add.

GLYN-JONES J. I also agree.

Appeal dismissed.

Solicitors: *Breeze, Benton & Co.; Town Clerk, West Ham.*

J. D. P.

[COURT OF CRIMINAL APPEAL.]

*REGINA *v.* MITCHELL.

C. C. A.

1955
Feb. 21.

Lord Goddard C.J., Ormerod and Gorman JJ.

Criminal Law — Fraud — Obtaining credit by fraud — Sale of motor-cycle before hire-purchase payments completed — Further hire-purchase transaction — Value of stolen motor-cycle "credited" against purchase of another—No debt created—Corrective training—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1).

Criminal Law—Sentence—Corrective training—Maximum sentence for offence one year—Inapplicability of corrective training.

A young man who was buying a motor-cycle on hire-purchase, before completing the payments due, sold it, representing to the buyers that it was his own property and inducing them to let him have another motor-cycle on hire-purchase and to credit him with the sum of £65, the secondhand value of the first motor-cycle. He pleaded "Guilty" at quarter sessions to both counts of an indictment charging him (1) with larceny of the first motor-cycle, and (2) obtaining credit by fraud contrary to section 13 (1) of the Debtors Act, 1869:—

Held, that the plea of "Guilty" to the charge under section 13 (1) of the Debtors Act should not have been accepted since the offence of obtaining credit by fraud could not be committed unless a debt was created. As no debt had been created in the transaction into which the applicant had entered with the buyers of the stolen motor-cycle he had not committed the offence charged and, therefore, the conviction on the second count should be quashed.

APPLICATION for leave to appeal against sentence.

The applicant, James Gordon Keith Mitchell, was charged upon indictment at Dudley Quarter Sessions on December 9, 1954, with (1) larceny of a motor-cycle, and (2) obtaining £65 by means of fraud other than false pretences, contrary to section 13 (1) of the Debtors Act, 1869.[1] The nature of the offences is set out in the judgment. The recorder accepted a plea of "Guilty" on each count and imposed sentences of three years' corrective training for each offence, the sentences to run concurrently.

An application for leave to appeal against sentence was treated as an appeal.

The applicant was not represented.

LORD GODDARD C.J. There are certain unusual points in this case with which the court thinks it ought to deal. [His Lordship referred to the charges set out above and continued:] The applicant was represented by counsel, and pleaded Guilty to both

[1] Debtors Act, 1869, Part II, s. 13: "Any person shall . . . be "deemed guilty of a misdemeanor, "and on conviction thereof shall be "liable to be imprisoned for any time "not exceeding one year . . . (1) If "in incurring any debt or liability "he has obtained credit under false "pretences, or by means of any other "fraud: . . ."

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charges, and the recorder sentenced him to three years' corrective training on both counts, to run concurrently. So far as the second count is concerned, the recorder should not have passed that sentence because under section 13 (1) of the Debtors Act, 1869, the maximum sentence permissible is only one year's imprisonment and under the Criminal Justice Act, 1948, a person may only be sent to corrective training on conviction for an offence which carries a sentence of two years' imprisonment or more. However, the present case was a bad one and we shall not interfere with the conviction, nor shall we alter the sentence on the first count, so the sentence of three years' corrective training will stand.

But we desire to say that in our opinion counsel should not have advised his client to plead Guilty to the second count, nor should the recorder have agreed to accept the plea. The matter was mentioned to him and he said that he thought it was a proper course. The circumstances were these: the first count charged was the old story of a man obtaining a motor-vehicle, namely, a motor-cycle, on hire-purchase and selling it while it was still on hire-purchase. That is stealing, because it was not his property to sell, the property remaining in the person from whom he hired it until he completed the hire-purchase payments. He took the motor-cycle to a firm, represented that it was his own, and induced the firm to let him have another motor-cycle on hire-purchase and credit him with £65, the secondhand value of the motor-cycle he was turning in. He was charged with obtaining credit by fraud. But he did not; to obtain credit by fraud there must be a debt. He did not obtain credit for any sum. He entered into a hire-purchase agreement and the firm accepted a motor-cycle believing it to be his, but which turned out not to be his. It is unnecessary to speculate as to what offence that amounted to, but it was certainly not obtaining credit by fraud or under false pretences. No doubt the expression that is used in such cases is that a man is "credited" with a sum and that is taken as if he had paid; but to obtain credit under the Debtors Act there must be the creation of a debt, and there was no creation of a debt here. Therefore, the conviction on the second count will be quashed.

Appeal allowed in part.

E. M. W.

[COURT OF APPEAL.]

* ATKINSON *v.* BETTISON.

C. A.

1955
Oct. 13.

[Plaint No. K. 737.]

Denning, Hodson and Morris L.JJ.

Landlord and Tenant—Act of 1954—*Business premises—Application for new tenancy—Landlord requiring possession for reconstruction —Reconstruction not primary purpose—"Substantial part" of premises a question of fact—Landlord and Tenant Act,* 1954 (2 *& 3 Eliz.* 2, *c.* 56), *s.* 30 (1) (*f*), (*g*), (2).
Fact or Law. "*Substantial.*"

The tenant of a provision shop applied to the landlord, a jeweller, for a new lease; the landlord refused, as he wished to open a jeweller's shop on the premises, which consisted of a shop on the ground floor and two storeys above used for storage.

On an application by the tenant to the county court for an order under the Landlord and Tenant Act, 1954,[1] directing the grant of a new lease, the landlord, who could not oppose the application on the ground that he required possession for himself, as he had only recently acquired the premises, opposed on the ground that he required possession in order to reconstruct a substantial part of the premises to make them suitable for a jeweller's shop. The proposed work was the provision of a new shop-front of a different type, the demolition of a wall at the back of the shop, so as to throw the whole ground floor into the shop, a complete re-laying of the floor in a different material, and the provision of extensive new shop fittings. No work was to be done on the upper floors.

The county court judge found that the real purpose of the landlord was to get possession so as to carry on a business of his own, and that the proposed reconstruction was merely ancillary to that purpose. He also found that the part of the premises affected was not a "substantial part," and directed the grant of a new lease. On an appeal by the landlord:—

Held, dismissing the appeal, (1) that the landlord could not defeat the Act by putting forward an ancillary purpose open to him in law as if it were the main purpose;

J. W. Smart (*Modern Shoe Repairs*) *Ld.* v. *Hinckley & Leicestershire Building Society* [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846 applied.

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "[for a new tenancy under the Act] ". . . are such of the following "grounds as may be stated in the "landlord's notice . . . that is to say: "— . . . (*f*) that on the termination "of the current tenancy the landlord "intends to demolish or reconstruct "the premises comprised in the hold- "ing or a substantial part of those "premises or to carry out substantial "work of construction on the holding "or part thereof and that he could "not reasonably do so without "obtaining possession of the holding; "(*g*) subject as hereinafter provided, "that on the termination of the "current tenancy the landlord in- "tends to occupy the holding for the "purposes, or partly for the pur- "poses, of a business to be carried on "by him therein, or as his residence. "(2) The landlord shall not be en- "titled to oppose an application on "the ground specified in paragraph "(*g*) of the last foregoing subsection "if the interest of the landlord . . . "was purchased or created after the "beginning of the period of five years "which ends with the termination of "the current tenancy, . . ."

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(2) That the question whether the part of the premises affected was "substantial" was one of degree and therefore of fact; and, as there was evidence on which the judge could properly find that the part affected was not "substantial," the court could not disturb his finding.

APPEAL from the late Judge Backhouse, sitting at Mansfield County Court.

The tenant, a provision dealer who occupied a shop in Westgate, Mansfield, applied under the provisions of the Landlord and Tenant Act, 1954, to his landlord for the grant of a new tenancy. The landlord, who was tenant of a jeweller's shop in the town, refused this request as he was anticipating that his lease would not be renewed, and wished to transfer his business to the premises in Westgate. On an application by the tenant to the county court for an order granting a new lease, the landlord lodged an objection pursuant to section 30 (1) (*f*) of the Act, stating that he required possession in order to reconstruct a substantial part of the premises in order to make them suitable for occupation as a jeweller's shop.

The shop in question had a plain flat shop-front; at the back of the front part of the shop to which the public had access was a wall, behind which were two rooms; there were two floors above, which were used merely for storage purposes. The work which the landlord proposed to carry out was to remove the existing shop-front and substitute an "arcade" type entrance with the door set back from the street and with windows for display on either side of the corridor so formed; to take down the wall at the back, so as to throw the two back rooms into the main shop; to re-lay the whole of the flooring, and to instal a considerable quantity of shop fittings. No work was to be done on the upper floors. The cost of the shop fitting work (no estimate for the builder's work had been obtained) was estimated at about £3,500. The value of the premises was estimated at £8,000 to £9.000.

At the hearing in the county court the landlord admitted that he could not claim possession for his own occupation, as he had acquired the freehold reversion only in 1953, and was accordingly debarred by section 30 (2) from claiming possession under section 30 (1) (*g*). He further admitted that if the lease were renewed he would not carry out any of the proposed work.

The judge found that the landlord's real intention was to obtain possession, and that the intention to reconstruct was merely ancillary. He also found that the proposed work did not constitute the reconstruction of a substantial part of the premises or a substantial work of construction, and made an order for the grant of a new tenancy. The landlord appealed.

W. A. Sime for the landlord.

J. A. Plowman Q.C. and *A. R. M. Ellis* for the tenant.

Case cited in argument not referred to in the judgments: *Agar* v. *Nokes*.[2]

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DENNING L.J. Mr. Atkinson is the tenant of a grocer's shop in Mansfield. Two years ago the lease of his shop was bought over his head by Mr. Bettison. Mr. Atkinson's lease has now come to an end, and under the new Landlord and Tenant Act, 1954, he is entitled to an automatic extension of that lease unless the landlord can bring himself within one of the grounds specified in the Act. The ground with which we are here concerned is the ground that he intends to reconstruct a substantial part of the premises. That is section 30 (1) (*f*) of the Act.

But before dealing with that subsection I may say that the following subsection (subsection (1) (*g*)) is important. That provides that the landlord can also resist a new lease if he intends to occupy the premises himself for the purpose of a business to be carried on by him. But in order to bring himself within that subsection he has to own the premises for the last five years. The Act does not allow an owner to buy a house just when the lease is coming to an end, and then get possession on the ground that he requires it for his own purposes; he has to be the owner for five years in order to come within that subsection. Now the landlord in this case, Mr. Bettison, is a jeweller, and he wants to get occupation of these premises so as to occupy them himself for his own business. But he cannot rely on subsection (1) (*g*) because he has not been the owner for five years. He can only rely on subsection (1) (*f*), which provides: "that on the termination of the current tenancy the "landlord intends to demolish or reconstruct the premises "comprised in the holding or a substantial part of those premises "or to carry out substantial work of construction on the holding "or part thereof and that he could not reasonably do so without "obtaining possession of the holding."

The landlord says that he wants to do the following work: He wants to take out the existing shop-front and to put in a new shop-front with a kind of arcade entrance which is suitable for a jeweller's shop, a long entrance flanked with windows where the public can walk in for some 15 feet before they come to the actual shop door. In addition, he proposes to take down a wall at the back. By this work the landlord says that he intends to reconstruct a substantial part of the premises. He says that the ground floor is a substantial part of the premises and that the work proposed is a reconstruction of the ground floor.

There is no doubt, however, on the evidence, and on the findings of the county court judge, that the real purpose of the landlord is to get possession in order to carry on a business of his own. The proposed work is a secondary or ancillary matter. By the decision of this court in *J. W. Smart* (*Modern Shoe*

[2] (1905) 93 L.T. 605.

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Repairs) *Ld.* v. *Hinckley and Leicestershire Building Society* [1]—a decision, it is true, on the Leasehold Property (Temporary Provisions) Act, 1951, but nevertheless on very similar provisions—it was held that in order to come within a similar subsection the landlord's *primary purpose* must be to reconstruct the premises or a substantial part thereof. In the present case that is not his primary purpose. His primary purpose is to get possession for his own business. He cannot get the premises on that ground because he has not owned the premises for five years. He should not be allowed to circumvent that provision by putting forward a secondary purpose as though it were the main purpose.

Assuming that the landlord was able to overcome that difficulty, the next question is whether the proposed work is the reconstruction of a substantial part of the premises. The question what is "substantial" is one of degree, and therefore of fact. If a judge went wrong in that he came to a conclusion which was clearly wrong or to which no reasonable man could come, then this court would interfere. But when it is a matter on which two minds can quite reasonably come to differing conclusions, then it is essentially a question for the county court judge. This seems to me to be such a case. It is a building on three floors. Nothing is proposed to be done with the first and second floors. All that is intended is the fitting of a new shop-front, and a new floor. The judge said that if Mr. Sime's construction of the Act was right, any landlord could buy premises, and by means of merely altering the shop-front get the tenant out and go in himself. That shows what the judge felt about the case. He thought that this was not the reconstruction of a "substantial part" of the premises. I think that that was a decision to which he could properly come, and that this court cannot and should not interfere with his view on the matter. The appeal must be dismissed.

HODSON L.J. I agree. I think that this case is governed in principle by the decision in *J. W. Smart* (*Modern Shoe Repairs*) *Ld.* v. *Hinckley and Leicestershire Building Society*.[2] The section under consideration in that case was section 12 (3) (*c*) of the Leasehold Property (Temporary Provisions) Act, 1951, that section providing: "The court shall not order the grant of "a new tenancy if it is satisfied—. . . (*c*) that the landlord "reasonably requires possession in order that the premises the "subject of the expiring tenancy, or a substantial part of those "premises, may be demolished or reconstructed," whereas in this case by section 30 (1) the grounds on which a landlord may oppose an application under subsection (1) of section 24 of this Act are "such of the following grounds"; then follows (amongst others) subsection (*f*): "that on the termination of the current

[1] [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846.

[2] Ibid.

" tenancy the landlord intends to demolish or reconstruct the " premises comprised in the holding or a substantial part of those " premises or to carry out substantial work of construction on " the holding or part thereof and that he could not reasonably " do so without obtaining possession of the holding."

What was said in the earlier case—which I think applies in principle to this case—was concisely put by my Lord [3]: " In " order that the landlord should bring himself within para- " graph (*c*), demolition or reconstruction must be the immediate " and primary purpose. That is not so here." Those words apply to this case on the admitted facts. There is no question of any sharp practice on the part of the landlord. He has been perfectly frank, but he has said that he wants occupation of these premises for his own purposes. He is unable to avail himself of the provision contained in sub-paragraph (*g*) enabling him to obtain possession if he intends to occupy for the purposes of his own business because of the short length of time since he purchased the property. As Evershed M.R. pointed out in *Smart's* case,[4] the emphasis under the subsection we are now considering has to be put on the premises themselves rather than the occupation or use to which they are going to be put. Further, he said, repeating what the county court judge had said in that case [5]: " this work of adaptation, with its structural com- " ponents is, after all, but ancillary to the desire of the landlords " themselves to occupy the shop and to make that occupation " more commodious." The Master of the Rolls then repeated a large part of the judgment of the county court judge with approval, that judgment being to the same effect.

So far as the second point is concerned I think that the respondents in this appeal are right on that also, because this appeal raises the question on which the county court judge did, I think, hope to get some guidance as to how the word " substantial " was to be approached. But I am afraid that nothing more can be said by this court than was said by the House of Lords in *Palser* v. *Grinling* [6] in connexion with a rent case, the question there being whether the substantial portion of the rent was attributable to furniture. In that class of case, as in this class of case, the onus is on the landlord, and Lord Simon's words are applicable. He said [7]: " One of the primary " meanings of the word is equivalent to considerable, solid, or " big. It is in this sense that we speak of a substantial fortune, " a substantial meal, a substantial man, a substantial argument " or ground of defence. Applying the word in this sense, it must " be left to the discretion of the judge of fact to decide as best " he can according to the circumstances in each case, the onus " being on the landlord."

[3] [1952] 2 T.L.R. 684, 688.
[4] Ibid.
[5] Ibid. 687.
[6] [1948] A.C. 291; 64 T.L.R. 2; [1948] 1 All E.R. 1.
[7] [1948] A.C. 291, 317.

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I think that the county court judge here arrived at a conclusion on the evidence at which he was entitled to arrive; that this was not a reconstruction of the premises comprised in the building or a substantial part of those premises, nor was it the carrying out of a substantial work of construction. It is not one of those cases where this court can say that there is no evidence upon which he could have arrived at such a conclusion. For these reasons, therefore, as well as those which my Lord has expressed, I think that this appeal fails.

MORRIS L.J. I also agree, and only add a word or two because of the importance of the matter.

The judge in his judgment commended the frankness of the landlord, who made it quite clear what his real purpose and intention was. The county court judge summarized the matter in these words: "He is perfectly frank about it. He says: 'I "'carry on business as a jeweller, my lease is up in just over a "'year's time, and I may have to come out. Even if I stop "'I would like the premises to carry on business there as well. "'I bought the premises in March, 1953, and I cannot apply "'for possession for my own occupation because I have not been "'owner for five years, and I would not want to do the proposed "'reconstruction for Mr. Atkinson.'"

Those facts admit of no doubt. The landlord wants these premises for himself to carry on his own business, and no reconstruction is in contemplation if there is a continuation by Mr. Atkinson of his occupation. It seems to me that the reasoning in the case to which reference has been made of *J. W. Smart (Modern Shoe Repairs) Ld.* v. *Hinckley and Leicestershire Building Society*[8] is of application to the case which we are now considering. Evershed M.R., in his judgment, expressly affirmed and adopted the wording in that case of the county court judge who had said this[9]: "'I think that in the present case the "'primary and real object for which the respondents require "'possession of these premises is for occupation by Cockshaw "'(the agent), and that the reconstruction contemplated by "'them is only ancillary to that occupation, and is therefore not "'the real reason for requiring possession.'"

In the present case, I find it abundantly clear that the real reason for wanting possession, and the real intention and the real purpose of the landlord. is that which would bring him within section 30 (1) (*g*) were it possible for him to avail himself of that section: his real intention and real purpose is to occupy the building for the purposes of a business to be carried on by him therein, and the reconstruction contemplated is only ancillary to that desired occupation.

On the other points which have been taken by the respondent I am also in agreement with the judgments which have been

[8] [1952] 2 T.L.R. 684. [9] Ibid. 688.

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delivered. The matters are largely matters of fact and of degree. I can see nothing in the judgment now under review which shows any wrong approach or wrong appreciation of the evidence or assessment of it, or any omission to consider any evidence. I see no reason for disturbing the conclusion reached by the judge.

Appeal dismissed.

Solicitors: *Gibson & Weldon for P. A. Foster, Mansfield; Taylor, Jelf & Co., for Shacklock, Bosworth & Hooton, Sutton-in-Ashfield.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

* SCHOFIELD *v.* JONES.

1955
Oct. 20.

Lord Goddard C.J., Ormerod and Barry JJ.

Licensing — Friends entertained by licensee — Supply by licensee of drink to staff after closing time — Staff employed by brewery company—Drinks debited to company—Whether staff "private" "friends" of licensee "entertained at his own expense"—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 100 (1) (*a*), (2) (*c*).

The licensee of an inn owned by a brewery company supplied members of the staff, who were employed by the company, with a drink after the inn had closed and they had tidied up the premises. In each case the drink was debited to the company. The supply of the drinks followed a general practice and was expected by the staff as an additional reward for their services. On a charge against the licensee of supplying intoxicating liquor after permitted hours, contrary to section 100 (1) (*a*) of the Licensing Act, 1953, the licensee was convicted. On appeal:—

Held, that, on the facts, the licensee was not supplying the drink to his "private friends" within section 100 (2) (*c*) of the Act of 1953, nor, since the drink was debited to the company, was the staff "entertained by him at his own expense," and, therefore, the licensee was rightly convicted.

Dictum of Humphreys J. in *Jones* v. *Cockroft* [1945] 2 All E.R. 333, 335 disapproved.

CASE STATED by a stipendiary magistrate for the City of Manchester.

On February 9, 1955, an information was preferred by the respondent Alan Jones, against the appellant, Harold Shaw Schofield, that he on January 9, 1955, except during permitted hours did supply to Harriett Rogers, in licensed premises known as Yew Tree Inn, Wythenshawe, intoxicating liquor to be consumed on the premises contrary to section 100 (1) (*a*)[1] of the

[1] Licensing Act, 1953, s. 100: "(1) Subject to the provisions of this Act, no person shall, except during the permitted hours—(*a*) himself, or by his servant or agent, sell or supply to any person in any licensed premises . . . any intoxicating liquor to be consumed either on or off the premises . . . . (2) Nothing in the preceding subsec-

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Licensing Act, 1953, and on February 9, 1955, fourteen further informations were preferred against the appellant in like terms in respect of the alleged supply to 14 different persons.

The following facts were found by the magistrate: The appellant was the licensee and manager of the inn, which was owned by a brewery company. The 15 persons named in the informations as being supplied with intoxicating liquor were all members of the staff of the inn and were all employed and paid by the company, though the appellant engaged the staff. Shortly before midnight on January 8, 1955, two groups of police officers took observations on the inn and at 12.10 a.m. on January 9 were admitted by the appellant. They went straight to the "Refreshment Room" where 15 members of the staff were seated around two tables, each having in front of him or her a partly consumed glass of intoxicating liquor. It was admitted that the staff had been supplied and had partly consumed the liquor during non-permitted hours and during non-working hours. No intoxicating liquor had been sold to the staff during non-permitted hours. On Saturday, January 8, 1955, some 1,200 customers were served in the inn and by the time all glasses had been washed and put away and the premises generally made tidy the time would be at least 11.30 p.m. or even later. Each night of the week, when the premises had been tidied up, each member of the staff was provided with one drink, which was debited to the brewery company, and on Saturday nights the appellant's wife provided the staff with pies and the appellant provided them with a second drink at his own expense. The appellant did not allow the staff to drink or smoke while on duty, and this period included the time taken in washing and tidying up after closing time. Each member of the staff was given the one drink (or two drinks on Saturday night) if desired, irrespective of the capacity in which he or she was employed by the company. The only qualification required to receive the drink was to have been a member of the staff on the particular night. The first drink was supplied by the appellant following a general practice and because he felt that it would be difficult to get staff if he did not do so. The staff expected it as an additional reward for their services and because of the nature of their employment. The second drink was supplied by the appellant because on Saturday the staff worked very hard and were a long time without food and drink. There was no evidence of any private friendship in the ordinary sense existing between the appellant and any of the 15 members of the staff.

It was contended by the appellant that the supply of intoxicating liquor in the circumstances was permitted by section 100 (2) (*c*) of the Act of 1953,[1] and that the subsection aimed at

[1] "tion shall prohibit or restrict— . . .
"(*c*) the supply of intoxicating liquor
"for consumption on licensed pre-
"mises to any friends of the holder
"of the licence bona fide entertained
"by him at his own expense, or the
"consumption of intoxicating liquor
"by persons so supplied."

customers and strangers. The appellant contended that the staff were his private friends within the meaning of the subsection.

It was contended by the respondent that the staff were not the private friends of the appellant, and that section 100 (2) (*c*) was not available to him.

The magistrate was of the opinion that (1) the 15 members of the staff were not within the meaning of section 100 (2) (*c*) the private friends of the appellant, who was the holder of the licence; (2) the drinks given to the staff were entirely a business transaction as one of the methods by which the licensee ran his house; (3) that the appellant remained in his capacity as licensee and the staff remained on the premises as staff and received their drinks as staff; (4) that consideration of private friendship did not enter into the transaction at all, and the staff received their drinks because of the work they had done and because the nature of their employment debarred them from drinking while on duty; (5) that the fact that drinks were debited to the brewery company did not prevent them being supplied at the expense of the appellant. The magistrate convicted the appellant on each of the 15 informations and fined him £9.

Percy Lamb Q.C. and *R. H. Mais* for the appellant.
W. G. Morris for the respondent.

The cases cited in argument are referred to in the judgment of Lord Goddard C.J.

LORD GODDARD C.J. stated the facts and continued: The magistrate's opinion was that: "The drinks given to the staff "were entirely a business transaction as one of the methods by "which the licensee ran his house." I entirely agree with him. The appellant was not entertaining the staff as private friends; he was giving them a drink as servants because if he did not he would not be able to get the staff, and they expected it as part of their remuneration. Therefore, as it seems to me, it cannot come within section 100 (2) (*c*) of the Licensing Act, 1953, which enables a licensee to supply intoxicating liquor to "any private "friends of the holder of the licence bona fide entertained by "him at his own expense." As I said in the course of the argument, if he was giving a Christmas party to his staff, that might be a different matter. There he would be giving entertainment, but one cannot say that this is an entertainment of private friends. It is giving the staff something which they expect, and without which he would not be able to get the staff. That does not seem to be entertainment of private friends. There is no evidence that they were friends, it is simply staff, though I do not think one would be too acute to find the degree of friendship or acquaintanceship between the parties in any case in which a licensee is giving a little entertainment to somebody. For instance, he might find somebody who had been in the Army

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with him and he had not seen for years, and he could easily say: "Come into my room and I will give you a drink." That would be the entertainment of a private friend, if the licensee paid for it.

It seems to me that the magistrate was quite right in finding that this was not the entertainment of private friends; but the magistrate does say: "The fact that drinks were debited to the "brewery company did not prevent them being supplied at the "expense of the appellant." I cannot agree with that. It may be that he founded himself on *Jones* v. *Cockroft*,[1] where Humphreys J. said[2]: "I do not think the fact that the land-"lord said here: 'As a matter of fact, I shall put down those "'drinks to the owners of the house afterwards,' means that it "was not at his own expense. The words in the section 'at his "'own expense' are probably merely to emphasise that he must "be the person who pays, not the people who get the drink." With all respect to Humphreys J., for whose opinion on a matter of this sort I have the greatest regard, section 100 (2) (*c*) provides that private friends must be entertained at the licensee's own expense. If the expense is falling on somebody else, it seems to me that it clearly does not fall on the licensee, and so it is not at the licensee's expense. The passage I have read from the judgment of Humphreys J. is only a dictum, and I cannot agree with it, and although I did not expressly dissent from it in *Parkinson* v. *Barnes*,[3] to which Mr. Lamb called our attention, I do not think that it can be said that I approved it. I quoted it and pointed out that it did not arise in the particular case. It does arise in the present case, and I say quite frankly I do not agree with the dictum. If the expense fell on the owners, it does not seem to me that the case is within paragraph (*c*). I mention that because there were in this case two drinks one of which was at the expense of the licensee, but he cannot bring that within paragraph (*c*) because that was not the entertainment of private friends; it was given as part of the remuneration of these people. For these reasons, I think the magistrate came to a right decision, though on one point I differ from him, and the appeal fails.

ORMEROD J. I agree, and for the same reasons. The magistrate found "There was no evidence of any private friendship in "the ordinary sense existing between the appellant and any of "the 15 members of the staff." Mr. Lamb submitted that the magistrate was in error in that he did not define or attempt to define what was meant by "private friendship" in section 100 (2) (*c*) of the Licensing Act, 1953. It is not for this court on this occasion to attempt to define what is meant by "private "friendship," and certainly I would not attempt to do so. But the magistrate has found that each of the staff was given a drink on this night irrespective of the capacity in which he or she was

[1] [1945] 2 All E.R. 333.
[2] Ibid. 335.
[3] (1947) 177 L.T. 520.

employed by the brewery company. It is also found that the only qualification required to receive the drink was to have been a member of the staff on the particular night. That, in addition to the other findings that the whole object of this entertainment or hospitality was to enable him to keep his staff, I think makes it quite clear that whatever should be the definition of "private "friendship" the facts of this case do not bring these particular defendants within it. I agree that this appeal fails.

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BARRY J. I agree on both the grounds stated by my Lords, and do not think it is necessary to add anything to what they have said.

Appeal dismissed.

Solicitors: *Meredith, Hardy & Hutchison for Bullock, Worthington & Jackson, Manchester; Sharpe, Pritchard & Co. for P. B. Dingle, Manchester.*

J. D. P.

[PRIVY COUNCIL.]

*GUSTAVO ROMEO VINCENTI . . . APPELLANT;

AND

STEPHEN J. BORG . . . . . RESPONDENT.

J. C.†

1955

Oct. 17.

ON APPEAL FROM THE COURT OF APPEAL OF MALTA.

Malta—Pre-emption—Immovable property—Judicial sale by auction—"Absent persons"—Conditions limiting right of pre-emption—Publication of notice of sale at least one month before the day fixed for the sale—"Day fixed for sale" in the notice—Code of Organization and Civil Procedure (*c.* 15), *ss.* 314, 356—*Civil Code* (*c.* 23), *s.* 1520 (1) (2).

In subsection (2) of section 1520 of the Civil Code of Malta, which provides that publication in the Government Gazette of the advertisement of a sale of immovable property by judicial auction "at least one month before the day fixed for the sale" will deprive "absent persons" of their rights of pre-emption, the words "the day fixed for the sale" mean the day fixed in the advertisement and not the day on which the sale is actually held.

Where, therefore, the interval of time between the date of publication of the advertisement in the Gazette of the judicial sale by auction of immovable property, of which the respondent, on behalf of persons who were at all times material to the advertisement and sale absent from Malta, claimed a right of pre-emption, and the day fixed therein for the sale was less than one month, the respondent was not deprived of the right

† *Present*: LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

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of pre-emption although the sale actually took place more than a month from the date of the notice.

Judgment of the Court of Appeal of Malta affirmed.

APPEAL (No. 44 of 1954) from a judgment of the Court of Appeal of Malta (Camilleri P., Gauci and Harding JJ.) (June 15, 1953) which affirmed a judgment of the Civil Court of Malta (May 28, 1951), granting to the respondent a declaration that he had on September 3, 1948, validly exercised a right of pre-emption in respect of certain immovable property situated in Malta. The appellant contended on a number of grounds that the respondent was not entitled to exercise the said right, but of these only one was urged on this appeal, namely, that subsection (2) of section 1520 of the Civil Code of Malta barred the respondent from exercising the right.

The relevant facts, shortly stated, were as follows: On July 24, 1946, the Civil Court made an order that the property which was the subject-matter of this case be sold by auction. On June 20, 1947, a sale notice appeared in the Government Gazette that an auction would take place on July 18, 1947. On July 17 the sale was adjourned. On December 30, 1947, a second sale notice appeared in the Government Gazette announcing that the sale would take place on January 22, 1948. On that date and also on January 29, 1948, and February 19 and 26, 1948, the sale was further adjourned. Finally on February 28, 1948, as the result of an auction held on that date the property was "adjudicated" under the relevant sections of the Code of Organization and Civil Procedure of Malta to one Theuma for £21,300.

It was permissible under the law of Malta for higher bids to be made after the auction. Such bids were made, and the property was finally adjudicated to the appellant on April 1, 1948, for the price of £32,200.

The respondent, on September 3, 1948, acting as attorney for and on behalf of two nieces, exercised a right of pre-emption, and it was the validity of the exercise of that right that was challenged. The advertisements of the two sales, though published in the Government Gazette, were not served (as was permissible under certain provisions of law which appear later) on the respondent or on the parties on whose behalf he acted. The latter were at all times material to the advertisements and the sale absent from Malta.

The relevant law of Malta relating to sales by auction was to be found in the Code of Organization and Civil Procedure.

Section 313 provided that after the lapse of a stated period "the Court shall, upon the demand of the creditor or of the debtor "to be made by an application, appoint one or more days for the "sale by auction, and order the issue of advertisements."

Section 314 (1) provided: "The advertisement shall be signed "by the registrar and shall state the date of the judgment or "decree ordering the sale by auction, the nature of the thing to

" be sold, the place of the sale and the day and hour in which the " auction is to begin and to end."

Section 315 (1) required the advertisement to be served on certain persons and to be posted up at certain places. Section 315 (2) provided: " It shall be lawful for the Court to order " such advertisement to be published in one or more periodical " newspapers." Section 315 (3) provided that with regard to immovable property: " the posting up and publication of the " advertisement shall, unless the Court otherwise directs, take " place, . . . at least fifteen days before the day appointed for " the sale by auction . . ."

Section 356 provided: " The right of pre-emption or re-pur- " chase in respect of immovable property sold by auction, " whether in favour of the debtor or of any other person, ceases " after four months from the date of the registration of the act " of adjudication in the Public Registry:

" Provided that such right shall not be exercisable by any " person, except the debtor, on whom, upon the demand, even " verbal, of the debtor or of the execution creditor, the advertise- " ment of the auction shall have been served."

A later enactment, the Civil Code, in dealing with rights of pre-emption, provided by section 1520 in respect of sales by judicial auction that: " 1520.—(1) Where the sale was made by " judicial auction, the right of pre-emption shall not be competent " to the persons to whom notice of the proposed sale was " given by service of a copy of the advertisement mentioned in " section 314 of the Code of Organization and Civil Procedure " (Chapter 15).

" (2) The provisions of this section shall also apply to absent " persons if the said advertisement shall have been published in " the Government Gazette at least one month before the day " fixed for the sale."

1955. July 11. *Walter Raeburn Q.C.* and *J. G. Le Quesne* for the appellant.

C. J. Colombos Q.C. and *N. Heald* for the respondent.

Walsh v. *Secretary of State for India* [1] was referred to for the proposition that where a provision of law involves a forfeiture of rights the law must be strictly interpreted.

October 17. The judgment of their Lordships was delivered by Mr. L. M. D. DE SILVA, who stated the facts and statutory provisions set out above and continued: It will be seen that under section 356 of the Code of Organization and Civil Procedure the only limitations upon the exercise of a right of pre-emption in respect of immovable property sold by auction under an order of court were that: (i) no person other than the debtor could

[1] (1863) 10 H.L.Cas. 367, 386.

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exercise a right of pre-emption if the advertisement of the auction had been served on him as prescribed by the section; (ii) the right to exercise it by persons entitled to do so ceased after four months from the date of the registration of the act of adjudication in the Public Registry. It will also be seen that the limitations on rights of pre-emption imposed by section 356 of the Code of Organization and Civil Procedure were extended by section 1520 of the Civil Code.

The only point argued on this appeal was that the provision in subsection (2) of section 1520 barred the respondent from exercising a right of pre-emption.

The appellant contends that the publication of the advertisement in the Gazette of December 30, 1947, complied with the terms of section 1520 (2) and therefore that it is not competent for the respondent, who was an "absent person," to exercise a right of pre-emption. The respondent denies that the terms of section 1520 (2) have been satisfied.

Reference has already been made to two sale notices in the Government Gazette. A sale notice appeared in the Gazette of June 20, 1947, to the effect that a sale would take place on July 18, 1947. Another sale notice appeared in the Gazette of December 30, 1947, that a sale would take place on January 22, 1948. It will be seen that in each of these notices the interval of time between the date of publication and the date fixed for the sale in the notice was less than a month. Under subsection (2) of section 1520 in order to preclude "absent persons" from exercising their right of pre-emption there must be an interval of "at least one month" between the date of publication and "the day fixed for the sale." If the words "the day fixed for "the sale" mean the day fixed in the notice for the sale it is clear that neither notice satisfied the requirements of the subsection. The appellant contends that the words "day fixed for "the sale" in the subsection do not mean the day fixed in the notice but the day on which the sale was actually held, namely, February 28, 1948. If that interpretation were correct more than a month would have elapsed between the date of publication of each of the notices and the "day fixed for the sale" and the terms of the subsection would have been complied with.

The interpretation sought to be put upon the words "day "fixed for the sale" by the appellant is contrary to the natural meaning of the words in the context in which they appear, namely, the day fixed in the notice for the sale, and if a departure from that meaning is permissible, it would be for some strong reason.

It was argued for the appellant that the "day fixed for the "sale" in subsection (2) of section 1520 should not be confused with the day "appointed" for the sale in subsection (1) of section 313. The words used in the two subsections are no doubt different, but their Lordships do not think any significance should be attached to the difference. They are appropriate in the context

of each subsection to indicate the day on which the sale is to be held.

Reliance was placed upon sections 1396 and 1397 of the Civil Code, which are: "1396. A sale is a contract whereby one of the "contracting parties binds himself to transfer to the other a thing "for a price which the latter binds himself to pay to the former.

"1397. A sale is complete between the parties, and, as regards "the seller, the property of the thing is transferred to the buyer, "as soon as the thing and the price have been agreed upon, "although the thing has not yet been delivered nor the price "paid; and from that moment the thing itself remains at the risk "and for the benefit of the buyer."

It was said that a sale did not take place until there had been a concluded contract and that the "day fixed for the sale" could not be ascertained until there had been a concluded contract. The words "day fixed for the sale," on the meaning of the word "sale" contended for by the appellant, would mean the day fixed for the conclusion of the contract and could be determined whether or not a contract is concluded on that day. What the appellant is striving to contend is that "the day fixed for the "sale" means "the day of the sale," ignoring the words "fixed for."

It was argued for the appellant that the legislature has enacted section 1520 (2) for the protection of a purchaser, and that no interpretation of it should be adopted which would make it possible by fixing the date of sale at less than one month from the date of publication of the advertisement in the Government Gazette to take away the protection afforded. Their Lordships are unable to accept this contention. The right of pre-emption is recognized and preserved in the statute law of Malta. In order to mitigate the uncertainty consequent on a possible exercise of rights of pre-emption after a judicial auction, the legislature in the case of immovable property by section 356 of the Code of Organization and Civil Procedure placed a time limit for the exercise of those rights and took away altogether the rights from persons other than the debtor upon whom the advertisement of the auction had been served. By section 1520 (2) of the Civil Code an alternative to service of the advertisement was provided for the special case of "absent persons." It was provided that publication of the advertisement in "the Government Gazette at "least one month before the day fixed for the sale" would deprive "absent persons" of their rights of pre-emption. Under section 315 an interval of only 15 days was necessary between the publication of the advertisement and the day appointed for the sale, and an advertisement in the Gazette was not compulsory. The necessity for publication in the Gazette, and the necessity for that publication to be at least one month before the sale, appear to have been imposed by the legislature for the benefit and protection of persons who were entitled to rights of pre-emption.

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But even if it were otherwise, the consequence suggested by the appellant, referred to earlier, does not justify a departure from the natural meaning of the words "fixed for the sale."

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondent the costs of this appeal.

Solicitors: *Highwood & Smith; Denton, Hall & Burgin.*

C. C.

1955
Oct. 6, 10.

Lord Merriman P. and Collingwood J.

[PROBATE, ETC., DIVISION.]

* BEVAN *v.* BEVAN.

Husband and Wife — Divorce — Desertion — Termination — State of deserted party's mind—Words spoken as result of deserted party's justified sense of grievance—Metaphorical not physical prevention of cohabitation.

A wife who suffered, not unjustly, from a deep sense of grievance because of the conduct of her husband both before and after he had finally left her in circumstances amounting to desertion, told him shortly after the separation that she did not want to see him again and that she wanted a divorce:—

Held, that, the wife's conduct in such circumstances did not exonerate the husband from the necessity of doing something to bring to an end the state of desertion which he had started, neither did it terminate his desertion.

Barnett v. *Barnett* [1955] P. 21; [1955] 2 W.L.R. 229; [1954] 3 All E.R. 689 and *Fishburn* v. *Fishburn* [1955] P. 29; [1955] 2 W.L.R. 236; [1955] 1 All E.R. 230, in which the deserted spouse effectively prevented any advances towards a reconciliation by bolting the door, not merely metaphorically but actually and physically, distinguished.

Sifton v. *Sifton* [1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109 and *Church* v. *Church* [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441 applied.

APPEAL from an order of the stipendiary magistrate for the Petty Sessional Division of Swansea, made on the ground of desertion.

The following statement of facts is taken from the judgment of Collingwood J. The parties were married on July 31, 1954, and the last six months or so of their life together was spent in rooms in St. Thomas, Swansea. The wife said, in her evidence before the stipendiary magistrate, that she was not happy in her surroundings there, but there was so far no real trouble between them, although she had found from a very early stage that the husband was not truthful over money matters. They had been buying the furniture for their home on hire-purchase. The wife was in work. She earned some £4 10s. 0d. a week, and out of

this each week she gave her husband £3 towards the instalments of the hire-purchase of this furniture. At the time of the parting these payments made by the wife to the husband for that purpose aggregated £64. Matters came to a head on February 1, 1955, which was a Tuesday. On that evening the husband was on night work, and, as was the custom when he was so engaged, the wife had gone to her parents. He came into her parents' home for his tea and supper, as he always did on these occasions, and then, after the evening meal, as he was leaving the house, he told his wife that he was leaving her, that his clothes were packed, and that the furniture was going back. In fact, he had spent the whole of the £64, which his wife had provided, upon his own pleasures, but the wife was not told that at the time; she discovered it later, after an interview between her husband and her father. The wife, in her evidence, said that she had tried to induce the husband to come back as he left the house, but he did not, and later that evening her father went to his place of work and had an interview with him to find out from him what it was all about, and it was on her father's return to her that she learned from him what it was all about, namely, that the furniture was being taken back owing to what the husband had done with the money. On the next day she went to their rooms in Sebastopol Street, St. Thomas, Swansea, with her father and her cousin, and there they met the husband. There was a scene between the father and the husband, the father demanding to know what he had done with this money and suggesting that he was keeping another woman. It led to blows, and they had to be separated, and the wife told the husband to go, because, she said, she wanted to bring the troubles to an end. On the Thursday the parties again met, this time at his mother's. The husband still refused to give his wife any information as to what he had done with this money; his whole attitude was one of complete indifference; he just sat there eating his dinner as if nothing had happened at all.

On February 3, 1955, a solicitor's letter was written to the husband on behalf of the wife, which read as follows: "Dear Sir, We have been consulted by your wife, Mrs. Glenys "Bevan, now of 46 Eiddwen Road, Fforestfach, Swansea, in "reference to certain matrimonial disputes existing between you. "From our instructions, it appears that you do not wish to remain "in cohabitation with your wife, and amongst other matrimonial "offences you have committed, you have failed to pay for the "furniture at the matrimonial home, 16 Sebastopol Street, in "respect of which your wife was entrusting you with £3 0s. 0d. "per week, in payment to Mr. Jenkins, The Stores, Fforestfach, "Swansea. Owing to personal endeavours of the writer, Mr. "Jenkins has stated that he will not in fact seize the furniture "if he hears from us that there is any prospect of the marriage "being saved. We ourselves can only inform you that unless "you see your wife within or before 12 noon on Monday next,

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"the 7th instant, with a view to discussing these matters, all "that can be done is to let Mr. Jenkins take the furniture back, "as is his undoubted right. We shall be glad to hear from you "or your solicitors."

On the following Friday, February 4, 1955, the husband went to the wife's parents' house, taking the solicitor's letter with him. Again, as the wife said in evidence, he showed no concern for her at all, his only concern being with regard to the furniture. All he did was to ask her if she was prepared to pay for it all over again, the alternative to which was to send the furniture back. She was distressed and angry, and told him that she did not want to see him again, and said, in fact, that she wanted a divorce, and she added to that by making to hit him with a milk bottle, but was restrained from so doing.

Some time later, on a date which was not clear, the husband wrote a letter to his wife, which had since been destroyed. The evidence of the wife with regard to the contents of that letter was this: "It did ask me to come back in a way. It started "'Dear Glenys.' He said 'If you don't answer this letter I "'shan't bother with you again.' In a way it asked me to make "things up. I didn't answer the letter or do anything. I took "out a summons." This she did on April 16, 1955, alleging desertion by the husband on February 4, 1955, and also wilful neglect to provide reasonable maintenance for her.

The matter came before the stipendiary magistrate on April 26, 1955, and, after the wife had given her evidence and had been cross-examined, the case was adjourned for a month, in order that the parties might have the advantage of the services of the probation officer.

It came again before the stipendiary magistrate on May 24, 1955. The offices of the probation officer had not been effective. The wife was recalled by the court, and said that she had been to see the probation officer, and added, "I have no desire now "to return to my husband, even if the court is satisfied he "genuinely wants me. He has done nothing to try and make "it up to me—either over the money or the home."

On May 13, 1955, between the two hearings, the husband wrote a second letter to the wife, in the following terms: "I am "writing to you once more to ask you for your forgiveness for "what I did to you. I know it was a verey bad thing to do but "if you would only give me a chance to make it up to you I "honestly and truley would. You see Glen I still love you and "allways will and I want you back with me. I dont want you "to come back to nothing if you would only give me a littel time "I will soon get back to where we left off with nealy every thing "payed for. I admit I have done a verey bad thing by you Glen "but give me a chance to repair things once agian. I have been "seen with women which is not true and I was told you were "see with a chap but I dont beleive that all I want is you back "with me. If you give me a few moths to get a place and fix

" things up. You said you did not love me any more if that is " true I dont know, but nothing can stop me loveing you. Well " Glen I got no more to say but all I have said on this letter I " mean and it is all true every word of it. I honesty and truely " love you Glenys and I want you back with me. Ill make you " a husband you will be proud of if you will give me another " chance. all my love Desmond. P.S. Please answer this letter " so I will know what to do." The wife did not reply to that letter or to the letter written before the first hearing.

At the conclusion of the hearing on May 24, 1955, the stipendiary magistrate found the husband guilty of desertion and made a nominal order for maintenance in favour of the wife.

From that order the husband appealed.

D. Rankin for the husband appellant.

The wife did not appear and was not represented.

The cases cited in argument are referred to in the judgment.

COLLINGWOOD J. referred to the facts, remarking, as to the interview of February 4, 1955, that there was clearly no explanation by the husband on that occasion of his conduct nor any effort to make things up, and continued: The stipendiary magistrate, upon the evidence, decided that the husband had been guilty of desertion, and in the course of the reasons, which have been provided, he said: " The day that they parted he said he " was leaving her and packed his belongings. The complainant " was distressed and sent her father to the respondent's works to " find out the reasons "—and he adds " and try and effect a " reconciliation," but that does not appear from the note of the evidence. The reasons go on: " During the period of the adjourn- " ment the respondent has written one letter to his wife, that on " May 13, in which he asked for forgiveness and time to get " other accommodation—otherwise he has made no attempt to " see his wife. He has, in fact, made no sort of endeavour to " seek any accommodation, saying it would be of no use as his " wife didn't want him. He has saved no money, in the mean- " time, although his wages were the same. If the respondent was " genuine in his desire to resume living with his wife, he would " have done everything in his power to win back his wife's " affection. He has done nothing, and I have come to the " conclusion he doesn't want his wife back and also that at the " time of leaving her he intended to break up the marriage " permanently, and I am satisfied that his offer in his letter of " May 13 was not a genuine offer, and therefore the case has " been made out by the wife for desertion. In regard to neglect, " the wife has been able to maintain herself and that summons " is dismissed."

That decision is attacked upon this ground. It is said that it runs counter to a passage in the speech of Lord Macmillan,

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Collingwood J.

delivered in *Pratt* v. *Pratt*.[1] The passage reads as follows[2]: "In fulfilling its duty of determining whether on the evidence a "case of desertion without cause has been proved the court ought "not, in my opinion, to leave out of account the attitude of mind "of the petitioner. If on the facts it appears that a petitioning "husband has made it plain to his deserting wife that he will not "receive her back, or if he has repelled all the advances which "she may have made towards a resumption of married life, he "cannot complain that she has persisted without cause in her "desertion." As was pointed out by Willmer J. in *Church* v. *Church*,[3] that passage in the speech of Lord Macmillan is obiter dictum, and is, in fact, in conflict with authorities in this country. Willmer J. says in his judgment[4]: "To my mind the point under "discussion is concluded so far as I am concerned by the decision "of this court in *Sifton* v. *Sifton*.[5] That case seems to me to "be authority for the proposition that once desertion has been "started by the fault of the deserting spouse it is no longer "necessary for the deserted spouse to show that during the three "years preceding the petition he actually wanted the other "spouse to come back. It will, I think, be helpful if I read "part of the headnote, which seems to me admirably to sum "up what was the effect of Henn Collins J.'s decision. It reads "as follows: '. . . When a spouse is deserted, he or she is in "'the position that the presumption is in his or her favour and "'against the deserting spouse. It is not until some offer to "'return is made by the deserting spouse that the question "'arises whether it is an offer which ought, in all the circum-"'stances, to be accepted. Notwithstanding that the husband "'did not expect or really want his wife to come back, it was "'not incumbent on him to show that he was at all times during "'the three years next preceding the petition ready and willing "'to receive her.'"

That being the position, the question arises in the present case: What has the appellant done to terminate the state of desertion which he brought about on February 1, 1955? He attempted in his evidence to show that since February 1, 1955, when he left the house, there had been on his part a supervening animus revertendi, coupled with a bona fide approach to his wife with a view to resuming cohabitation with her. That clearly is what he was setting out to do. The stipendiary magistrate has found that such efforts as he did make were not bona fide. It is true, and it is perhaps unfortunate, that in his statement of reasons the stipendiary magistrate confines himself to the consideration of the final letter written by the husband on May 13, 1955. With respect to him, I should have thought that attention could more properly have been directed, with regard to the matter

[1] [1939] A.C. 417; 55 T.L.R. 910.
[2] [1939] A.C. 417, 420.
[3] [1952] P. 313; [1952] 2 T.L.R. 557; [1952] 2 All E.R. 441.
[4] [1952] P. 313, 317.
[5] [1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109.

of the husband's bona fide efforts to return to his wife, to (1) the interviews which took place between them, and (2) the first letter which he wrote to his wife, these being matters which took place before the issue of the summons on April 16, 1955. However, the only matter to which he refers is the letter written in the period of the adjournment between the two hearings, an adjournment, as I have said, granted with a view to the possibility of the parties becoming reconciled.

In my opinion it is impossible, on the evidence before the stipendiary magistrate, to say that it was not open to him to find that there was desertion originally by the appellant on February 1, 1955, and that such efforts as were made by him were not genuine efforts to get back to his wife. It is said "Well, is he not exonerated from making further efforts?" He himself says "I "did not go on making further efforts because she did not want "me back," and it is suggested that this case is really in the same class as *Barnett* v. *Barnett*,[6] which is a decision of Sachs J., and the similar case of *Fishburn* v. *Fishburn*.[7] But in my opinion those cases are in quite a different category from the present. They were not cases merely of words indicating that the wife had no desire to see her husband again. In both those cases the deserted spouse effectively prevented the other spouse from approaching her by bolting the door against any advances towards reconciliation, not merely metaphorically, but actually and physically, and I think that those cases go a long way further than anything that can be found in the evidence in the present case, which really amounts to this, that this wife, suffering, and not unjustly, from a deep sense of grievance, says to a husband who apparently is showing no contrition for, and almost no recognition of what he has done, "I do not want to see you any "more." In my opinion that cannot exonerate him from the necessity of doing something to bring an end to the state of desertion which he started. It requires something far more than that to relieve him of the necessity of doing something to bring the state of desertion to an end.

Having said that, I feel that I ought to add this: That does not mean that for all time, and in all circumstances, the wife is entitled to take up a non possumus attitude towards the husband. If and when he makes further efforts at reconciliation it will be for those efforts, against the background in which they are made, to be tested as to whether they amount to genuine efforts for reconciliation. I do not think I need say any more with regard to that aspect of the matter.

In my opinion this appeal fails.

LORD MERRIMAN P. I agree with the reasons which my brother has given for dismissing this appeal, and in particular I

[6] [1955] P. 21; [1955] 2 W.L.R. 229; [1954] 3 All E.R. 689.

[7] [1955] P. 29; [1955] 2 W.L.R. 236; [1955] 1 All E.R. 230.

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wish to add my concurrence with his concluding observations. Although as things stand the wife is entitled to succeed on the ground of desertion, it is not, in my opinion, a case in which she is entitled to take up an obdurate attitude and say that it has been decided that in no circumstances whatever is she obliged to resume cohabitation.

Appeal dismissed.

Solicitors: *Murray Napier & Co. for Andrew, Thompson & Partners, Swansea.*

E. J.

[COURT OF APPEAL.]

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1955
Oct. 5, 6.

Singleton, Jenkins and Parker L.JJ.

* BROPHY *v.* J. C. BRADFIELD & CO. LD.

Factory — Ventilation or fumes — Boiler room — Workman killed by injurious fumes—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 4 (1), 47 (1).

The plaintiff's husband, who was employed as a motor-lorry driver by the defendants, was found dead in the boiler room of the defendants' factory and the plaintiff claimed damages alleging, inter alia, that the defendants were in breach of their statutory duty under sections 4 (1) and 47 (1) of the Factories Act, 1937, to provide adequate ventilation and to take proper measures for the removal of injurious fumes:—

Held, that on the facts the defendants were not liable.

Per curiam, on the facts, sections 4 and 47 did not apply to the boiler room, for it was not a workroom of the factory and the fumes were not "generated in the course of any process or work carried "on in the factory."

Judgment of Glyn-Jones J. affirmed.

APPEAL from Glyn-Jones J., sitting at Liverpool Assizes.

The plaintiff, Mrs. Hilda Brophy, sued the defendants, J. C. Bradfield & Co. Ld., for damages in respect of the death of her husband, Patrick Brophy, who was employed by the defendants as the driver of a motor lorry. The defendants, manufacturers of tents and canvas goods, carried on business in a warehouse in Great Howard St., Liverpool. Those premises had an entrance from the main road. Inside there was a lobby, with steps down to the basement, where there was a boiler room divided into two parts, one of which contained the boiler, the other being used for the stowage of coke to be used in the boiler. On Sunday morning, January 20, 1952, Brophy was found dead on the floor of the boiler room, and it was admitted by the defence that he had died as the result of inhaling carbon monoxide fumes from the boiler.

The evidence showed that he had returned with his lorry to the warehouse late on the Saturday night. Evidence was given for the defendants that on the Saturday afternoon, when work ceased

in the factory, Robertson, the employee who had charge of the boiler, had stoked it up, closed the furnace door, pushed the damper in and according to practice had left the boiler room door open. When Brophy was found the furnace door was open and the boiler room door partly closed. On this evidence Glyn-Jones J. drew the inference that Brophy had gone into the boiler room with the idea of having a sleep, had opened the furnace door, and had been overcome by the fumes. He rejected the contention that the defendants were in breach of their statutory duty under sections 4 (1) and 47 (1) of the Factories Act, 1937,[1] and gave judgment for the defendants.

The plaintiff appealed.

Edward Wooll Q.C. and *E. E. Youds* for the plaintiff.
D. J. Brabin Q.C. and *R. S. Nicklin* for the defendants.

Mist v. *Toleman & Sons*[2]; *Gibby* v. *East Grinstead Gas and Water Co.*[3]; and *Ebbs* v. *James Whitson & Co. Ld.*[4] were referred to in argument.

SINGLETON L.J. This appeal shows some of the difficulties which may confront a judge of first instance who has to decide a claim under Lord Campbell's Act. The man Brophy died when he was alone in the defendants' warehouse, and it is difficult to form a true conclusion as to how quickly his death occurred.

On Sunday morning, January 20, 1952, Brophy was found dead on the floor of the boiler room. It is admitted in the defence that he died in the boiler-house from carbon monoxide fumes which he inhaled, and it is not disputed that the fumes which brought about his death were fumes from the boiler in the basement of the defendants' premises. The furnace was stoked with coke and the boiler provided hot water for the pipes throughout the factory in order to keep the temperature of the place suitable for the workpeople.

[1] Factories Act, 1937, s. 4: "Ventilation. (1) Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory."

S. 47: "Removal of Dust or Fumes. (1) In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained."

[2] 62 T.L.R. 131; [1946] 1 All E.R. 139.

[3] [1944] 1 All E.R. 358.

[4] [1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.

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The case was not left in a very satisfactory position. In the course of his judgment Glyn-Jones J. referred to the fact that there had been an expert witness sitting in front of the plaintiff's advisers who was not called as a witness. The plaintiff had legal aid and there would have been no difficulty in her advisers obtaining the help they desired in order to present the case. There was no expert witness called before the judge to describe the boiler and to say what, if any, further steps should have been taken in the boiler room and in the basement. We were told this morning that at the time of the trial the boiler had been dismantled. I asked Mr. Brabin when the boiler was removed, and he could not say. I should like to have had a little further information with regard to the boiler and what should be done in regard to ventilation if such a boiler is installed in a basement; but there was nothing of that kind before the court. Furthermore, I do not know how soon a man may be stricken down by fumes that come from a boiler of that kind. I do not know whether it happens quite quickly or whether it takes some time. There was no evidence about that before the trial judge—and I think that there might have been. I wondered at one time whether it would be better for this court to order a re-hearing of the case so that some of these matters might be cleared up, but I do not think that that would be right in the circumstances, for the plaintiff had legal aid and there was plenty of time before the action came on for trial and there was nothing to prevent the plaintiff securing evidence, if such evidence was available and of help to her.

Glyn-Jones J. came to the conclusion that the plaintiff had not proved a case against the defendants and gave judgment for the defendants. The plaintiff appeals to this court and Mr. Wooll on her behalf has put forward submissions which merit close consideration. His case on the appeal can really be stated in two sentences which he used at the beginning of his argument. He said: "There are two factors to be borne in "mind. (1) The first is that early one Sunday morning Brophy "was found dead from carbon monoxide fumes from a boiler "in the defendants' factory basement and (2) there is absolutely "no ventilation in the boiler-house." Put in that short way the plaintiff's case appears to have considerable force behind it, but I am not sure the second heading or factor used by Mr. Wooll is not stated too widely. There is no real dispute between the witnesses. Many admissions were made and the evidence given was quite short.

Brophy was a motor driver and he and two other men named Fairclough and Gorst had to make a journey on Saturday, January 19, 1952, from Liverpool to Abergele with a load of goods manufactured by the defendants. They did not get back from Abergele until fairly late; when they got to the defendants' premises they were closed and in darkness. Brophy had a key and he opened the door. The practice had been that when the

premises were closed for the day all electricity within the building was cut off by the main switch which is in the basement, not very far from the boiler room. Somewhere in the basement there were the bicycles of Fairclough and Gorst which had been left there and it had been arranged that Brophy should drive those two men and their bicycles to their homes that night and then return to the defendants' premises, put the motor van away and lock up the premises. There is a garage on the premises which has a sort of shutter door which can only be raised when the electric power is on.

When they got to the defendants' premises Fairclough went downstairs to the basement and switched on the electric switches so far as was necessary to give them the light they wanted. The bicycles of the two men were obtained and two of the men, Brophy and Gorst, clocked off, and the clock records the time of their clocking off as 28 minutes past 9 o'clock. Fairclough switched off the electricity and went upstairs to join them. Thereafter Brophy drove Fairclough and Gorst to their homes, left them and their bicycles and went to his own home with the motor van.

According to the evidence of the plaintiff, Brophy arrived at his house about 11.30 p.m. Mrs. Brophy had kept his dinner waiting for him, but he said he did not want it and was going to take the van back to the company's premises and he left to do that. It is clear that he took the van back, for it was found in the garage the next day after his body had been found. When he arrived back at the premises he would have to unlock the door and go down to the basement to switch on such lights as he required; thereafter he would have to go up, open the door of the garage and put the van in, and when he had done that I suppose in the ordinary course he would go down and switch off the lights which he had switched on, go upstairs, close the door, and then go home. We know that he did not go home, for round about 8 o'clock on the Sunday morning he was found dead on the floor of the boiler room. Work had ceased in the factory at 4 o'clock on the Saturday afternoon. Robertson, who had charge of the boiler, had stoked it up about 3.30 p.m. and, after he had stoked it up—that is to say, after he had put on sufficient fuel as he thought was necessary—he closed the furnace door according to the usual practice and put the damper in. Again according to the ordinary practice he left the boiler room door open.

It is here that I indicate my doubt about whether Mr. Wooll's second proposition is not too wide. In the ordinary way there was a draught coming down the steps from upstairs to the basement, and it is said there was a flue or chimney to the boiler to take away the fumes or smoke. Therefore, it is not quite correct to say that there was absolutely no ventilation in the boiler-house. [His Lordship referred to the evidence and continued:]

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This further fact emerges from the evidence. Brophy had no duty in the boiler-house; he was a motor driver. How he came to be in the boiler-house or how long he had been in there before he died no one will ever know. When Brophy was found on the floor on the Sunday morning, the door of the furnace was open and, according to the evidence of Robertson, the shovel was not in the place in which he had left it the afternoon before—from which it appears clearly that after the stoking up by Robertson someone had opened the door of the furnace and someone had moved the shovel. It may be that someone had put some more fuel on the fire. Questions were asked whether the state of the fuel inside the furnace was such as one would have expected it to be in the early morning if anything more had been put on, and the answers of Crossley, the defendants' foreman, and Robertson do not agree altogether as to that. Glyn-Jones J. drew an inference that Brophy, having switched the lights out, had gone into the boiler-house to rest for a while or to sleep. Mr. Wooll, on behalf of Mrs. Brophy, submitted that that inference was wrong and that the judge ought not to have inferred that Brophy must have opened the furnace door. It appears to me that that was an inference which the judge was entitled to draw. He was faced with considerable difficulties in regard to the lack of evidence. So far as the evidence shows, work had ceased at the factory on the Saturday afternoon at 4 o'clock, soon after the furnace had been stoked and the furnace door had been closed. When Brophy's body was found the furnace door was open. Moreover, the door of the boiler-house was partly closed; it was not fully open as it had been left the afternoon before. It may be that Brophy had gone into the boiler-house to get warm after his long day, he may have switched off the lights and gone into the boiler-house with the idea of warming himself in front of the furnace: he may have opened the door—and he may have put some more fuel into the furnace. I cannot say that the judge was wrong in drawing the inference which he did.

I should have thought that if Brophy had been going in there with the intention of having a sleep he would not have switched all the lights off and I cannot understand why he should have done. On the other hand, if he switched off the lights and was on his way to the steps in the dark and took the wrong turning and so got into the boiler room, I wonder who opened the door of the furnace. So far as we know, there were no other workmen about, although again the evidence as to who had the right to be there is lacking. The judge formed the view that Brophy had gone into the boiler room with the idea of having a sleep and that he opened the door of the furnace. Mr. Wooll asked us to reject that finding, and his main argument is that it is not in line with some other evidence and in particular with the evidence of Gorst who said that when he was on the floor above and somewhere above the top of the steps he noticed

a strong smell of fumes coming from below. Fairclough, the man who went downstairs at that time, about 9 o'clock in the evening, did not notice anything unusual or any smell; so far as he saw, the place was in the condition in which it would be if it had been properly left. The judge accepted the evidence of Fairclough. I do not think that this court ought to accede to the submission of Mr. Wooll that the judge's inference upon this point was wrong.

Mr. Wooll further submitted that, even if the judge's inference was right, the plaintiff was entitled to succeed in this action on three grounds: first, that there was a breach of duty by the defendants—in other words, that the defendants were negligent at common law and the death of Brophy was caused thereby; secondly, that the plaintiff had a claim under section 4 (1) of the Factories Act, 1937, and, thirdly, that she also had alternatively a claim under section 47 (1) of that Act.

I propose to consider those sections first in so far as necessary for the purpose of this case. [His Lordship read section 4 (1) and continued:] I propose to say nothing on the point raised by Mr. Brabin as to whether that section gives a right of action in the circumstances such as those in this case. But upon the facts it does not appear to me that the boiler room was a workroom within the meaning of section 4 (1) of the Act or that the fumes were "generated in the course of any process or work "carried on in the factory." This was a boiler used for heating the factory and I do not think that that section applies to the facts of the present case.

Over and above that it appears to me that in the absence of any evidence it cannot be said that effective and suitable provision had not been made having regard to the fact that the boiler had existed for some 25 years in the same place with such ventilation as there was from above and through the flue without anybody ever having noticed anything wrong so far as the evidence shows. As I have said, I should have liked some evidence as to what the boiler was like and I think that the defendants might have given the judge some information upon this—evidence either from the makers or from the people who installed it or from the people who took it down. I do not think that section 4 (1) of the Act applies to this case.

Section 47 (1), which concerns the removal of dust and fumes provides: [His Lordship read section 47 (1) and continued:] That section again deals with workrooms and with processes carried on in a factory. For the reason I have given with regard to section 4 (1), I do not think that section 47 (1) applies to the facts of the present case.

It appears to me that the case for the plaintiff can best be put on the allegation that there was a breach by the defendants of the duty which they owed to Brophy under the common law.

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An employer owes to his workmen the duty of taking all reasonable precautions to prevent their having to undergo unnecessary risk.

Mr. Wooll submitted that the undoubted fact that Mr. Brophy was found dead in the defendants' boiler room from carbon monoxide poisoning shifted to the defendants the onus of showing that they had taken reasonable precautions. Again I am not sure that that is the true position, and for this reason: Brophy was found in a place to which his work did not take him. There was no reason why he should have gone into the boiler room so far as his duties with the defendants went. If a man goes to some part of a factory where he has no duty and if he, in that part of the factory, interferes with a boiler (as the judge found that Brophy did) I am not sure that it can be said that there is an onus upon the defendants to explain the accident. If the onus is shifted from the plaintiff to the defendants, it appears to me that the defendants do put forward an answer when they say that this furnace and boiler had worked without accident for 25 years and, but for the interference of someone (in this case they say the interference of Brophy) they would have continued to work safely. The accident was caused, they say, by Brophy interfering with the furnace—a thing which he had no right to do—and upon that they submit that there is no liability upon them. That was the view of Glyn-Jones J. I agree with him that this was a most unfortunate accident. If the plaintiff had been able to show by the evidence of some expert witness that it was not proper or not good practice to have a furnace of this kind in a basement without some ventilation other than that which I have mentioned, it may be that the plaintiff could have established a case, but with the case left in the position in which it was, I am of opinion that the judgment of Glyn-Jones J. was right, although I confess I should have been happier if there had been more evidence put before the court. This appeal must be dismissed.

JENKINS L.J. I agree.

PARKER L.J. I also agree.

Appeal dismissed.

Solicitors: *Silverman & Livermore, Liverpool; Weightman, Pedder & Co., Liverpool.*

A. W. G.

[COURT OF APPEAL.]

* O'REILLY *v.* IMPERIAL CHEMICAL INDUSTRIES LD.

C. A

1955
Oct. 12, 13.

[1953 O. No. 2361.]

Singleton, Jenkins and Parker L.JJ.

Master and Servant—Employment of servant of another—Employment pro hac vice—Full-time hiring of lorry and driver over prolonged period—Methods of loading and unloading under supervision and control of hirer—Unsafe system of unloading—Relationship of parties.

The plaintiff was a lorry driver employed by British Road Services, who paid him his wages and had the sole right of dismissing him. Over a long period of years he had been engaged in carrying loads under the control of the defendants between their various depots. The loading and unloading of his lorry was done under the supervision of the defendants, who supplied the necessary equipment, but the plaintiff had control of the actual stowing of the load upon his lorry. The plaintiff's lorry was marked with the defendants' initials, and there was no indication of its true ownership. On January 1, 1953, while unloading his lorry at one of the defendants' depots, the plaintiff was injured through the unsafe system of work of the defendants. In an action by the plaintiff for damages for negligence he alleged that there existed between himself and the defendants a relationship of employer and employee pro hac vice:—

Held, that the onus of proving a relationship of employer and employee pro hac vice between himself and the defendants was on the plaintiff; that he had failed to discharge that burden and, accordingly, his claim failed.

Mersey Docks and Harbour Board v. *Coggins and Griffiths (Liverpool) Ld.* [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345 applied.

Decision of Oliver J. [1955] 1 W.L.R. 839; [1955] 2 All E.R. 567 reversed.

APPEAL of defendants from Oliver J., sitting at Manchester Assizes.[1]

The plaintiff was a lorry driver employed by British Road Services at their depot at Kearsley. At this depot British Road Services had continued a practice originated by their predecessors which had been carried on for 12 or 14 years. A certain number of the lorries at Kearsley, including the plaintiff's, were occupied whole-time upon transport for the defendants, Imperial Chemical Industries Ld. The name upon these particular lorries was "I.C.I." and there was no reference upon them to their ownership by British Road Services. Nevertheless the drivers were in fact the servants of British Road Services. For a considerable time the plaintiff had been employed upon this work. Each morning on the defendants' instructions he drove his lorry from Kearsley to one of their depots where he picked up a load. The stowing of the load upon the lorry was left to

[1] [1955] 1 W.L.R. 839; [1955] 2 All E.R. 567.

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the driver's discretion. He then carried the load to another depot of the defendants where he unloaded it. The nature of the load and the methods of loading and unloading were under the supervision and direction of the persons in charge at the defendants' depots.

On January 1, 1953, the plaintiff took a load of 23 drums of a chemical called terylene, manufactured by the defendants, from one of their depots to their terylene plant at Thornton-le-Fylde. Each drum weighed 300 lb. and measured approximately 3 ft. long by 2 ft. wide. There were no handles or lugs by which to hold the drums. The drums were stowed on the plaintiff's lorry in three tiers, those in the bottom tier standing upright. For 10 years or more it had been the defendants' practice to have such drums delivered at the unloading bay of the Thornton-le-Fylde depot, where there were proper facilities for unloading, but which was nearly a quarter of a mile from the terylene plant, but later the defendants decided to have the drums delivered by British Road Services direct to the plant. On January 1, 1953, the defendants had provided unloading equipment which was rolled up to the tail of the lorry and which consisted of a mechanical platform supported upon a column. The platform could be moved up or down the column to accord with the height of the article to be moved but its maximum height was 5 ft. 2 in. above the ground. This was only a few inches above the deck of the plaintiff's lorry. Since the platform could not be raised higher, the plaintiff had to stand on it to lower drums from the two top tiers down on to himself until they reached the platform. The platform itself was 5 ft. long by 3 ft. wide so that there was insufficient room for another person to stand upon it to assist the plaintiff at this stage of the unloading. The plaintiff had manoeuvred one drum from the top tier on to the platform and was engaged in getting down a drum from the second tier, trying to hold it by the edges and to slide it down upon himself, when it "kicked" as it came down; the plaintiff fell on to the floor and the drum fell on his back and severely injured him. He claimed damages against the defendants for personal injuries arising out of their negligent method of unloading the drums.

Oliver J. held that the method of unloading the drums was dangerous; that in the circumstances the plaintiff was not merely an invitee, but was entitled to the same standard of care as if he had been the defendants' employee; and that, accordingly, the defendants were liable in negligence. He distinguished the decision of the House of Lords in *London Graving Dock Co. Ld.* v. *Horton*.[2]

The defendants appealed.

R. H. Forrest Q.C. and *Gordon Clover* for defendants.
H. I. Nelson Q.C. and *C. M. W. Elliott* for plaintiff.

[2] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

Holt v. *Rhodes (W. H.) & Son*[3]; *Lomas* v. *Jones (M.) & Son*[4]; and *Garrard* v. *Southey (A. E.) & Co.*[5] were cited in addition to cases referred to in the judgments.

Singleton L.J. I will ask Parker L.J. to give the first judgment.

Parker L.J., having stated the facts, said he entirely agreed with the finding of Oliver J. that the method of unloading adopted by the defendants was unsafe, and continued: The real question, however, is: What, if any, duty was owed by the defendants to the plaintiff? Thus, if he was merely an invitee his claim would be bound to fail, since on the evidence, he was well aware of the danger; on the other hand, if he had become a servant of the defendants then it is clear, in my view, that they had failed in their duty of care towards him and, as the judge found, there is no evidence of contributory negligence on his part. It is necessary in considering this question of duty to go a little more into the circumstances. It appears that for a number of years the defendants had an arrangement—the exact terms of the arrangement were not in evidence—whereby British Road Services set aside, as it were, certain of their lorries for use almost exclusively on the defendants' business; not only lorries, but drivers, and these lorries and these drivers were employed almost exclusively in carrying goods from one depot of the defendants to another depot, or from a depot to a plant, or for delivering to customers; in fact, the lorries were painted in a special colour and carried the name of I.C.I. and their trade mark.

The plaintiff had been one of those drivers for a number of years. He carried no gear or equipment for the purposes of loading or unloading his lorry; but the defendants, to put it quite generally, would assist in both operations. So far as the carriage of these drums of terylene was concerned, at first they were delivered to the main stores at Thornton-le-Fylde, where there was a proper unloading bay and there was then no trouble in unloading drums stacked in this way. Later, when the experimental plant started—and that was situated some 400 yards away—it was clearly more convenient to deliver the drums to the plant. At this plant there was no unloading bay and the evidence, which the judge accepted, was that the defendants would then supply the driver in question with sacks, straw, and old motor tyres upon which the drums could be dropped off the lorry; and later still, and I think for some matter of a year before the accident in question (no doubt in order to avoid any danger of the drums being damaged in dropping off the lorry), they had at the plant one of these tiering trucks.

[3] [1949] 1 All E.R. 478.
[4] [1944] 1 K.B. 4; 60 T.L.R. 28; [1943] 2 All E.R. 548.
[5] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

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It is, I think, clear that the judge accepted the evidence called by the plaintiff in preference to that called by the defendants. There was an issue, for instance, whether the defendants had supplied sacks and straw and motor tyres, and had given instructions in regard to the unloading. He accepted the evidence of the plaintiff and his witnesses, and his findings, having dealt with the evidence, were as follows: "Having reached the "appropriate depot of the I.C.I. the plaintiff (I am taking it "merely as an example; there were many other men doing the "same thing) would load his lorry under the supervision and "direction of whoever was in charge of the I.C.I. depot. They "would decide what load was to be taken. The driver, of course, "would decide how that load was to be stowed, and I suppose if "he thought the load was so big as to be dangerous he could "have refused to load. The same could be said of his ordinary "employers; if they told him to do a thing that he thought was "dangerous he could refuse to do it, but subject to that he was "entirely under the direction of whoever was in charge of the "I.C.I. depot."

Later he said: "Each of those methods"—those methods I have already referred to, unloading at the bay, unloading on to the sacks of straw and unloading on to the tiering truck—"Each "of those methods, as Mr. Nelson pointed out, was inaugurated "by the I.C.I. It was their method. Just as they were in "control of the loading, so they were in control of the "unloading to that extent, always bearing in mind that "this plaintiff could have said: 'I am not going to use that "'machine; I am going to take my load back home to Kearsley,' "which was about 50 miles away, and waste the day, and "probably get the sack when he got there for not doing what the "I.C.I. told him."

Finally he said: "With considerable hesitation I have come "to the conclusion that the plaintiff is right and that in this case, "by reason of all the circumstances, the defendants owed him "the same duty as regards appliances and system of work as if "he had in fact been their own employee. They were his "employers in every respect except that they did not pay him "and could not dismiss him." In other words, as it seems to me, the judge is there finding that, although undoubtedly the plaintiff always remained in the general employment of British Road Services, yet on the facts of this case at the moment of unloading he became the servant of the defendants. That such a position can occur, though perhaps rather rarely, is shown by a series of cases of which the most recent authority, that in the House of Lords, is to be found in *Mersey Docks and Harbour Board* v. *Coggins & Griffiths (Liverpool) Ld.*[1]

It is unnecessary to consider the actual facts of that case. The importance of it is that their Lordships there lay down the

[1] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

test which has to be applied in considering the question whether at any moment a workman, though in the general employment of A, yet for certain purposes comes into the special employment of B. Lord Simon emphasized the difficulty of proof. He said [2]: "It is not disputed that the burden of proof rests on the "general or permanent employer—in this case the appellant "board—to shift the prima facie responsibility for the negli- "gence of servants engaged and paid by such employer so that "this burden in a particular case may come to rest on the "hirer who for the time being has the advantage of the service "rendered. And, in my opinion, this burden is a heavy one and "can only be discharged in quite exceptional circumstances."

It is perfectly true that that was a case in which both the general employers and what I may call the temporary employers were both sued, and the burden there referred to is the burden on the general employers; but equally, as it seems to me, if a workman, as in this case, chooses to sue not his general employers but the persons whom he says temporarily owed him the duty of master to servant, there is a considerable burden on him to show that those temporary employers have become under that duty. Without going through the speeches in detail, it is sufficient to refer to two passages, one in the speech of Lord Porter and one in the speech of Lord Simonds.

Lord Porter said [3]: "Many factors have a bearing on the "result. Who is paymaster, who can dismiss, how long the "alternative service lasts, what machinery is employed, have all "to be kept in mind. The expressions used in any individual "case must always be considered in regard to the subject matter "under discussion but amongst the many tests suggested I think "that the most satisfactory, by which to ascertain who is the "employer at any particular time, is to ask who is entitled to "tell the employee the way in which he is to do the work "upon which he is engaged. If someone other than his general "employer is authorized to do this he will, as a rule, be the "person liable for the employee's negligence. But it is not "enough that the task to be performed should be under his "control, he must also control the method of performing it. It "is true that in most cases no orders as to how a job should be "done are given or required: the man is left to do his own work "in his own way. But the ultimate question is not what specific "orders, or whether any specific orders, were given but who is "entitled to give the orders as to how the work should be done." Then he goes on: "Where a man driving a mechanical device, "such as a crane, is sent to perform a task, it is easier to infer "that the general employer continues to control the method of "performance since it is his crane and the driver remains "responsible to him for its safe keeping. In the present case, "if the appellants' contention were to prevail, the crane driver

[2] [1947] A.C. 10.

[3] Ibid. 17.

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"would change his employer each time he embarked on the "discharge of a fresh ship."

Lord Simonds is reported as saying [4]: "In the cited case"—that is *Donovan* v. *Laing, Wharton and Down Construction Syndicate* [5]—"the court held upon the facts that the burden of "proof had been discharged and I do not question the decision. "But it appears to me that the test can only be satisfied if the "temporary employer (if to use the word 'employer' is not to "beg the question) can direct not only what the workman is to "do but also how he is to do it."

It is clear that the judge accepted the evidence of the plaintiff and his witnesses in preference to that of the defendants, and in considering whether his findings, to which I have referred, are justified by the evidence it is proper, I think, to refer only to the evidence of the plaintiff and his witnesses. The plaintiff was asked by Mr. Nelson: "Having put the thing there"—that was the tiering truck at the back of the lorry—"was anything "said about what you were to do? (A.) Just to put the drums "on the platform of the tiering truck. (Q.) Who told you that? "(A.) The person in charge of the tiering truck."

He described the methods which had been employed, to which I have already referred, and he was asked in cross-examination specifically with regard to this point. The first question was: "(Q.) Mr. O'Reilly, you were employed by "British Road Services? That is right, is it not? (A.) That is "correct. (Q.) And they were the people who could give you "orders? That is right, is it not? (A.) Yes. (Q.) And tell you—"who was it could tell you—where you were to go, for example? "(A.) Yes. (Q.) Who? British Road Services? (A.) British "Road Services in the second place. (Q.) And as regards the "way you were to do your job? They were the people who could "tell you how to do your job, weren't they? (A.) No, Sir. Not "always. (Q.) Let me put it this way. The only people who "could sack you if you did not do your job properly were "British Road Services? That is right, is it not? (A.) That is "correct. (Q.) And you need not take orders from anybody else "at all, need you? (A.) No, not really."

It is true that the question and answer went on in this form: "(Q.) And the method of loading your lorry—loading it—was "entirely under your control? That is right, is it not? (A.) That "is correct. (Q.) And the method of unloading your lorry was "entirely under your control, was it not? (A.) No. (Q.) Don't "you agree with that? (A.) No. (Q.) I will have to follow that "last question up in that case. If a factory to which you went "suggested to you a dangerous way of unloading your lorry, "you could refuse to do it, could you not, that way? (A.) If I "were aware of it being dangerous I could refuse."

[4] Ibid. 18.

[5] [1893] 1 Q.B. 629; 9 T.L.R. 313.

I have very grave doubts whether, accepting those answers in that form, it can possibly be said that the rigorous test laid down by the House of Lords in the case to which I have referred is satisfied in the present case. The answers of that witness leave the matter, to say the least, in doubt; and, bearing in mind the heavy burden of proof and the rigorous test to be applied, I do not think it is possible on the facts, accepting, as the judge did, the evidence given for the plaintiff, to say that that test has been satisfied. No doubt the defendants would in a general sense control and assist in the operations of unloading and, indeed, of loading. They might make suggestions, they might make, indeed, requests. When there was no other way they would supply, as they did, some platform upon which they desired the carrier to unload the goods.

But one of the difficulties, as it seems to me, in suggesting that the plaintiff goes into the special employ of the defendants is to be seen at once when one realizes that except for certain periods in the defendants' business it is beyond argument that the plaintiff was acting for British Road Services and for British Road Services only. From the moment he left their depot with their lorry he was clearly acting as their servant; and what is really being suggested here is that, at some undefined moment of arriving at a depot or, as here, at this experimental plant, and presumably at a time when he has dismounted from the driving seat, he becomes the servant temporarily of the defendants; and equally, the moment the unloading has ceased and he rolls up his tarpaulins and gets back into the driving seat it has to be said that he ceases to be in any relationship of master to servant to the defendants, and reverts to the position of being solely the servant of British Road Services. It seems to me on the facts of this case that the test laid down by the House of Lords cannot be said to be satisfied.

I should add this. No doubt British Road Services as general employers give their drivers—including the plaintiff—instructions to do what the defendants, I.C.I., want; but throughout, as it seems to me, British Road Services remained sub-contractors of the defendants using their own lorry and their own driver, and had in no sense delegated to the defendants the right to give orders as to how the work was to be done.

I think it is unfortunate, although I am not blaming anybody, that the judge was not referred specifically to the *Mersey Docks and Harbour Board* case,[6] and to the passages to which I have referred. I said I am not blaming anybody because there is considerable doubt as to exactly how the case was put below, and, indeed, if one looks at the pleadings, it is hardly surprising that the judge himself did not have this case in mind as relevant to the argument, or that Mr. Forrest did not refer the judge specifically to it. I think it may well be that if the judge had

[6] [1947] A.C. 1.

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been referred to that case he would have come to a different conclusion.

But the matter does not rest there because, as I understand it, Mr. Nelson puts his case in a much broader way. He says in effect: "Even if I cannot satisfy the test laid down in the "*Mersey Dock and Harbour Board* case [6] yet I am entitled to "succeed," and, as I understand it, he puts forward this proposition, that in the case of a carrier delivering goods to the consignee, if the consignee interferes, a fortiori if he gives instructions to the driver, he becomes under a duty; and having got to that stage, he says that where that interference and instruction assumes the form of control not only is there a duty, but there is a duty akin to or of the same nature as that between master and servant. On that basis, as I understand it, he would say that there may well be two people, the employers, British Road Services in this case, and the defendants, both of whom owe the workman a similar duty, a duty of master to servant. I confess that, doing the best I can to follow that argument, it does seem to me that Mr. Nelson is putting forward a completely new and novel claim, something, as far as I know, unknown to the law.

If a duty of master to servant is to be found in any case it can only be where there is either a true relation of master and servant or a relationship of master and servant of a temporary character as that envisaged in the *Mersey Docks and Harbour Board* case.[6] Unless one or other of those features is proved I cannot see any possibility of maintaining a claim for a breach of the duty owed by a master to his servant.

I understand that below a reference was made to the principle in *Donoghue* v. *Stevenson*.[7] That has not been developed in this court, and it is sufficient for me to say that I see no possibility of presenting the case on those lines. Indeed, a similar argument based on *Donoghue* v. *Stevenson* [7] was advanced in the House of Lords in *London Graving Dock Co. Ld.* v. *Horton*,[8] and was specifically rejected. Sorry as I am for the plaintiff in this case, I am not satisfied that he has shown the breach of any duty owed to him by these defendants. It may well be—I do not know; it is not for me to say—that he may yet have a perfectly good claim against British Road Services. For these reasons I would allow the appeal.

Jenkins L.J. I agree. It is not in dispute that if the relationship between the plaintiff and the defendants in the present case was merely that of invitee and invitor, the plaintiff's case must fail owing to his knowledge of the danger, as is shown by *Horton's* case.[8] But it has been argued for the plaintiff that in all the circumstances of this case the defendants were under a duty to him amounting to the duty owed by an employer to an

[6] [1947] A.C. 1.
[7] [1932] A.C. 562; 48 T.L.R. 494.
[8] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

employee; that is to say, the duty on the employer to provide the employee with adequate plant and to devise a safe system of work for the employee, and not to do anything to expose the employee to unnecessary risk. If it had been established that the defendants were under such a duty as that in this case, it is clear from the learned judge's findings and from the evidence that the plaintiff would be entitled to succeed, for the tiering truck was not an adequate apparatus for the purpose of unloading a lorry having upon it three tiers of 300 lb. drums. But the duty owed by an employer to his employee is a contractual duty and prima facie, therefore, it can only exist in a case in which the contractual relationship of employer and employee exists between the parties.

For instance, as was shown by *Horton's* case,[8] the fact that a person entering the premises of another enters those premises for the purpose of rendering services to that other person, pursuant to a contract between the employer of the person entering and the occupier of the premises, does not give the person entering any higher right than that of an invitee, because there is no contract of service between him and the occupier, and it matters not what arrangement may have been made between his employer and the occupier, that being an arrangement to which he is no party. There is, however a rare exception to that rule which has been sometimes referred to as the case of employment pro hac vice. That is the kind of case in which an employer hires out to some other person the services of his employee, and the transfer of the control and direction of the actions of the employee is so complete, and puts his temporary employer in such close control of the situation that for the purposes of liability either to a third party, or equally, I think, to the employee himself, the temporary employer is to be regarded in law as his master.

As my brother Parker has said, the onus on those who seek to establish a relationship of employer and employee pro hac vice is a heavy one, and, in my view, the range of cases in which that relationship should be held to have been set up ought not to be extended; and notwithstanding the judge's findings in the present case I cannot agree that the facts here suffice to establish the existence of such a relationship. I say that with the greatest respect to the judge, and I note that he arrived at his conclusion with, as he said, "considerable hesitation." When one adds to that hesitation the circumstance that, as my brother Parker has pointed out, the leading case on this subject of *Mersey Docks and Harbour Board* v. *Coggins & Griffiths (Liverpool) Ld.*[9] was not cited to the judge, I think it is easy to understand how he reached the conclusion that he did, and it seems to me that had the *Mersey Docks and Harbour Board* case[9] been cited to

[8] [1951] A.C. 737.

[9] [1947] A.C. 1.

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him, and had he applied his mind to the facts in the light of that authority, he might well have come to a different conclusion.

If there is no relationship here of master and servant in the ordinary sense, as I hold there is not—indeed, it was not and could not be contended that there was—and if the facts here do not suffice to discharge the heavy onus lying on those who seek to make out a case of employment pro hac vice—and in my view they do not suffice to discharge that onus—then it seems to me that the plaintiff's case must necessarily fail; for I decline to erect in cases of this kind a new duty which is neither the duty subsisting between invitor and invitee, nor the duty arising from the relationship of employer and employee. I decline to erect in addition to those categories a new duty of care formulated in the very sweeping and general way in which it was put forward by Mr. Nelson in his argument for the plaintiff. For these reasons, and for the reasons given by my brother Parker, I agree that this appeal should be allowed.

Singleton L.J. I am in full agreement with the judgments which have been given, and there is nothing that I wish to add.

Appeal allowed.

Solicitors: *J. W. Ridsdale; Fielding & Fernihough, Bolton.*

A. W. G.

[MANCHESTER SUMMER ASSIZE.]

1955
July 8, 11, 25.
Oliver J.

*PERRY *v.* THOMAS WRIGLEY LD. AND ANOTHER.

Trespass—Child—Injury to—Allurement—Trespasser—Road works—Excavation—Child injured when playing inside the barrier—Whether excavation constituted an allurement—Liability of contractors—Duty of care—Extent.

Licensor and Licensee—Child—Allurement.

Contractors engaged on repairing a road in the occupation of a corporation dug a trench and deep pit in the road and placed a barrier round them. During daylight the plaintiff, a boy aged eight, who knew that he should not go beyond the barrier, did so and fell into the trench:—

Held, (1) that the plaintiff was a trespasser and the corporation were not liable to him for his injuries.

Robert Addie & Sons (Collieries) Ld. v. *Dumbreck* [1929] A.C. 358; 45 T.L.R. 267 applied.

(2) That, even assuming that the contractors bore a higher duty than the corporation if they had put an allurement on land of which they were not the occupiers, an allurement was essentially something attractive to a child but with a danger concealed from a child's intelligence; and that a hole in the ground such as the

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[Reported by John Ward, Esq., Barrister-at-Law.]

plaintiff encountered in broad daylight would not constitute an allurement.

Davis v. *St. Mary's Demolition and Excavation Co. Ld.* [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578 distinguished.

ACTION.

The plaintiff, Ronald Perry, an infant, brought an action by his next friend for damages against the first defendants, a firm of contractors, and the Corporation of Ashton-under-Lyne, the second defendants, for injuries which he received on May 18, 1951, as the result of falling into a pit excavated during road repairs carried out by the contractors for the corporation. In the spring of 1951 Trafalgar Street in Ashton-under-Lyne was closed to vehicular traffic by the corporation for road works. The works were extensive and involved the digging of a trench about 22 yards in length at the end of which was a pit some 20 feet deep. One side of the trench was near a kerb and pedestrians on that pavement were completely protected by a solid fence some five to six feet high. Access to the works was provided at the opposite side of the trench which was near the middle of the street. On this side the trench and the pit was outlined by a similar solid structure forming the side of the excavation and projecting above street level to a height ranging irregularly from one to three feet. Outside this low fence on the road side of the excavation was a barrier consisting of drainpipes 2 ft. 6 ins. high with planks across marking the boundary, inside which public access was forbidden.

Children played inside the barrier but were chased away by the watchman, and had never been observed playing there when the watchman was present. On occasions when he was absent they had persisted in playing on the works and had often been driven off by people living in Trafalgar Street opposite the site. The accident happened in broad daylight when the plaintiff, who was then aged eight years, went inside the barrier and fell into the pit. He gave evidence that he knew then that he must not go beyond the barrier.

The plaintiff claimed damages on the grounds that he was a licensee, but that even if he was a trespasser the defendants were negligent in leaving a dangerous allurement upon the site.

The report is confined to the question of the first defendants' liability on the issue of the allurement.

Alexander Karmel Q.C. and *Philip Curtis* for the plaintiff.

Fenton Atkinson Q.C. and *Joseph Cantley Q.C.* for both defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

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July 25. OLIVER J., after stating the facts and finding that the plaintiff was a trespasser on land occupied by the corporation, said that the duty owed to a trespassing child was not to act with a reckless disregard of his presence (*Excelsior Wire Rope Co. Ld.* v. *Callan* [1]) and that an occupier could not escape liability if he acted with a malicious intention towards any trespasser (*Lowery* v. *Walker* [2]). He said that neither of these principles was applicable, and that the case against the corporation fell within the decision in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* [3]; accordingly he held that the second defendant was not liable.

Turning to the question of the contractors' liability, his Lordship said: Are they in a worse position than the corporation? If there were no authority on the matter I should have felt it difficult to say that contractors, doing for the corporation the very work for which the corporation had been given statutory powers, owed any higher duty to the trespasser than the corporation itself; but if there be a difference, I can only think it must be this: the owner is not liable for accidents contributed to by allurements, but the contractor is, and the case which supports that view—it is not binding on me but I have great respect for the judge who decided it—is *Davis* v. *St. Mary's Demolition and Excavation Co. Ld.* [4]

The facts in that case were that the defendants were contractors working for the corporation of the City of London. They were pulling down houses which belonged to the corporation and near the houses there was an open space used by children to play on. Work had reached the stage when children could get upon the premises because certain walls were demolished, and one wall which was standing was in a very rocky state. When the coast was clear some boys got hold of some bits of gas piping, stuffed them into the cracks of this wall and heaved away, and brought the wall down on one of their heads. In those circumstances Ormerod J. said [5]: "If the defendants were the occupiers of the "site and the plaintiff was a trespasser, that clearly would be an "end of the case, following the decision in *Robert Addie & Sons* "(*Collieries*) *Ld.* v. *Dumbreck*,[6] unless the case could be brought "within the decision in *Excelsior Wire Rope Co.* v. *Callan* [7] or "*Mourton* v. *Poulter*,[8] in each of which cases the defendants "were found liable despite the fact that the plaintiff was a "trespasser because it was found that there was a reckless dis-"regard of the presence of trespassing children." He proceeded to say that the contractors were not in the same position as the corporation, and by inference that the corporation were not the occupiers of the site; but what he did say was that on the facts

[1] [1930] A.C. 404.
[2] [1911] A.C. 10; 27 T.L.R. 83.
[3] [1929] A.C. 358; 45 T.L.R. 267.
[4] [1954] 1 W.L.R. 592; [1954] 1 All E.R. 578.
[5] [1954] 1 W.L.R. 594.
[6] [1929] A.C. 358.
[7] [1930] A.C. 404.
[8] [1930] 2 K.B. 183; sub nom. *Moulton* v. *Poulter*, 46 T.L.R. 256.

of the case the children were clearly trespassers. He said that if the defendants were occupiers, they would have been protected by the decision in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*[9]; but they were not occupiers, and he proceeded in effect to say that they owed a duty not to put allurements or lay traps for children. He said[10]: "But the plaintiff here argues that "the defendants not being the occupiers of the site, the duty as "between plaintiff and defendant is different. The plaintiff "bases his argument on the decision of the House of Lords in "*Donoghue* v. *Stevenson*."[11]"

Considering the facts of *Davis* v. *St. Mary's Demolition and Excavation Co. Ld.*, Ormerod J. said[12]: "Under those circum-"stances, it appears to me that the foreman in considering "whether the premises were safe and considering against whom "the premises had to be made safe ought to ask himself the "question—which does not seem to call for any great exercise "of the imagination—Are children likely to come on this site, "and, if they do, are they likely to interfere with the brickwork "and the building generally? That they were likely to come on "the site, I think, could admit of only one answer. The foreman "would be bound to answer that question in the affirmative. He "knew they were in the habit of coming on the site. Whether "they would interfere with the building in such a way as small "boys might interfere, again is a question which, in my view, "would have to be answered in the affirmative. If small boys of "12 years of age go on to a building site where there are loose "stones and bricks and where apparently in the wall in question "there are loose bricks, and if there are about the place pieces "of old gas pipe and other such implements, it seems one of the "most likely things that in the course of an afternoon's play "there will be some interference with some part of a building "such as that in course of demolition which must offer a constant "allurement and temptation to any child who is within sight "of it." It seems to have been the judge's view that the contractors were liable on those facts, because they had put an allurement upon land of which they were not the occupiers, and therefore had not the protection of *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*.[13]

I have to decide the liability of the contractors in the present case upon the facts. I would not have thought that they had any higher duty on these facts than the corporation, but I am prepared to assume that they had. Now let me consider the question of whether they had put an allurement on this road. What is an allurement? I suppose it is something attractive but dangerous, although not apparently so—something insidious. The capacity of an object to attract will, of course, vary with the age and experience of the person concerned—the turntable in *Cooke's*

[9] [1929] A.C. 358.
[10] [1954] 1 W.L.R. 594.
[11] [1932] A.C. 562; 48 T.L.R. 494.
[12] [1954] 1 W.L.R. 592, 596.
[13] [1929] A.C. 358.

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case,[14] the colliery wheel in *Addie's* [15]—but would present neither attraction nor deception to adults, who would probably avoid them as being both dirty and dangerous.

Children, on the other hand, would not mind the dirt and would be ignorant of danger. Can a hole in the ground be an allurement? I think not. There is nothing insidious about a hole in the ground; its danger is not concealed. It was broad daylight and was quite obvious to a child, and the infant plaintiff knew he must not go beyond the barrier. If a hole in a road is an allurement, what about dozens of objects met with in the daily life of children? What about a canal, an unfastened window, a flight of stairs? They are all dangers—especially if one falls down them—but children know it. I cannot see anything alluring about a hole in the ground; and having come to that conclusion, it seems to me that the case even on that footing fails against the contractors as well as against the corporation. There must be judgment, therefore, for both defendants.

Judgment for the defendants.

Solicitors: *Bostock, Yates & Chronnell, Ashton-under-Lyne; A. W. Mawer & Co., Manchester.*

[14] [1909] A.C. 229; 25 T.L.R. 375. [15] [1929] A.C. 358.

[COURT OF APPEAL.]

C. A.

1955
Oct. 14, 17

Denning, Hodson and Morris L.JJ.

* COTTON *v.* WALLIS.

[Plaint No. L. 148.]

Building—Contract—R.I.B.A. form—House "built down to a price" —Defects in materials and workmanship—Final certificate issued by architect—Liability of architect to building owner. Architect—Negligence.

The defendant entered into a contract with a builder, in the standard form issued by the Royal Institute of British Architects, for the construction of a house at the price of £1,910 (which was admittedly low), the plaintiff being nominated as the architect.

The contract provided, inter alia, (a) that the contractor should complete the works in accordance with the directions and to the reasonable satisfaction of the architect; (b) that defects or faults appearing within the defects liability period should on the architect's instructions be made good by the contractor, and (c) that on the expiration of the defects liability period or on the making good of defects the architect should issue a final certificate. The specification issued under the contract required that the materials and workmanship were to be the best of their respective kinds and to the full satisfaction of the architect, who had liberty to reject. At the end of the defects liability period the plaintiff issued a final certificate.

Some two years after the completion of the house, the plaintiff brought an action claiming a sum of money as balance of fees and expenses owing to him; the defendant counterclaimed for damages, alleging that the plaintiff had not exercised due skill and care in supervising the work and ensuring that the house was constructed with proper materials and good workmanship.

The county court judge dismissed both claim and counterclaim. On the counterclaim he found that, while there were a number of items of workmanship and material were not as good as they might have been, and while another architect might have required a higher standard, the house was being "built down to a price," so that the builder could not be expected to execute the work in a perfect manner; he held that the passing of the defects did not amount to negligence or breach of duty on the part of the plaintiff. On appeal by the defendant:—

Held (by Hodson and Morris L.JJ., Denning L.J. dissenting), that the judge had not erred in principle when, in testing the conduct of the plaintiff as reasonable or otherwise, he took into account the fact that the house was being built at a low price; and that, provided that the plaintiff used his skill and acted reasonably, the adequacy of the work done was a question of degree coming within the province of the judge.

APPEAL from Judge Gordon Clark, sitting at Epsom County Court.

In 1952 the defendant entered into a contract with a builder, in the standard form issued by the Royal Institute of British Architects, for the construction of a house, at a price of £1,910, the plaintiff being nominated as the architect. The contract provided by clause 1: "The contractor shall carry out and com- "plete the works in accordance with this contract in every respect "with the directions and to the reasonable satisfaction of the "architect." By clause 12: "Any defects, shrinkage or other "faults which shall appear within the defects liability period "stated in the appendix to these conditions and shall be due to "materials or workmanship not in accordance with this contract "or to frost occurring before the completion of the works, shall "within a reasonable time after receipt of the architect's written "instructions in that behalf be made good by the contractor and "(unless the architect shall otherwise direct) at his own cost." By clause 24: "Upon expiration of the defects liability period ". . . or upon making good defects under clause 12 of these "conditions, whichever is the later, the architect shall . . . issue "a final certificate of the value of the works executed by the "contractor." The specification under the contract provided that the whole of the materials and workmanship were to be the best of their kind, and to the full satisfaction of the architect.

At the end of the defects liability period (six months) the plaintiff issued a final certificate. Some two years after the completion of the house the plaintiff issued a plaint in the county court in respect of money he claimed was due to him for fees and expenses. The defendant, who had hitherto made no complaint against the conduct of the plaintiff, counterclaimed for damages, alleging that the plaintiff had not exercised due skill and care

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in supervising the work and in ensuring that the house was constructed with proper materials and with good workmanship. He complained, in particular, that woodworm had been found in the bathroom; that two feet of water piping in the roof had been left unlagged; that the paintwork and plastering were of inferior quality; and that a number of floor tiles in the dining room had paraffin stains. This last defect the plaintiff had required the builder to rectify. The builder took some fresh tiles to the house, but, on finding that they did not match the existing tiles, he did nothing further. The plaintiff issued the final certificate without requiring him to re-lay the floor as a whole.

The county court judge dismissed the plaintiff's claim. On the counterclaim, he found that there was a certain amount of inferior material and scamped workmanship, but, taking into account the fact that the house was being built down to a price, he held that a certain tolerance must be expected, and that the plaintiff had not failed in his duty, although another architect might have required a higher standard; and he gave judgment for the plaintiff. The defendant appealed.

Frederick Hallis for the defendant.
Stephen Stewart for the plaintiff.

Cases cited in argument: *Westgate* v. *Crowe*[1]; *Amsterdamsche Lucifersfabrieken (N.V.)* v. *H. and H. Trading Agencies Ltd.*[2]; *Chambers* v. *Goldthorpe*.[3]

DENNING L.J. In 1952 Mr. Wallis determined to build a house at No. 93 Gilhams Avenue, Banstead, for which purpose he employed Mr. Hillman as the builder, and he also employed Mr. Cotton, carrying on business in New Malden, to do the architect's work. Mr. Cotton himself is a Fellow of the Auctioneers' Institute, but he has a qualified architect on his staff.

A contract was drawn up in the ordinary R.I.B.A. form whereby the builder agreed to build the house for £1,910, Mr. Cotton being nominated as the architect. There was an oral arrangement between Mr. Wallis, the owner of the house, and the architect, that the architect would charge £90 for the architect's fees.

The house was built, and at the end of 1952 Mr. Wallis went into occupation, the house then being practically complete. But there was a "the defects liability period" of six months allowed in the contract for the making good of defects. During those six months, between January and July, 1953, the architect called the attention of the builder to some things which required attention. In particular there were some stains on the tiles of the floor. The builder's men had been careless and dropped paraffin

[1] [1908] 1 K.B. 24; 24 T.L.R. 14.
[2] [1940] 1 All E.R. 587.
[3] [1901] 1 K.B. 624; 17 T.L.R. 304.

on the tiles, and they had become stained. The architect, in two letters, drew the attention of the builder to that defect, but the builder did not remedy it. It is fair to say that on one occasion the builder took some new tiles to the house so as to replace the stained ones, but they were not the same colour and did not match, so he did not put them in and he did nothing more about it. Another defect was that the plastering and the paintwork also were not as good as they might have been, or perhaps as they should have been. The architect drew the builder's attention to it, but that defect also was not made good.

The time came when the defects liability period expired. The architect wrote to the owner (Mr. Wallis) that he understood that all these matters had been made good, and requested him to pay the builder the final instalment. Mr. Wallis did not agree that they had been made good, so he did not pay the whole of the bill, but deducted £25 from the builder's account. The architect also put in his own account, and in it he claimed not only the sum of £90 which had been agreed, but also an extra £35. In so doing he was departing from the oral arrangement that had been made. He put in also a claim for £4 17s. for out-of-pocket expenses.

I do not think that anything more would have been heard of all these defects if it had not been for the architect putting in those extra amounts of claim. When Mr. Wallis, the owner, was faced with these additional claims by the architect he then retorted and said: "You have passed a lot of work which is not "up to standard," and he said that the architect had been negligent. That was the contest in the county court, the architect suing for his extra fees, and the owner saying: "You passed a "lot of bad work."

Upon the claim itself the judge has found that the architect was not entitled to the extra £35 which he sought to charge. The judge said that the agreement was for £90, and that the architect must stand by that. He said, however, that the architect was entitled to his out-of-pocket expenses of £4 17s. The owner had paid or tendered the £90 before action, and he admitted the £4 17s. in the defence. Nevertheless, the judge thought that the proper order to make on the claim was no costs on either side. I will come back to the question of costs later.

On the counterclaim the judge thought the work had been "scamped," to use his own word. He held that the architect had applied a lower standard than another architect might have done. He said in respect of a number of items, for instance, that they were not as good as they might have been or should have been. "Nevertheless," he said, "one has to remember "that the builder was building down to a price, and that a "certain tolerance must be expected." He said that on that account, because the price for the house was a low price, the builder could not be expected to do the work in a perfect manner, or as well as might otherwise be expected. He held, therefore,

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that the passing of these defects did not amount to any negligence or breach of duty on the part of the architect.

Upon this aspect of the case I would draw attention to three clauses in the R.I.B.A. form of contract. The first is: "The "contractor shall carry out and complete the works in accordance "with this contract in every respect in accordance with the "directions and to the reasonable satisfaction of the architect." I observe on that clause that the directions of the architect were not observed, as, for instance, in regard to the tiles. Clause 12 provides: "Any defects, shrinkage or other faults which shall "appear within the defects liability period stated in the appendix "to these conditions and shall be due to materials or workman-"ship not in accordance with this contract or to frost occurring "before completion of the works, shall within a reasonable time "after receipt of the architect's written instructions in that "behalf be made good by the contractor and (unless the architect "shall otherwise direct) at his own cost."

Clause 24 provides that: "Upon expiration of the defects "liability period . . . or upon completion of making good defects "under clause 12 of these conditions, whichever is the later, the "architect shall . . . issue a final certificate of the value of the "works executed by the contractor."

In my opinion the duty which the architect owes to the building owner is to see that the builder does his work, and does it properly. The specification required that the whole of the materials and workmanship were to be the best of their respective kind, and to the full satisfaction of the architect. The architect is employed by the building owner and paid by him to see that the builder does his work properly. If the architect allows shoddy work to pass or work that is scamped, he does not do his duty to the owner. The contract provides that if there are defects which appear, it is the duty of the architect to call upon the builder to make them good. The architect has no dispensing power. He must hold up the final certificate until the defects are made good. That was not done in this case. The architect called the attention of the builder to these defects, but did not insist on them being put right, but nevertheless called upon the owner to pay the full amount.

It does not matter that the price is a low one. He must see that the contract is properly carried out.

I think that the judge misdirected himself in giving a dispensing power to the architect. I would have thought that the decision on the counterclaim was wrong and that the matter should be remitted to the judge to find the quantum of damages. But as I believe my brethren are of a different opinion, their view will, of course, prevail.

HODSON L.J. The appellant is the defendant who was the owner of a house, and the plaintiff was the man who acted as architect for that house, and he claimed in the action for his fee.

The defendant was found to be right in substance upon the claim, and the only appeal in connexion with the claim is in relation to the costs, with which we will deal hereafter.

Having been sued by the plaintiff for his fees as an architect, the defendant counterclaimed against the plaintiff that he had not exercised the skill, care and knowledge in the performance of his duty as an architect in supervising in a skilful manner the erection of the house and garage and ensuring that it was constructed with proper material and good workmanship in accordance with the plans and specification. On that matter the judge found in favour of the plaintiff.

Mr. Hallis, for the defendant, recognizes that he must accept the findings of fact of the judge, and has said that on the facts as found the defendant was entitled to judgment on the counterclaim, because the judge had found that there was some evidence of scamped workmanship, and that the decoration, painting and plastering, and so on, was not as good as it should have been. Mr. Hallis accordingly submits that there was a misdirection on the part of the judge in this sense: that he had treated the architect as entitled to disregard the specification as to how the work was to be done, and what was to be done, and had really given the architect a dispensing power to pass bad work, whereas good work (and good work only) was necessary for the performance of the contract by the builder; it being the duty of the architect, as the watch-dog on behalf of the owner, to see that the work was carried out properly.

For my part I have read and re-read the judgment, and I am of opinion that that criticism is not well founded. I do not think that the judge misdirected himself, nor did he regard the architect as having a dispensing power to cut down the standard which was required of the builder. It is perfectly true that he used expressions which show that the work of the builder might have been better. But when one reads the note prepared on behalf of the plaintiff—which was accepted by the judge as being an accurate representation of what he said—I am bound to say that I do not find anything there which justifies the main criticism which Mr. Hallis has put forward. I shall refer to that judgment in a little further detail.

Mr. Hallis's main complaints were as follows: he said that the architect had been treated as entitled at the owner's expense to a measure of neglect; that the judge had wrongly thought that substantial performance of major matters relieved the architect of his duty as to minor matters; that the fact that the remedy is a troublesome and expensive one does not mean that one can let the builder off repairs, and that the architect had no business in the matter of the tiles (with which I shall deal in a little more detail later) to excuse the builder from putting right what was wrong; finally, that the judge wrongly considered that as the defendant had got good value, he was not entitled to complain of

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breaches by the builder, and that accordingly the architect could disregard the breaches.

With regard to the observations of the judge about the good value which the building owner obtained, as I read those observations, I think they were merely inserted in his judgment not as ground for his decision, but in the hope perhaps of consoling the building owner for losing his claim against the architect in respect of these, as the building owner no doubt thought, pieces of defective work which had been performed by the builder. One really comes back to the question: What was it that was complained of, and what were the judge's findings on those matters? They come mainly, I think, under four heads: Tiles, pipes, woodworm and paint. The complaint about the pipes sounds a small one, but it might well have been a serious matter if it had been established. It was this, that before the owner went into the house the pipes were not lagged in accordance with the contract; the reason for that was that he wished to get in promptly. However, the lagging was done afterwards, and the builder gave evidence which, so far as one can see, was accepted by the judge, that he had done the whole of the lagging of the pipes himself. That was in 1952 or 1953. In 1954 there was trouble owing to a freeze-up; a tank buckled and the Water Board had access to the pipes. In 1955 the premises were inspected by an expert witness for the purposes of this case, and two feet of pipe were found to be exposed, not lagged, and the defendant—who works in a printer's warehouse—obtained some printing felt and lagged the pipes himself.

In that state of the evidence the judge found the facts in favour of the plaintiff, and against the defendant. In his judgment he refers to the evidence to which I have called attention and ends by saying: "At a very much later date after all sorts "of other events"—that statement including the visit by the Water Board in January, 1954—"it was found that two feet "had not been lagged. I cannot say that it has been satisfac- "torily proved to my satisfaction that this shows any lack of "supervision." It is quite true that the judge says that it was found that two feet of pipe had not been lagged. Perhaps, in order to express what I have stated, he should have said: "It was found that two feet were not lagged." I cannot see how the evidence given in this case could lead to any other conclusion but that two feet were unlagged in 1955, which throws no light on whether Mr. Hillman was right or wrong in saying that he did the work years earlier over the whole system of pipes without leaving any out. So much for the pipes.

In regard to the woodworm, Mr. Hallis very fairly conceded that he could not make much of that because the judge found that the attention of the architect was not drawn to this by the building owner, and it was not a matter which was so obvious as to be seen. The worm apparently worked its way eventually through the paint, but the judge could not possibly hold against

the architect that he was negligent for not observing this if his attention was not drawn to it.

The third major matter was the paintwork and the plastering. That requires consideration. The judge undoubtedly took the view—having seen the house and having taken into account the fact that the paint had been on for two years, and that there were only two coats of paint—that the standard of paintwork was moderate. Here perhaps I should use the language that the judge used which covered this matter: "There are certain com- "plaints that are made which complaints really amount to this, "that the architect did not supervise properly and allowed the "builder to get away with a certain amount of shoddy work. "I think that there is no complaint that does not come under "that head in one way or another—at any rate the painting, "plastering and exterior is not admittedly as good as it could "be "—I drew attention to that phrase "as good as it could "be." "I am not at all sure one might not say 'not as good "'as it should be.' One must remember that, as Mr. Cotton "very properly put it to me, they were building down to a price. "That must mean that a certain tolerance must be expected. "I think that this accounts for a very great deal of the com- "plaints, if not indeed for all of them."

Later the judge deals with other matters and says: "Very "much the same story extends all the way through—the leaded "lights, and so on. There are imperfections in the house, as "I think there are in practically every house, but in very few "matters does it seem to me that there is anything like the point "where I can say: 'Their architect failed here—he ought to "'have noticed this—or he ought to have ordered the builder "'to put this right.'" I notice particularly the expression: "In very few matters does it seem to me that there is anything "like the point where I can say: 'The architect failed here.'"

Taking a broad view on what I have been discussing—the paintwork and other matters—I think that the judge has not come to the conclusion that the architect failed, but that he had not (except in a few cases) even approached failure. Of course, the question still remains, what is the standard which had to be applied. Here, I think, is the crux of the case, because Mr. Hallis eventually conceded that, when one considered this matter, one could not leave out of account altogether the price at which the work was to be done. The house was not a very expensive house. Even taking into account and giving proper weight to the language of the specification: "The whole of the "materials and workmanship is to be the best of their respective "kinds and to the full satisfaction of the surveyor who shall be at "liberty to reject any materials," and so on, "and any work "he may consider done in an unsatisfactory manner to be "carried out to his full satisfaction"—bearing in mind the terms of the contract for the building of this house and in particular what I have said about the paintwork—that there

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were to be only two coats—and not leaving out of account the price, I cannot see that the judge was wrong in taking the view that there must be some tolerance (to use his word) in building down to a price. The question of the adequacy of the work, provided that the architect used his skill and acted reasonably, was a matter for the county court judge coming within the limits of questions of degree which were in his province.

I have in mind in particular the contract between the building owner and the builder—a standard R.I.B.A. contract—with the standard conditions attached thereto, the first condition of which is as follows: "The contractor shall carry out and complete the "works in accordance with this contract in every respect in "accordance with the directions and to the reasonable satis-"faction of the architect." The judge's finding, I think, is to the effect that the work was carried out in accordance with the reasonable satisfaction of the architect in so far as the matters with which I have so far dealt are concerned. He undoubtedly came to the conclusion that this architect was not as hard on the builder as he might have been, or as another architect might have been. But he was quite clear in his opinion that no case of professional negligence had been made out against the plaintiff. He concluded his judgment by saying: "They"—that is the plaintiff, including no doubt in the word "they" not only the plaintiff, who was not a professional architect, but his servant who was—"applied perhaps a lower standard than another "architect might have done under different circumstances, but "they never passed anything 'rank bad,' and I cannot find "them guilty of professional negligence."

I have left till last the case of the tiles, which I think does stand on a different footing. The architect in this case was obviously not simply backing up the builder at every stage and doing nothing for his client, because the correspondence shows that he was drawing the attention of the builder to the work which needed doing to put things right. He drew the attention of the builder to these stained tiles. They were "Marley" tiles which were stained, no doubt, by paraffin dropped by the builder's men when working in the house. These stains were not very bad, but they were noticeable, and the sort of thing which a housewife would naturally object to. When the attention of the architect was called to this defect, he drew the attention of the builder to it with a view to having the matter put right. There were a number of stained tiles, there is no specific evidence as to the number of tiles, but the judge did see the stains, and there was evidence to the effect that the largest of them was the size of about half-a-crown or the size of a tennis ball.

The question arose then as to what was to be done to put the matter right. Apparently these tiles mark very easily, and even if a rug is put on them, if the rug is taken up after an interval there is left the mark where the rug has been. When the question of dealing with these tiles arose the builder came round

with some other tiles with a view to replacing the marked ones, and according to the evidence of the builder (which, I think, is the only evidence upon this point) the tiles that he brought round did not match, and it was inferred from that that they did not match to the satisfaction of the building owner or his wife. So they were taken away and nothing more was done. The architect did—I again infer from the correspondence—issue his final certificate on the basis that the tile work was to be charged for; and, accordingly, Mr. Hallis says: " In regard to this the position " is clear, because my client was entitled to have the whole floor " taken up and put down again. It is no good to say that the " remedy is so out of proportion. If the builder was wrong he " has to put the matter right, and the architect has to see to " that."

I think that this matter did come within the province of the architect. He did say that the tiles which were marked should be replaced, and when they could not be replaced by matching tiles it appears that nothing further was done, and the architect passed the matter through. Again, in this respect, although I agree that the situation is rather different from the matters which I have found perfectly clear up to date, he was, in my view, not going outside the scope of clause 1 of the conditions attached to the agreement providing for the architect being reasonably satisfied with what had been done by the builder in accordance with his directions, although all that had been done by the builder was to do the best he could to match the tiles which had previously been laid. As my Lord pointed out, it seems a little odd that there were no tiles left over, or that it was not possible to match tiles of a well-known make, like " Marley " tiles, without difficulty. But again, this I think was a matter which was passed to the reasonable satisfaction of the architect, and therefore, that nothing can be made of this point—which was really, I think, the only point left in the case at the end—to enable the defendant to succeed on the counterclaim.

For these reasons, therefore, I think the appeal fails on the main matter which has been argued here, and there remains only the question of costs.

MORRIS L.J. I have found myself in this matter in agreement with the judgment of the county court judge, and I share the conclusions reached by Hodson L.J.

I have read and re-read the notes that have been provided for us of the judgment delivered by the learned judge, and when those notes are read as a whole I do not think that he erred in any way in principle. Nothing that I propose to say I hope will give any countenance to the view that a sort of general dispensing power was given to the architect. He entered into a contract with the man who employed him. The terms of that contract are known, and he must carry out that contract. We have also before us the terms of the contract made between the building

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owner and the builder, and attention has already been directed to clause 1 of the conditions of that contract, the first sentence of which reads: "The contractor shall carry out and complete the "works in accordance with this contract in every respect in "accordance with the directions and to the reasonable satisfaction "of the architect."

As I read the judgment of the judge, he takes the view that it is reasonable to have in mind that the price of the house that was being built was a price of £1,910. The evidence satisfied the judge that that was a low price, and I think he did not err in taking the view that, when measuring the finish of the work, it was proper to have in mind the kind of house that was being built, and the price of that house. It seems to me only natural that where there is a house that is being built at a very great expense, and another house that is being built at a very moderate price, one would expect different quality in the work. Of course, everything must depend upon the exact contract that is made. If someone contracts to give the very best possible workmanship for the lowest possible price, then, of course, the contract must be carried out. But I do not find that the judge here erred in principle in any way when he said that there was in this case the fact that the price was a low one, and when he tested the conduct of the architect by considering whether the architect acted reasonably, and whether he performed his contract with the building owner in what he did. Did he wrongly let the builder off, or did he apply his mind to deciding whether the builder had in his judgment done what under the contract the builder had contracted to do? It seems to me that the judge said: "Each "architect might have a different perception. Each architect "might come to a slightly different conclusion on the one set of "facts." But the judge thought that this architect had not failed to do what he had contracted to do.

Hodson L.J. has referred to certain passages in the judgment which I have had in mind, and I think that they show the way in which the judge's mind was working, and I do not see any error in principle at all. He said: "One must remember that, "as Mr. Cotton very properly put it to me, they were building "down to a price." Mr. Cotton had said in his evidence: "Building down to a price and not up to a standard." The judge went on: "That must mean that a certain tolerance must "be expected. I think that this accounts for a very great deal "of the complaints, if not, indeed, for all of them." Then at the end of his judgment the judge said: "Mr. Cotton and his "assistant, Mr. Lofthouse, might well have been rather more "hard on Mr. Hillman than they were, but they knew that this "was being done as a cheap job and could not afford any very "expensive work. They applied perhaps a lower standard than "another architect might have done under different circum-"stances, but they never passed anything 'rank bad,' and I "cannot find them guilty of professional negligence."

Mr. Hallis not unnaturally referred to certain phrases in the judgment, and, of course, one or two of the phrases can perhaps be looked at in a very critical way, and some argument then based upon that critical examination. But I think that this judgment must be read as a whole, and I see no fault in it. The judge tried this case for three days and spent over two hours in examining the house.

[His Lordship then referred to the fact that the defendant had made no complaint until the plaintiff claimed further remuneration, and continued:] But the judge, though recognizing that fact, nevertheless proceeded very carefully to deal with the counterclaim on its merits. That there is a bad reason for putting forward a claim does not necessarily invalidate the claim, if it can be shown to be a good one.

I would add only a word or two about this item of the tiles. It is true that the contract provides by clause 12 as follows: [His Lordship read the clause, and continued:] What happened in regard to the tiles has already been described. It was not that the tiles were bad tiles, or that they were badly put in. Apparently everything was done perfectly correctly. But after it had all been done, by some mischance paraffin was spilt on the tiles. This occurrence may not at first sight seem to come within the phrase "workmanship" in clause 12, but at the same time I think that clause 12 probably does cover it, because I suppose "workmanship" covers everything that may be done or left undone by the workmen until the time that the house is handed over. But it is a rather special circumstance which was an unfortunate mischance.

As has been pointed out, this is not a case where the architect did nothing. He did write to the builder in January, 1953, asking that the tiles be dealt with. At a much later date, in June, 1953, he again wrote and asked that attention should be given to the matter. Then, as has been pointed out, it was found that they could not rub the paraffin stains off, although there is some suggestion that steel wool might achieve that purpose, but that the tiles would have to be taken up. Tiles could not then be found that matched, and so the result was that they had either to leave these stains, or else to take the whole of the floor up although it had been quite properly put down in the first place. In considering that I think the architect was entitled to have regard to the sort of stains that they were. [His Lordship reviewed the evidence regarding the stains, and continued:] On that evidence it seems to me that it was within the competence of Mr. Cotton, the architect, having regard to the whole of the circumstances and the size and number of these stains, to say that he could pass the work as being reasonably within the standard of what was to be done, and I do not think that the judge erred in principle.

The tests of a reasonable standard and of reasonable conduct are, after all, very good tests, and it may be that the judge

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thought that this matter—on which so much time has been spent, and of which nobody would ever have heard a word had it not been that a wrong claim was put in for more fees—was de minimis. It appears to me trifling.

The money amount of this claim I do not know. Apparently the whole claim was put forward on the basis not of indicating the particular sum required to put any specific matter right, but of indicating how the value of the house had diminished because of the totality of these complaints, and it was said that the house was worth £200 less than it ought to have been, a figure which the judge thought in any case would have to be critically examined.

That is the item of the tiles which, perhaps, has assumed a major importance, and I do not want to take up time in dealing with other matters. It seems to me that they come within the principle primarily enunciated by the judge that the architect was entitled to apply his mind fairly and honestly to the question whether this work had reasonably been done so as to satisfy the contract, and he came to the conclusion that it had been. Whether someone else in similar circumstances might have come to a different conclusion does not seem to me to matter. It appears to me that the judge considered the evidence before him with very great care; he came to the conclusion which he indicated in his judgment, and I do not feel that this court should interfere with it.

Appeal dismissed.

Solicitors: *Gard, Lyell & Co. for Theodore Bell, Cotton & Curtis, Sutton, Surrey; Gregsons.*

F. R. D.

[COURT OF APPEAL.]

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Mar. 1, 2, 25.
Singleton, Hodson and Morris L.JJ.

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Factory—Dangerous machinery—Fencing—Unfenced nip between conveyor belt and roller—Employee cleaning machine in motion—Causation—Contributory negligence—Apportionment of liability—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

Causation.

The plaintiff was employed by the defendants in their factory to operate and clean a sand preparation plant. Sand was carried along an electrically driven conveyor belt, over a headroller and into a suction fan. The fan was fenced, but there was no fencing of the nip between the conveyor belt and the roller. The plant was normally cleaned while the parts were stationary, but one

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[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

evening, after work had ceased and the foreman had left, the plaintiff switched on the current and began to clean the plant with the machinery in motion and in doing so caught his hand between the roller and the belt and suffered injuries. The trial judge held that the defendants were in breach of their statutory duty to fence under section 14 (1) of the Factories Act, 1937, but that the plaintiff had been guilty of contributory negligence; and he apportioned the damages equally between them:—

Held, (1) that the part of the machinery where the roller met the belt was dangerous, as, in the ordinary course of events, danger might reasonably be anticipated from its use without the protection of a fence, and the defendants were, accordingly, in breach of section 14 (1) of the Act of 1937.

Dictum of Wills J. in *Hindle* v. *Birtwistle* [1897] 1 Q.B. 192; 13 T.L.R. 129 applied.

(2) That the absence of a fence was in part the cause of the accident and it was no defence to say that a fence would have to be removed in order to clean the machinery, since it was impossible to tell whether the accident would still have happened had there been an effective guard—for example, whether the plaintiff would have been deterred from acting as he did or whether he would have removed the guard. Dictum of Lord Goddard C.J. in *Roberts* v. *Dorman Long & Co. Ld.* [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428 applied.

(3) That in the circumstances the plaintiff's negligence was greater than the defendants' negligence, and liability would be apportioned one fifth to the defendants and four-fifths to the plaintiff and the damages recoverable by the plaintiff reduced accordingly.

Stapley v. *Gypsum Mines Ld.* [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478 followed.

APPEAL from Oliver J.

The plaintiff, Robert David Williams, was injured on August 15, 1952, when he was working for the defendants at their iron foundry at Port Penrhyn, near Bangor. He, together with his foreman, one Jones, was the operator of an electrically driven sand preparation plant. Part of the plant consisted of a conveyor belt which, gradually rising, carried sand up to and over a headroller where there was a suction fan. The fan drew the sand into a disintegrator where the cleaning process of the sand was completed. The fan was fenced, but there was no fencing of the nip between the conveyor belt and the roller. Some sand adhered to the roller and the belt and these were cleaned each evening by the foreman and the plaintiff when work on the plant had ended and whilst the machinery was stationary. On August 15, 1952, after the foreman had left, the plaintiff decided to carry out further cleaning work. He put the machinery in motion and placed a steel brush upon the belt at the point where it passed over the headroller. The movement of the roller drew the brush and the plaintiff's hand and arm into the nip between the roller and the underside of the conveyor belt. His arm was severely injured and amputation was necessary.

The plaintiff claimed damages against the defendants for

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negligence and/or breach of section 14 (1) [1] of the Factories Act, 1937, in that they had not protected the plant with a fence or guard. Oliver J. at Chester Assizes on November 2, 1954, held that the defendants were in breach of their statutory duty, but that the plaintiff had been guilty of contributory negligence and was equally to blame. He awarded the plaintiff £1,782 15s. damages, half the total amount which he would have awarded if there had not been contributory negligence.

The defendants appealed.

F. W. Beney Q.C. and *Andrew Rankin* for the defendants.
John Thompson Q.C. and *Geraint Rees* for the plaintiff.

The material authorities referred to in argument appear in the judgment.

Cur. adv. vult.

Mar. 25. SINGLETON L.J. The plaintiff was employed by the defendants at their iron foundry as a labourer and, along with his foreman, Jones, he worked upon, and cleaned, a sand preparation plant at the foundry, which is a factory within the meaning of the Factories Act, 1937. On August 15, 1952, his right hand was caught in a nip between the belt and the head-roller of an electrically driven belt conveyor on the plant, and he sustained severe injuries to his hand and arm. He brought this action against his employers alleging that his injuries were caused through breach of statutory duty or negligence on the part of the employers. At the trial of the action Oliver J. held that the defendants were in breach of their statutory duty, and that they were responsible in damages to the plaintiff, and, further, that the plaintiff himself was negligent. He found that they were equally to blame, and he awarded £1,782 15s. damages to the plaintiff, one-half of the amount the plaintiff would have recovered if he had not been guilty of negligence. The defendants appeal to this court.

The finding against the defendants is that they were in breach of section 14 of the Factories Act, 1937, in that the place on the machine at which the plaintiff's hand was caught was a dangerous part of machinery and was not fenced as is required. [His Lordship read sections 14 (1) and 16 of the Factories Act, 1937,[1] and continued:]

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery, other than prime movers "and transmission machinery, shall "be securely fenced unless it is in "such a position or of such construc-"tion as to be as safe to every person "employed or working on the "premises as it would be if securely "fenced."

S. 16: "All fencing or other safe-"guards provided in pursuance of the "foregoing provisions of this Part of "this Act shall be of substantial "construction, and constantly main-"tained and kept in position while "the parts required to be fenced or "safeguarded are in motion or in "use . . ."

Mr. Beney, on behalf of the defendants, raised three points: 1. that this was not a dangerous part of machinery; 2. that the absence of a guard did not cause, or contribute to, the accident which was due to the deliberate act of the plaintiff himself; 3. that upon the judge's findings the fault on the part of the defendants was very much less than that upon the plaintiff, and the proportionate liability ought to be materially altered.

In an iron foundry much use is made of sand, and the plant upon which the accident happened was used for the purpose of reconditioning sand so that the same sand can be used again and again. The plant is in two parts. The first part crushes and cleans the sand, which is then delivered on to a conveyor belt of the second part which, gradually rising, carries the sand up to and over the headroller where there is a suction fan. The fan draws the sand into a disintegrator where the cleaning process is completed. The fan was fenced, but there was no fencing of the nip between the conveyor belt and the roller; when the plant was working the movement of roller and belt was slow, and it would appear that it had not been thought to be a dangerous part of machinery; it was about 3 ft. 6 ins. above floor level. A certain amount of sand adhered to the roller and belt, and in order to keep the movement even the plant was cleaned by the foreman and the plaintiff each evening when work upon it ended. There was a switch near the plant and a main switch a little further away, by which electric power was put on or off. On August 15 work upon the plant finished somewhat earlier than usual; the plant was cleaned, and the foreman left about 4.50 p.m. A little later the plaintiff determined to do some more cleaning and to do it when the plant was in motion. Accordingly he turned on both switches; he then used a steel brush upon the headroller which was moving round, and his hand was caught between the roller and the belt. The judge described his course of conduct as "hopelessly dangerous."

The plaintiff's case as pleaded was that he was cleaning away sand from the headroller by means of a wire brush whilst the conveyor was in motion. Particulars were asked for, and these were the particulars given: "As the defendants their "servants or agents well knew sand frequently accumulated on "the head roller of the conveyor causing tension on the con- "veyor belt. This frequently occurred while the plaintiff was "working on the disintegrator on dates which the plaintiff cannot "specify. On such occasions the plaintiff cleared away the "accumulated sand while the power was switched on. This "practice was known to the senior man working on the machine "and must have been seen by employees of the defendants "whom the plaintiff cannot identify. Nevertheless the plaintiff "was at no time warned that it was dangerous so to remove "sand and was never instructed not to do so or prohibited from "so doing. Accordingly, in the premises, the plaintiff says that

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" the defendants impliedly acquiesced in the said practice and/ " or must be deemed so to have acquiesced."

That case was supported by the evidence-in-chief of the plaintiff and by that of some other witnesses, but on cross-examination it disappeared and the judge found that it was wholly untrue. His reference to the plaintiff's evidence is helpful: " Now one turns to his evidence. ' I cleaned this " ' roller twice or three times in all during the six months that " ' I had been working at the machine. I haven't cleaned it in " ' any other way. I cleaned it by wire brush '—and he " describes the way—' and I was successful when I did it.' Then " he describes how on this particular occasion the foreman went " away and then he says this: ' This roller, owing to sand upon " ' it, had not been working satisfactorily for about a week.' " That, of course, is a ridiculous statement. The roller was " cleaned, and had to be cleaned, at least once a day, and as " he later admitted in his evidence that was so and that it " had been cleaned earlier that evening. ' So I switched on " ' the machine,' he said, ' and continued my cleaning method.' " It was his hand that let the tiger out of the cage, and I am " quite satisfied—unpleasant as it is to admit it—that he knew " the proper way to do it; he had seen it done over and over " again. He had helped it to be done over and over again, and " it was a piece of sheer folly to have turned on this machine " that day—of that much I am quite satisfied. He had never " seen it done in this way, and I am quite satisfied he had " never before done it in this way himself. He was then cross-" examined. He said: ' Jones and I had cleaned this machine " ' many times.' He was asked over and over again, both by " counsel for the defendants and by me, whether it was not " cleaned every day, and he would not answer the question. " He never has answered it, and that remains unanswered. " ' When Jones was there the machinery was stopped when the " ' work was done. That is the proper way of doing it. The " ' roller would, of course, tend to draw the brush under the " ' belt. We used to stop the machine,' and he then described " what was the most proper process of cleaning the machine " which was to stop it and continue cleaning part of the surface " of the roller in the position in which it was stopped. Then " by manipulating the switch they ' inched ' the thing round, " by just touching the switch now and again the belt moved a " foot at a time, and that was the proper way of doing it. That " was how he described the way he had always seen it done. " That evidence comes from him. He is then pressed about " whether that roller had not been cleaned that very evening " before Jones went away and eventually he said this: ' It is " ' true that before Jones went away he and I had been cleaning " ' the roller and the belt.' And he admits—I have already " referred to this before—he went off and switched off not only " this machine but also the main check switch. That was how

" the evidence stood when he went out of the witness-box. He " had never seen Jones do it otherwise than when the machine " was stationary, that the correct method was the one described, " that the roller had been cleaned that very evening by him " and Jones. I hold in reserve, for the moment, the question " of whether I believe he had ever done that himself at all " before with the roller running."

The judge, having referred to the evidence of other witnesses, much of which he found to be entirely unsatisfactory, said: " I " find as a fact that this plaintiff, so far from having made a " practice of doing what he said he did on this occasion, never " did it at all, and the only guide he had as to how to clean it " was the guide he had had every day of the six months or " more when he was operating with Jones. He knew."

On the first point raised on the appeal, Mr. Beney submitted that the part of the plant at which the plaintiff's hand was caught was not a dangerous part of machinery within the meaning of section 14 of the Act. The belt, he said, moved very slowly, and the roller was close to a wall and in a position in which no one would anticipate danger; and, moreover, at the time the plaintiff went to the plant there was no danger, for it had been cleaned, and in the normal course it would not have been touched again until the next day. He drew our attention to section 16, from which it could be said that the obligation to fence only continued when a machine such as this was in motion, for there was no danger at any other time. The opinion of Oliver J. on this point was as follows: " Now to what con- " clusions does one come? First of all, this machine was " unfenced. So it was—absolutely unfenced. It was strenu- " ously argued for the defendants that although unfenced it was " not the dangerous part of the machine, but one does not want " experts' evidence on that. One's own experience tells one " that anybody who is moving about working near that belt " when it is unfenced may get caught, as the plaintiff got caught. " I say no more than probably get caught, but I do not think " you can imagine a more obvious result than this. It is not " without importance to observe that Mr. Jones, in spite of " the way he ended up his evidence, began by saying in effect, " that it would be madness to try and clean that thing with the " roller running. You could not do it, and if you tried to do " it you were almost sure to get caught. Now that statement " was in contradiction to the way in which he treated the back " roller, which was in all respects the same, which equally could " not be done this way without someone getting caught, so I " come to the conclusion therefore that that was a dangerous " piece of unfenced machinery."

I agree with the judge's conclusion. There will never be a more helpful guide upon this than the judgment of Wills J. in *Hindle* v. *Birtwistle*,[2] where he said: " It seems to me that

[2] [1897] 1 Q.B. 192, 195; 13 T.L.R. 129.

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" machinery or parts of machinery is and are dangerous if in " the ordinary course of human affairs danger may be reasonably " anticipated from the use of them without protection. No " doubt it would be impossible to say that because an accident " had happened once therefore the machinery was dangerous. " On the other hand, it is equally out of the question to say " that machinery cannot be dangerous unless it is so in the " course of careful working. In considering whether machinery " is dangerous, the contingency of carelessness on the part of the " workman in charge of it, and the frequency with which that " contingency is likely to arise, are matters that must be taken " into consideration. It is entirely a question of degree." I believe it is unnecessary to look in a case of this kind further than the test laid down by Wills J. so many years ago. Applying the test there given, I consider that this was a dangerous part of machinery when the plant was working.

The question of causation presents much more difficulty. It is claimed that the injuries to the plaintiff were not caused by a breach of section 14 (if there was one), but were due to the deliberate act of the plaintiff himself. He turned on both switches and started to clean the plant when it was in motion. He had not done that before, so the judge found. If there had been a guard he would have moved it if he had decided to clean the plant. And, again, there was no reason why there should have been a guard upon it at night time when it was not, and was not intended to be put, in motion. Thus it was argued that the absence of a guard did not contribute to the accident in any sense. On the other hand, it was pointed out by Mr. Thompson that the accident could not have happened if the terms of section 14 were complied with: the dangerous part of machinery had never been securely fenced; an accident happened of a kind which was likely to happen if the statutory duty is not fulfilled, and it was the very thing which the section was designed to prevent happening. Reliance was placed on that which was said by Lord Goddard C.J. in *Roberts* v. *Dorman Long & Co. Ld.*[3] That was a case in which it was said that there was a breach of a statutory duty in not supplying belts for people who had to work at a height, and an argument was raised to the effect that the workmen would not have used them if they had been provided. The Lord Chief Justice said[4]: " It may " very well be that the judge could form the opinion on the " evidence that it was unlikely that if safety belts had been " available the deceased would have used one, but, in my " opinion, once it was proved that the defendants had not these " belts available, it was no answer for them to say: ' Even if " ' we had them available, the deceased would not have used " ' them.' The fact that they were not available gave him " no opportunity of exercising his election. Had one been

[3] [1953] 1 W.L.R. 942, 946; [1953] 2 All E.R. 428.
[4] [1953] 1 W.L.R. 946.

" available, and had he elected to use it, while it might not " have prevented him meeting with some injury, it would cer- " tainly have prevented him from falling to his death. Some " actions for negligence are based on the failure of a person to " make inquiries when the circumstances are such as to show " that he was put on inquiry. If he is put on inquiry, and " makes none, it is no answer to say: ' Well, if I had made the " ' inquiry it would have led to no result.' That is well estab- " lished, and I need only refer to the judgment of Bankes L.J. " in *A. L. Underwood Ld.* v. *Bank of Liverpool*.[5] It seems " to me that the two things are closely analogous. If a person " who has to make an inquiry fails to do so, he cannot be heard " to say: ' But even if I had, it would have led to no useful " ' result.' So, I think that if a person is under a duty to " provide safety belts or other appliances and fails to do so, " he cannot be heard to say: ' Even if I had done so they would " ' not have been worn.' "

In the same case Birkett L.J. said[6]: " I am of opinion " that the breach of statutory duty was proved, and I do not " think that it is any answer to a breach of that duty to say " that had it been fulfilled the result would have been the same. " The deceased man had no right of election given to him as " the regulation provides, and the defendants were guilty of a " breach of the regulations which occasioned or contributed to " the death of the deceased man."

Hodson L.J. said[7]: " I would, accordingly, find that safety " belts were not available for such persons who elected to use " them. If this is so, I think it cannot lie in the mouth of " the defendants to say that this was not the cause of the " accident on the ground that the probabilities are that the " deceased would never have elected to use a belt. The man " having been killed, there is no possibility of finding out " whether he would have exercised his election one way or the " other, and I must decline to assume that he would not have " elected to use a safety belt if one had been available."

Oliver J. treated the matter in this way: " The third doctrine " was a rather ingenious one. It was this, that any reliable " fence, which completely screened all the spinning roller from " possible contact with a human hand, must be such as to " prevent cleaning unless and until you took it off, and in order " to take it off you would have to stop the machine, and there- " fore this accident would not have happened. But I do not " quite understand that. Having stopped the machine and " taken off the fence, there is nothing to prevent you starting " the machine again with the fence off. It would not be doing " anything silly. On this occasion he thought running it again " would eventually save him trouble. Therefore, I have the " argument that the damage does not flow from the absence

[5] [1924] 1 K.B. 755; 40 T.L.R. 302.
[6] [1953] 1 W.L.R. 942, 949.
[7] Ibid. 951.

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" of the fence, but I think it is not a sound argument, because " it is impossible to tell what might have happened had there " been an effective fence. I have come to the conclusion that " this accident must be shared, or at least the pecuniary conse- " quences of it must be shared. I always find it extremely " difficult to say who is more to blame. In the event, there was " no fence on this machine, and a man would be a great fool " to do what he did, but if there had been a fence there, a " proper fence, there would not have been an accident, and so " I say that each are equally to blame."

I find this an extraordinarily difficult problem. It would be easy to say that it was a matter for the decision of the judge of first instance and that this court ought not to interfere, but the parties are entitled to have the decision of this court upon it. It is not a pure question of fact; no question was raised on the judge's findings of fact. " ' Causation,' said Lord Wright in *Yorkshire Dale S.S. Co.* v. *Minister of War Transport*,[8] " is to be understood as the man in the street, and not as either " the scientist or the metaphysician, would understand it." Some might say that the cause of the accident was the plaintiff's own act, and that the lack of fencing had nothing to do with it. There was, as I have said, no statutory requirement that the machine should be fenced that night after work had ceased and it had been cleaned; it was not a dangerous part of machinery until power was switched on again. The plaintiff knew the plant well, and on the judge's finding he knew that he was doing something which he ought not to have done. He turned on both the immediate switch and the main switch and began to do something which was " complete folly," " sheer folly," " most " stupid," and " hopelessly dangerous," to repeat expressions used by Oliver J., though the judge thought that the plaintiff meant to do something useful and that he probably thought it would save him a lot of trouble. At the same time one must not overlook the fact that a guard or fence not only gives protection but also may be valuable as a warning. If there is a guard a workman may hesitate before removing it. It may act as a deterrent, or the removal of it may be difficult.

Left to myself, and without the help of the authorities, I am inclined to think that I should come to the conclusion that the defendants' failure to comply with their statutory duty ought not to be regarded as one of, or as part of, the causes of this accident. In *Stapley* v. *Gypsum Mines Ltd.*[9] the Court of Appeal had held that any negligence and breach of the Regulations by Dale did not cause or contribute to the death of Stapley. The House of Lords (by a majority) reversed that finding and held that Dale's fault, for which his employers were liable, was a contributory cause of the accident which resulted in the death of Stapley. In the speeches of each of their

[8] [1942] A.C. 691, 706; [1942] 2 All E.R. 6; 58 T.L.R. 263.

[9] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

Lordships who formed the majority reference is made to a passage from the speech of Lord Birkenhead in *Admiralty Commissioners* v. *S.S. Volute* [10]: " . . . the question of contributory negligence " must be dealt with somewhat broadly and upon common-sense " principles as a jury would probably deal with it. And while " no doubt, where a clear line can be drawn, the subsequent " negligence is the only one to look to, there are cases in which " the two acts come so closely together, and the second act of " negligence is so much mixed up with the state of things " brought about by the first act, that the party secondly negli- " gent . . . might, on the other hand, invoke the prior negli- " gence as being part of the cause of the collision so as to make " it a case of contribution." Indeed, it may be said that this formed the basis of their decision.

Now, it is difficult to say that the lack of a guard upon the machine in the present case and the act of the plaintiff were not so closely " mixed up " that the lack of guard could be regarded as not being part of the cause of the accident, especially when one remembers the principle stated by Lord Goddard C.J. in *Roberts* v. *Dorman Long & Co. Ld.*[11] These considerations lead me to the conclusion that the decision of Oliver J. that the accident was in part due to the defendants' failure to perform their statutory duty ought not to be disturbed.

As to the degree or measure of responsibility, I would say that much the greater responsibility rests upon the plaintiff than upon the defendants. The defendants were in breach of their statutory duty, but their failure to comply with the statute was in respect of a part of machinery which they did not consider dangerous, and which no one appears to have thought to be dangerous before this accident; its position was such that many people might well not think of an accident happening. The plaintiff, on the other hand, knew just what he was doing and, as the judge said, " It was his hand that let the tiger out of " the cage."

Having regard to the opinion I have formed as to the fault on the part of each, I would scarcely attribute as much as 20 per cent. of the responsibility for the damages to the defendants, but as both my brethren think that is a fair proportion I am prepared to agree, and I consider that it is proper for the court to make such an alteration, having regard to the course taken by the House of Lords in *National Coal Board* v. *England*,[12] following upon *Stapley* v. *Gypsum Mines Ld.*[13]

I would allow the appeal to the extent I have indicated.

HODSON L.J. stated the facts and continued: The defendants contend, in the first instance, that no fencing was necessary, since the part was not a dangerous part. They rely on the fact

[10] [1922] 1 A.C. 129, 144; 38 T.L.R. 225.
[11] [1953] 1 W.L.R. 942, 946.
[12] [1954] A.C. 403; [1954] 2 W.L.R. 400; [1954] 1 All E.R. 546.
[13] [1953] A.C. 663.

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that there had been no previous accident, although the machine had been working for a long time, and no factory inspector had required fencing to be erected; and they said that, applying the correct test, namely, the objective test of foreseeability, that is to say, posing the question: "Ought the employer to anticipate danger?" rather than the question: "Does the event show the part was dangerous?", the court should hold that the part was not a dangerous part.

In my view the trial judge directed himself correctly on this point. He said: "One's own experience tells me that anyone "who is moving about working near that belt when it is "unfenced may get caught as the plaintiff got caught." In answering the question: "Was it foreseeable?" he said, in effect, that he did not think he could exclude from consideration a negligent act such as the foolish action of the plaintiff in switching on the machine and trying to clean it when in motion. He considered the function of the machine and its working and the normal method of cleaning, and had before him the photographs which gave him a good idea of its height from the ground and accessibility to workmen employed at the factory together with the position of the controlling switches.

On consideration of the evidence he held that the part was clearly dangerous. In so doing, I am of opinion that he came to the right conclusion and that such conclusion is fully in line with the authorities beginning with *Hindle* v. *Birtwistle*,[14] the principle of which is summarized in Redgrave's Factories, Truck and Shop Acts, 18th ed., p. 32, in the passage: "The behaviour "of human beings that has to be regarded is such behaviour as is "reasonably foreseeable which is not necessarily confined to such "behaviour as is reasonable behaviour." This passage has received judicial approval in the judgment of Tucker L.J. in *Smithwick* v. *The National Coal Board*.[15]

The defendants have argued that even if they are in breach of the section by reason of the dangerous part of the machine being unfenced when the power was switched on, nevertheless, the effective cause of the accident was not the breach but the foolish conduct of the plaintiff in switching on the current and then trying to clean the machine. This argument is an attractive one for it is said, fence or no fence, in order to clean the machine the fence would have to be removed for cleaning, and the plaintiff would have been injured in any event if he switched on the power before cleaning. The plaintiff's expert agreed that when the man was employed in the work of cleaning the roller there would not then be a guard on the machine, because the machine could not be cleaned with the guard on. Hence it is argued that there is no *nexus* between the breach and the accident, which was caused by the turning on of the current when no guard was there.

[14] [1897] 1 Q.B. 192. [15] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.

I think the answer to that argument is, as Oliver J. said, that it is impossible to tell what might have happened had there been an effective guard. The plaintiff's injury was certainly of the kind which compliance with the statute was designed to prevent. If the guard had been there it might have acted as a deterrent indicating the danger of that part of the machine, so that he would not have entered on the foolhardy operation of switching on the power if and when he had removed the guard. The absence of the guard would tend to lull him into a false sense of security. In my opinion the breach of section 14 is to be regarded as one of the causes of the accident.

Finally, I share with Oliver J. the difficulty in making a fair apportionment in a case such as this. On the one hand the plaintiff acted, though zealously on his employers' behalf, yet in a foolhardy and reckless manner going far beyond that excusable inadvertence which may fall short of contributory negligence. This was the immediate cause of the accident. On the other hand, there was a static breach of the Factories Act in failing to fence securely a dangerous part of a machine, which failure resulted in an injury. When one finds a combination of a static breach of the statute with, as an immediate cause, the negligent act of the injured man operating at the same time, it is, I think, peculiarly difficult to assess the proportion of the fault. It is urged that far the greater proportion of blame should be attached to the plaintiff, and in the light of the recent decisions of the House of Lords in *Staplcy's* case [16] and *England's* case [17] this court can, and should, interfere. Not without hesitation I have accepted this submission and agree that 20 per cent. only of the blame should be attributed to the defendants, and accordingly I would allow the appeal to this extent.

MORRIS L.J. stated the facts and continued: The defendants advance three submissions: (a) that the roller need not have been fenced and that there was no foreseeable risk of injury; (b) alternatively, that the omission to fence the roller was not a cause of the plaintiff's injury; (c) alternatively, that the defendants' share of responsibility should have been adjudged to have been much less than one-half.

In regard to the first of these submissions, I consider that the roller was a dangerous part of the machinery, and that the roller should have been securely fenced, and that the fencing should have been of substantial construction and constantly maintained and kept in position while the roller was in motion or in use. (See Factories Act, 1937, ss. 14 and 16; and as to the meaning of the phrase "securely fenced" see *John Summers & Sons Ld.* v. *Frost.*[18]) The evidence as to the siting and location and height from the ground of the roller gave ample warrant for the

[16] [1954] A.C. 403.
[17] [1953] A.C. 663.
[18] [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

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view which the judge entertained. The fact that no complaint was forthcoming from visiting factory inspectors does not deflect the conclusion to which the evidence pointed. In my judgment, the unfenced roller was dangerous for the reason that " in the ordinary course of human affairs " (see *Hindle* v. *Birtwistle*,[19] and *Mitchell* v. *North British Rubber Co. Ld.*,[20] danger might reasonably be anticipated from the use of the machinery while the roller was unfenced. It could be added that in the ordinary course of judicial affairs knowledge of the danger which lurks where someone may be caught in the nip between a moving belt and a moving roller becomes cumulative.

The second submission raises questions of no little difficulty. It is presented in two days. It is said that when the foreman went away the machinery was not in motion or use, but had been stopped with the current switched off; that while such state of affairs existed there was no breach of statutory duty; and that the plaintiff was himself solely responsible for his injuries in that of his own volition he put the machinery in motion and then proceeded to clean it by a method never previously employed. In regard to this matter the position appears to have been that when the foreman went away the plaintiff was left to do other work which included sweeping up round the machine. He was about 46 years old, and had been employed by the defendants for about six years. He and the foreman were due to operate the machinery the next morning. Accordingly, in the desire, as the judge held, to do " something useful," he decided to clean the roller. He proceeded to switch on the machinery. He did this because, hoping to employ his time profitably, he conceived the idea of cleaning the roller with a wire brush while the roller was revolving. This method had not been adopted before and was described by the judge as " complete folly "; but in the mere switching on of the machinery he was not doing something beyond the scope of his authority. He was perfectly entitled to decide to clean the machine, and he certainly did not intend to injure himself. Though he knew that it had always been the practice to clean the roller while it was stationary, he could not have realized that his method of cleaning would so inevitably be fraught with peril.

When he put the machinery in motion the defendants became in breach of their statutory duty just as they had been, in my judgment, during the day and during all the preceding periods when, with the roller unfenced, the machinery had been in motion or in use. After putting the machinery in motion, which, for any legitimate purpose, the plaintiff was entitled to do, he was injured. There was not, and had never been, any fencing provided for the roller, and the machinery was in such a state that when it was switched on the defendants would inevitably be and become in breach of duty. It could not be

[19] [1897] 1 Q.B. 192. [20] 1945 S.C.(J.) 69.

switched on without effecting this result. The machinery in that state was left in the charge of the plaintiff, or left so that he might put it in motion if he thought fit. In those circumstances it seems to me that the fact that the machinery was unfenced when put in motion and that the defendants became in breach of statutory duty cannot be excluded as having some casual connexion with the plaintiff's injuries. The purpose of having fencing is to prevent contact with a dangerous part. As Lord Simonds said in *Nicholls* v. *F. Austin (Leyton) Ld.*[21]: "The "fence is intended to keep the worker out . . ." He pointed out that section 14 (1) aims at security from unintentional and even intentional contact with a dangerous part. Other authority shows that the security must be from contact which may result from careless or ill-advised conduct. (See *Smithwick* v. *The National Coal Board.*[22])

In further support of the second submission it was said that even if the roller had been fenced it would have been necessary to remove the fencing before the surface of the roller could have been cleaned, and that therefore the absence of fencing could not be regarded as a cause of the plaintiff's injuries. The evidence as recorded is in some respects not entirely clear but was, I think, to the effect that a fence would have to be removed in order to allow the cleaning of the roller. The evidence further showed that to have a safe method of cleaning the roller should be stationary.

In approaching this submission it is relevant to have in mind the words of Lord Goddard C.J. in his judgment in the Court of Appeal in *Lee* v. *Nursery Furnishings Ld.*[23]: "where you find "there has been a breach of one of these safety regulations "and where you find that the accident complained of is the very "class of accident that the regulations are designed to prevent, a "court should certainly not be astute to find that the breach of "the regulation was not connected with the accident, was not "the cause of the accident."

In my judgment, the defendants cannot successfully assert that the plaintiff would have been injured even had there been fencing. I am not prepared to make so great an assumption in their favour. I agree with the trial judge when he said that "It is impossible to tell what might have happened had there "been an effective fence." It may be that an effective fence could not be removed in a short period of time, and had there been fencing the plaintiff might not have entertained his purpose or put it into execution, in view of the time available for him. He might not have possessed the knowledge how to remove it. He might have been caused to reflect that a fence betokens danger, and so he might have been diverted from any plan of cleaning the roller while it was moving. The consulting engineer who was called on behalf of the plaintiff expressed the view that

[21] [1946] A.C. 493, 503; [1946] 2 All E.R. 92; 62 T.L.R. 320.
[22] [1950] 2 K.B. 335.
[23] [1945] 1 All E.R. 387, 390.

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the fencing of the roller which was later installed, and which is in the form of a hood, is not adequate. The question whether the fencing is, or is not, adequate, was not an issue before the judge. But if it is being urged by the defendants that the accident would equally have happened even if the roller had been fenced, it can effectively be said on behalf of the plaintiff that if there had been secure fencing on the day of the accident it might have been of a kind which incorporated an interlocking device which would have prevented power being switched on while the fencing was not in position. I do not think that the defendants can rely on mere surmise as to what might have resulted if they had done what they ought to have done. If speculations are being indulged in, they ought not to be those most favourable to a party in default.

For these reasons I consider that there was a breach of statutory duty which operated as one of the causes of the plaintiff's injuries.

The plaintiff himself was held by the judge to have been negligent. When it comes to considering how responsibility is to be shared the approach is different from that which is apposite when causation is being decided. The Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), directs that the damages "shall be reduced to such extent as the court thinks just and "equitable having regard to the claimant's share in the respon- "sibility for the damage." In *Stapley* v. *Gypsum Mines Ld.*[24] Lord Reid said: "A court must deal broadly with the problem of "apportionment and in considering what is just and equitable "must have regard to the blameworthiness of each party, "but 'the claimant's share in the responsibility for the damage' "cannot, I think, be assessed without considering the relative "importance of his acts in causing the damage apart from his "blameworthiness."

The judge held that the plaintiff, though well intentioned, acted in a most foolish manner. He set the machinery in motion. Though doing so for the legitimate purpose of cleaning the machine, he conceived and put into execution a method of cleaning which on the judge's findings must be regarded as negligent. In the light of all the circumstances, I consider that the plaintiff's share in the responsibility for the damage should be rated very much higher than that of the defendants; I would assess the defendants' share in the responsibility as one-fifth, and that of the plaintiff as four-fifths. I would therefore vary the award of Oliver J. accordingly.

Appeal allowed in part.

Solicitors: *Cardew-Smith & Ross for Geoffrey Warhurst & Co., Manchester; W. H. Thompson.*

[24] [1953] A.C. 663, 682.

[COURT OF APPEAL.]

* HODKINSON *v.* H. WALLWORK & CO. LD.

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Oct. 4, 5.

[1953 H. No. 4856.]

Singleton, Jenkins and Parker L.JJ.

Factory—Dangerous machinery—Fencing—Transmission machinery—Unfenced machinery nine feet above ground—Unauthorized interference by worker—Causation—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 13 (1).
Causation.

The plaintiff, an employee of the defendant company in their factory, sustained injuries in respect of which he claimed damages, alleging a breach by the defendants of their duty under section 13 of the Factories Act, 1937, to fence transmission machinery at which he was working. The machine in question, called a "wheel-"abrator," was electrically powered and used to clean metal castings and forgings. On the day in question the machine suddenly stopped owing to the wire ropes used in the transmission slipping off the two pulleys, which were nine feet high from the ground. The established practice in the factory when such a breakdown occurred was, as the plaintiff knew, to summon men from the maintenance staff to put matters right. The plaintiff, however, instead of waiting for the maintenance men, elected to do the work himself; obtained a ladder and mounted to the pulleys, leaving the electric current still on. In consequence, when he was replacing the ropes the machine started to work and his left hand was crushed between a rope and the pulley. The trial judge held that the defendants were in breach of their statutory duty to fence under section 13, but he also held the plaintiff equally to blame.

The defendants appealed, contending that the ropes and pulleys being nine feet from the ground were in such a position as to be as safe for persons working on the premises as they would be if fenced, and there was therefore no breach of section 13. Further, that if there was a breach it was not a cause of the accident:—

Held, (1) that although the risk of danger was lessened by the height of the machinery from the ground it was not possible to say that the machinery was as safe as it would have been if it had been fenced, and the defendants were in breach of section 13 (1); (2) that their breach of statutory duty was a cause of the accident, for a guard was a kind of warning or deterrent; and (3) that the plaintiff must be held ninety per cent. to blame, for the defendants could not have foreseen the negligent acts of the plaintiff.

Williams v. *Sykes & Harrison Ld.*, ante, p. 1180 applied.

APPEAL of defendants from Havers J.

The plaintiff, George Hodkinson, was injured on December 10, 1952, when he was working for the defendant company at their factory in Manchester. He was the operator of a transmission machine called a "wheelabrator," an electrically powered machine used for cleaning metal castings and forgings. During the course of the afternoon the machine stopped, and it was seen by the plaintiff that the wire ropes above the machine and

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operating it had gone off the pulley wheels, which happened occasionally. There was a recognized practice in the factory that if that sort of thing happened, or if anything went wrong with the machine, it was the duty of the operator to communicate that fact to the charge-hand or to the foreman, who would summon the fitter-mechanics of the maintenance staff, who alone were entrusted with the duty of putting the machine in order. It was not part of the operator's duty to interfere once a fault of that kind had occurred. As a rule, the fitter-mechanics would attend to the fault quite quickly. On the afternoon in question, when the plaintiff saw that the ropes were off the pulley wheels, he told the charge-hand what had happened, and the charge-hand reported to the foreman, who sent for the fitter-mechanics, who arrived by the machine within two or three minutes of receiving the report. For some reason which was not explained the plaintiff did not wait for the fitter-mechanics. A short ladder was kept nearby for the use of the fitter-mechanics, and the plaintiff took the ladder, put it against the machine, got on top of the machine and tried to pull the ropes over the pulley wheels. As he was putting the second of the ropes over a pulley wheel the machine commenced to move, the power not having been cut off, and the plaintiff's left hand was caught between the rope and the pulley wheel, with the result that he lost two of the middle fingers of that hand. There was no sort of guard above the ropes and pulley wheels, which were nine feet above floor level.

The plaintiff brought the present action against his employers claiming damages for negligence and alleging a breach of statutory duty in failing to fence dangerous transmission machinery as required by section 13 of the Factories Act, 1937.

The claim of the plaintiff was heard before Havers J. at Manchester, and on March 22 the judge gave a considered judgment in which he found that the plaintiff was entitled to damages against the defendants in respect of the defendants' breach of the duty they owed to him under section 13 of the Act. He further found that the plaintiff himself was guilty of negligence to the extent of 50 per cent. He awarded the sum of £1,376 17s. as damages. There was some out-of-pocket loss, and the injury to the hand the judge thought would have called for an award of £2,500 general damages had the plaintiff not been at fault.

The defendants appealed.

Daniel Brabin Q.C. and *Charles Elliott* for the defendants.
Fenton Atkinson Q.C. and *Philip Curtis* for the plaintiff.

The following cases, in addition to those referred to in the judgment, were cited: *Walker* v. *Bletchley Flettons* [1]; *Smithwick*

[1] [1937] 1 All E.R. 170.

v. *National Coal Board*[2]; *Lyon* v. *Don Bros. Buist & Co. Ld.*[3]; *Sowter* v. *Steel Barrel Co. Ld.*[4]; *Findlay* v. *Newman, Hender & Co.*[5]; *Chastency* v. *Nairn & Co.*[6]; *Vowles* v. *Armstrong-Siddeley Motors*[7]; *Carr* v. *Mercantile Produce Co. Ld.*[8]; *Atkinson* v. *London & N. E. Railway Co.*[9]

SINGLETON L.J., having stated the facts, continued: With regard to the plaintiff's claim based on negligence at common law, the judge decided in favour of the defendants. The plaintiff had given evidence to the effect that when the stoppage took place he approached the foreman, Mr. Oulton, and, after having had a word with him, the plaintiff offered to put the trouble right, and that the foreman said: "You'll help me very "much if you will do so." That was the reason, the plaintiff said, that he went up to put the ropes over the pulley-wheels. That was denied by the charge-hand and by the foreman. Havers J. rejected the plaintiff's evidence on that part of the case. Indeed, it may be said that Mr. Atkinson, during the course of the evidence of the defendants' witnesses, said that he could not pursue that point. Thus Havers J. found himself unable to accept the plaintiff's account of the accident. He accepted the evidence of the defendants' witnesses, particularly that of the charge-hand and the foreman, and there was left unexplained the reason why the plaintiff had gone up on to the machine himself, when he knew that the fitter-mechanics had been sent for and when he knew that it was no part of his duty to attend to the machine, which had stopped for some cause or other.

The defendants appeal against the award of damages to the plaintiff, and Mr. Brabin, on their behalf, raises four questions. The first is that there was no breach of the provisions of section 13 of the Act of 1937 as they have been construed in this court and elsewhere. The second is that if there was a breach by the defendants of section 13 that breach was not a cause of the accident. The third is that in any event the proportion of responsibility as assessed by the judge is wholly wrong in view of the facts found by him, and that the defendants ought not to be held responsible to the extent of 50 per cent. or anything like it. The fourth is that the damages are too high. Mr. Brabin did not pursue this last point in view of an intimation given to him by the court. It would be difficult for this court to say that the judge was wrong in assessing the general damages for the injuries to the plaintiffs' left hand at the sum of £2,500. It was a serious injury that he sustained. It may be that the amount awarded is higher than is sometimes given for an injury

[2] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.
[3] 1944 S.C.(J.) 1.
[4] (1936) 33 L.G.R. 376.
[5] [1937] 4 All E.R. 58.
[6] [1937] 1 All E.R. 376.
[7] [1938] W.N. 385; 55 T.L.R. 201; [1938] 4 All E.R. 796.
[8] [1949] 2 K.B. 601; 65 T.L.R. 503; [1949] 2 All E.R. 531.
[9] [1926] 1 K.B. 313; 42 T.L.R. 79.

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of that kind to the left hand, but it must be remembered that this was a man who had some years earlier sustained an injury to his right hand—the loss of his right thumb—so that his left hand would be more valuable to him after the earlier injury. I propose to say nothing more about that fourth and last point.

[His Lordship then read from the judgment of the court below the description of the machine and of the accident to the plaintiff, and continued:] Later in his judgment the judge found that the action of the plaintiff was not merely inadvertence or an error of judgment. He said: "He knew the established practice and he knew that it was not his business to deal with this breakdown, and, in defiance of the established practice, he did something which he knew it was not his business to do."

The first question which arises is upon section 13 of the Act. The judge's judgment, so far as it is in favour of the plaintiff, is based entirely on the allegation that there was a breach of section 13—the claim which was made by way of amendment during the hearing of the case. Section 13 (1) provides: "Every "part of the transmission machinery shall be securely fenced "unless it is in such a position or of such construction as to be as "safe to every person employed or working on the premises as it "would be if securely fenced." The submission of Mr. Brabin is that there was no breach of that section, for it has been held in this court that when you are considering a question of this kind you must have in mind the question of foreseeability—a question which arises under both section 14 and section 13. Mr. Brabin agreed that the part of the machinery with which we are concerned was transmission machinery, but he submitted that there was no breach because the dangerous part of the transmission machinery was at a height above the ground of nine feet. Therefore, Mr. Brabin submitted, although it was not securely fenced it was in such a position as to be "as safe for every "person employed or working on the premises as it would "be if securely fenced." The submission really is that neither section 13 nor section 14 of the Act would apply to machinery nine feet above the ground, placed as this was.

Mr. Brabin cited a number of authorities including *Burns* v. *Joseph Terry & Sons, Ld.*[1] I do not propose to go into those authorities. It is sufficient for this purpose to look at the words of the section itself and to ask whether this part of the transmission machinery, nine feet above the ground, was in such a position as to be as safe to every person employed or working on the premises as it would be if securely fenced? I do not think it is possible to say that it was. I accept readily that the risk is much less if the part of machinery is nine feet above the ground than if it is five feet above the ground, but I do not think it can be said that transmission machinery nine feet above the ground is, by reason of that fact, "in such a position as to

[1] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

" be as safe to every person employed or working on the premises " as it would be if securely fenced."

There was a ladder near by which somebody spoke of as " a ' temptation." Sometimes maintenance fitters might have to go up to do a repair or make an adjustment, according to the ordinary working arrangements. (I bear in mind the provisions of section 15 of the Act.) Everyone who was asked, with regard to persons who might have to go up to the place where the ropes and pulley wheels are, whether they were safe, must surely answer " No." The question depends not upon the construction of the section, but upon a plain question of fact: Is the transmission machinery in that position in such a position as to be as safe to every person employed as it would be if securely fenced? As I have said, I do not think it was, and, in spite of the argument of Mr. Brabin, and the authorities he cited, I am satisfied that his first submission fails.

His second point, that, assuming there was a breach of section 13, that breach was not a cause of the accident, presents more difficulty. Again we have been referred to various authorities. I do not propose to go into them at length. Reliance is placed by Mr. Atkinson on the judgment of Denning L.J. in *Cork* v. *Kirby Maclean Ld.*,[2] where the Lord Justice said: " Subject to the question of remoteness, causation is, I " think, a question of fact. If you can say that the damage " would not have happened but for a particular fault, then that " fault is in fact a cause of the damage; but if you can say that " the damage would have happened just the same, fault or no " fault, then the fault is not a cause of the damage. It often " happens that each of the parties at fault can truly say to the " other: ' But for your fault, it would not have happened.' In " such a case both faults are in fact causes of the damage." I am not sure that that passage carries one very much further in the determination of the question before this court today.

Some months ago there was a somewhat similar question before this court on an appeal from a decision of Oliver J. in *Williams* v. *Sykes & Harrison, Ld.*[3] In that case judgment was given by this court on March 26, 1955. That case is not yet reported but we have the transcript of the shorthand notes of the judgments. Dealing with the question of causation in that case, I said—and I hope I may repeat it—" I find this an extra- " ordinarily difficult problem. It would be easy to say that it " was a matter for the decision of the judge of first instance " and that this court ought not to interfere, but the parties are " entitled to have the decision of this court upon it. It is not " a pure question of fact; no question was raised on the judge's " findings of fact. ' Causation,' said Lord Wright in *Yorkshire* " *Dale Steamship Co. Ld.* v. *Minister of War Transport*,[4] ' is

[2] [1952] 2 T.L.R. 217; [1952] 2 All E.R. 402, 407.
[3] Ante, p. 1180.
[4] [1942] A.C. 691, 706; 58 T.L.R. 263; [1942] 2 All E.R. 6.

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" ' to be understood as the man in the street, and not as either the " ' scientist or the metaphysician, would understand it.' "

In the present case the plaintiff went to a place to which he had no right to go. According to the judge's view, he determined to put right himself that which he saw to be wrong, and at the same time he knew he ought not to have done it; he knew that it was not part of the established practice for him to do it. It might be said that he was seeking to help his employers, and to help himself as well—he was a piece-rate worker. He went to a position which he knew was dangerous. He was asked in cross examination: "(Q.): It stands to reason, " of course, once you get these ropes back on the pulley, if " you have not locked the machine, going into the reversing " position the machine is going to move, is not it? (A): Yes. " (Q): If you are putting the rope over a pulley on something " that is going to move, you are going to get your fingers " trapped? (A): Yes."

It was said that there ought to have been a guard upon each of the ropes and pulleys, and the kind of guard mentioned by the expert witness for the plaintiff was a guard over the whole of the rope, or where the rope and wheel came together, fastened down by four screws or nuts. Havers J. wondered what good that would be in regard to a matter of this sort, and he put to the expert witness: " The guard would have to be taken off " before the rope could be put over the pulleys?" That was so; but, none the less, it has been said more than once that a guard is a kind of warning or deterrent. If there had been a guard there and the plaintiff had gone up to it and had seen the guard, with its bolts and nuts, he might well have decided to leave the adjustment of the thing to the fitter-mechanics. Again, if there had been any sort of guard over these pulley wheels, it is clear that before the plaintiff could have got to the second of them, the one on which the accident occurred, the fitter-mechanics would in fact have been there. They were there in two or three minutes, and arrived just as the plaintiff's hand was trapped between the pulley and the rope.

Therefore, I think it is right to say that if there had been a guard there this accident would not have happened—and it is important to remember that the accident is of the very kind which the statutory requirement is intended to avoid. Again I find it difficult to accept Mr. Brabin's argument that the breach of the statute was not a cause of the accident. I am inclined to think that a guard would have prevented this accident happening. Moreover, if there is a breach of statutory duty and an accident takes place of a kind which is likely to happen if the statutory duty be not fulfilled, the court ought to be slow to say that the failure to perform that statutory duty has nothing to do with the accident. I think Mr. Brabin's second point fails.

The third point deals with the division of responsibility between the plaintiff and the defendants. The learned judge in the course of his judgment did not deal specifically with the question of causation; but in two paragraphs he may be said to cover that question and the question of apportionment. These are the passages to which I refer: "A further question which I "have to consider is this: Was the plaintiff guilty of negligence "which contributed to this accident? Mr. Atkinson conceded "that there was considerable negligence, which he suggested "was about 50 per cent. I am satisfied that the plaintiff's con- "duct was not merely inadvertence or an error of judgment; he "knew the established practice, and knew that it was not his "business to deal with this breakdown; and in defiance of the "established practice he did something which he knew it was "not his business to do. Of course, he sought to make Oulton "the author of his act, and I think the reason he did that was "because he knew that he really had not got any answer unless "he succeeded in seeing that the company was saddled with a "degree of blame. In those circumstances, I think I must hold "that he was 50 per cent. to blame, and that the defendants "share the degree of culpability and responsibility."

In my opinion, there are other considerations beyond those mentioned by the learned judge and although I have reached the opinion that it is impossible to say that the defendants were not in breach, or that their breach was not a cause of the accident, I feel that it ought to be remembered that an accident of this kind was unlikely to happen and that it would not have happened to the plaintiff but for his acting in a way which the judge described as "in defiance of the established practice"; The fault of the employers is their breach of a statutory duty. Though it was a breach it was a breach which no employer would think would lead to the accident to the plaintiff so long as the plaintiff kept to the place at which he was expected to work and did not go somewhere in defiance of the accepted practice. When these considerations are borne in mind, it appears to me that the portion of blame to be attached to the plaintiff is much higher than that which ought to be attached to the defendants, even though they were guilty of breach of statutory duty. In my judgment, the plaintiff ought to bear 90 per cent. of the responsibility and the defendants should be saddled with no more than 10 per cent. of the responsibility, and I would allow the appeal to that extent.

JENKINS L.J.: I agree that this appeal should be allowed to the extent of increasing the plaintiff's proportion of blame from 50 per cent. to 90 per cent. Beyond saying that, I cannot add anything.

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PARKER L.J.: I agree—and there is nothing I can usefully add.

Appeal allowed only in part.
Re-apportionment of fault.

Solicitors: *L. Bingham & Co. for James Chapman & Co., Manchester; Cecil Ellison, Manchester.*

A. W. G.

[COURT OF APPEAL.]

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Oct. 20, 21.
Singleton, Jenkins and Parker L.JJ.

* SUMNER *v.* R. L. PRIESTLY LD.

[1953 S. No. 4417.]

Building—Safety regulations—Application—"Repair or maintenance"—Preparation for—Fall of workman through fragile asbestos roof—Failure of employers to affix prominent notices that roof fragile—Workman sent up to take measurements for new roof gutter—Whether regulations applicable—Building (Safety, Health and Welfare) Regulations, 1948, *regs.* 2 *and* 31 (3) (*a*) *and* (*b*).

A workman employed by the defendants having been sent up to the roof of a building in the defendant's factory, to take a "profile" of the gutter, which needed renewing, in some manner unknown slipped and fell through the asbestos roof covering a lower building and was killed. His widow sued the defendants for damages under Lord Campbell's Act, alleging, inter alia, that the defendants were in breach of their statutory duty under reg. 31 (3) (*b*) of the Building (Safety, Health and Welfare) Regulations, 1948, to give prominent notice of the fragile character of the roof:—

Held, that, on these particular facts, the work on which the deceased workman was engaged at the time of the accident was not an operation of repair or maintenance within regulation 2 (1) of the regulations, but only work in preparation for repair or maintenance and, therefore, the Building Regulations did not apply.

Decision of Oliver J. approved.

APPEAL from Oliver J., sitting at Maidstone Assizes.

The deceased, William Harry Sumner, a workman employed by the defendant company, Robert L. Priestly Ld., at their factory at Gravesend, as a handyman, was on the morning of August 11, 1953, instructed by the foreman to go up to the roof of a building and take particulars of the guttering which needed replacing. In the afternoon of that day Sumner mounted to the roof by means of a ladder and, while taking the required measurements of the gutter, he fell through an asbestos roof a distance more than 30 feet and sustained injuries from which he died. No one saw him fall and no evidence could be given of what happened.

The widow, Mrs. Amy Edith Sumner, brought the present action, claiming damages under the provisions of Lord Campbell's Act for herself and her infant children. Counsel on her

behalf alleged, inter alia, that the defendants had been guilty of breaches of regulation 31 (3) (*a*) and (*b*) of the Building Regulations, 1948,[1] and that the death of Sumner was caused by those breaches.

Oliver J. held that the Building Regulations did not apply because the work on which the deceased was engaged at the time of the accident was merely work done in preparation for and not in performance of a building operation. He therefore dismissed the action. The plaintiff appealed.

Leonard Caplan Q.C. and *F. E. C. Grundy* for the plaintiff.
Martin Jukes Q.C. and *P. H. Ripman* for the defendants.

Sexton v. *Scaffolding (Great Britain) Ld.*[2]; *Attorney-General* v. *Lockwood*[3] were referred to in argument.

SINGLETON L.J. stated the facts and continued: On the morning of the accident the defendants' foreman, Jessup, according to his evidence, instructed Sumner to take particulars of a roof gutter—a profile of the gutter—and reminded him to take the usual precautions. It appears from what Oliver J. said in his judgment that the way of taking a profile of or recording the shape of the gutter is to use a piece of wire and to bend it until it fits into the gutter, so that it gives the dimensions of the gutter itself. It appears, further, from the evidence, that the intention of the foreman, or of the management, was that when proper particulars had been ascertained, a new gutter of the right length and of the right shape would have been ordered from someone, and that at some time that gutter would have been erected either by the defendants' own men or by someone else; I know not which. The instructions were given by the foreman in the morning, but it was not until afternoon that Sumner went upon the roof. The next thing that was known was that Sumner had met with the accident. He had apparently gone up by a ladder and then, for some reason, which no one knows, had walked along the guttering to the other end of the building, and had then fallen from that end of the building through a hole in an asbestos roof.

Sumner had been employed by the defendant company for a

[1] Building Regulations, 1948, reg. 2 (1): "These regulations shall apply "to the following operations . . . the "construction, structural alteration, "repair or maintenance of a building, ". . . the demolition of a building "and the preparation for, and laying "the foundation of, an intended "building."

Reg. 31 (3): "Where work is "being done on or near roofs or "ceilings covered with fragile ma- "terials through which a person is "liable to fall a distance of more than "10 feet—(*a*) where workmen have to "pass over or work above such fragile "materials, suitable and sufficient "ladders, duck ladders or crawling "boards, which shall be securely "supported, shall be provided and "used; (*b*) prominent notices stating "that the coverings are fragile shall "be affixed at the approaches "thereto."

[2] [1953] 1 Q.B. 153; [1952] 2 T.L.R. 986; [1952] 2 All E.R. 1085.

[3] (1842) 9 M. & W. 378.

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good many years, and for about 15 years he had been accustomed to going on the roof when there was anything to be done up there, to the knowledge of the foreman. He knew, as the judge said, better than anyone else, what he should take if he was going to do some particular work upon the roof. There were ladders and duck boards available at some part of the defendants' premises, if it had been thought necessary to take them up on the day in question, though it would have taken a little trouble, and probably would have needed the help of someone else in order to get the boards and ladders up.

Only one point was taken in this court, and that arises on the Building Regulations of 1948. Regulation 31 (3), on which the plaintiff relies, provides: "Where work is being done on or "near roofs or ceilings covered with fragile materials through "which a person is liable to fall a distance of more than 10 feet— "(*a*) where workmen have to pass over or work above such "fragile materials, suitable and sufficient ladders, duck ladders "or crawling boards, which shall be securely supported, shall be "provided and used; (*b*) prominent notices stating that the "coverings are fragile shall be affixed at the approaches thereto." The submission made on behalf of the plaintiff is that there was a breach of (*a*) and (*b*), that the death of Sumner was caused through one or both breaches, and that the plaintiff is entitled to damages.

Of course, Sumner knew more about the nature of the work than anyone else, and it might be said that a notice would not help him much, and it might be said that a breach of regulation 31 (3) in either respect was not the cause of the accident which brought about his death. I do not think it is necessary to consider those matters further, for there is a point raised by the defendants below and in this court, to the effect that these regulations do not apply to the facts of this case; and, in my opinion, the submission of the defendants, raised thereon, is right. Perhaps I should put it in another way: I am not satisfied, upon the argument of Mr. Caplan, that the Building Regulations, 1948, apply. That question depends upon a view of regulation 2 as applied to the facts of this case.

I wish to make it clear that I am dealing with the facts of this case and with nothing else. Instances have been put as to what the position would be if certain facts were proved. Some might be on one side of the line, some on another; and it is not easy to set a line which would be a guide for all purposes. Each case must depend upon its particular facts. Regulation 2 is headed: "Application of Regulations" and it reads: "These "Regulations shall apply to the following operations where under- "taken by way of trade or business or for the purpose of any "industrial or commercial undertaking, or by or on behalf of "the Crown or any municipal or other public authority, namely, "the construction, structural alteration, repair or maintenance "of a building (including re-pointing, re-decoration and external

" cleaning of the structure), the demolition of a building, and " the preparation for, and laying the foundation of, an intended " building."

The first thing to which I draw attention is that there is a provision that the regulations shall apply to the preparation for certain things, the preparation for and laying the foundation of an intended building. There is no provision that the regulations shall apply to the preparation for the following operations: " the " construction, structural alteration, repair or maintenance of a " building." Oliver J. described the activities of Sumner at the time of his accident as " gaining information, making prepara- " tion for the purpose of being able to order an item belonging " to the building." He was of opinion that the regulations did not apply to the facts of this case.

It seems to me that the case falls to be determined very largely upon a question of fact. This man, at the time of his accident, had gone up to the roof in order to make a profile of the gutter. He might have been asked to make a measurement. A profile was thought better. He was not told to do any repair nor did he commence to do anything by way of repair. He was, at the request or on the instructions of the foreman, to obtain something which would have enabled a gutter to be made and which would have enabled a repair to be done. If he had been asked, when he went up the ladder, " Are you " going to repair the gutter? ", I should imagine his answer would have been " No; I am going to take measurements (or " take a profile) so that a new gutter can be ordered." If any- one was asked: " Was the man Sumner, when he was upon the " roof, engaged upon an operation of repairs? ", I think the answer would have been " No, he was not." If that was followed by the question: " Was he engaged upon an operation " of maintenance?", I am inclined to think that the answer of the ordinary person would have been the same, " He was not," though that is not quite so clear as the other part.

The first thing, as I have said, is to ascertain the facts, and I am inclined to think that this is really a question of fact, though I recognize that in many instances where the facts have been found, the question of construction of these regulations has arisen, as it will again. If one considers the question of con- struction alone, it is necessary to remember that this is a penal regulation. If there had been an inspector present when Sumner went up the ladder and upon the roof, and if the inspector had laid an information alleging an offence against regulation 31 (3), and if the information had come before justices to determine the question, what would they have had to ask themselves?—this plain, but perhaps not simple, question: Was the employee at that time engaged on an operation of repair or maintenance? Looked at in that way, it is a question of fact.

Mr. Caplan asked us to bear in mind the words of Baron

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Alderson in *Attorney-General* v. *Lockwood*,[1] where the Baron said: "The rule of law, I take it, upon the construction of all "statutes, and therefore applicable to the construction of this, "is, whether they be penal or remedial, to construe them accord- "ing to the plain, literal, and grammatical meaning of the words "in which they are expressed, unless that construction leads to a "plain and clear contradiction of the apparent purpose of the "act, or to some palpable and evident absurdity." I have sought to construe the words in their plain, literal and grammatical meaning. For the purpose of this regulation, I do not think that it is shown that Sumner was, at the time he met with his accident, engaged upon an operation of repair or maintenance. That is sufficient for the determination of this question, but I prefer to look upon the matter rather as a question of fact which was decided by the learned judge against the plaintiff; and, in spite of the argument of Mr. Caplan, I am of the opinion that the judgment of Oliver J. was right, and that this appeal should be dismissed.

JENKINS L.J. I agree. In my opinion the task on which the deceased was engaged at the time when he met with his accident, consisting as it did simply and solely of the making of a profile of the gutter, was not an "operation of repair" according to the ordinary and natural meaning of those words; and, inasmuch as I see no ground for construing the language of regulation 2 of the Building Regulations, 1948, otherwise than according to its natural and ordinary meaning, it follows that, in my judgment, this appeal fails and should be dismissed. I entirely agree with my Lord that every case of this kind must depend on its own particular facts, and that it is neither necessary nor desirable to attempt to lay down an exhaustive definition of what is or is not "repair" or an "operation of repairs" or "maintenance," within the meaning of the regulation. I agree that the appeal fails.

PARKER L.J. I also agree, and there is nothing I can usefully add.

Appeal dismissed.

Solicitors: *Rowley Ashworth & Co.; Clifford-Turner & Co.*

A. W. G.

[1] 9 M. & W. 378, 398.

[QUEEN'S BENCH DIVISION.]

*HINCHLIFFE *v.* SHELDON.

1955 *Jan.* 20.

Lord Goddard C.J., Cassels and Streatfeild JJ.

Licensing — Police right to enter licensed premises — Obstruction — Attempted entry by police — Warning given to licensee by third party — Police detained from entering — Whether obstruction of police in execution of duty—Prevention of Crimes Amendment Act, 1885 (48 *&* 49 *Vict. c.* 75), *s.* 2—*Licensing Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 151 (1).

Criminal Law—Police obstruction.

H., the son of the licensee of a hotel, returned to the hotel one night after permitted licensing hours and, seeing that police were watching the premises, knocked at the door and shouted warnings to his parents that the police were about. A police constable immediately knocked at the door, but some ten minutes elapsed before the licensee admitted him to the premises. No licensing offence was proved against the licensee, but H. was charged with obstructing the police in the execution of their duty, contrary to section 2 of the Prevention of Crimes Amendment Act, 1885, and convicted:—

Held, that the police had a right, under section 151 of the Licensing Act, 1953, to enter licensed premises at any time to see whether or not offences were being committed, and to detain them from so doing, as H. had done by giving a warning, obviously amounted to obstruction of the police in the execution of their duty and, therefore, justices were entitled to convict H.

Bastable v. *Little* [1907] 1 K.B. 59; 23 T.L.R. 38 and *Betts* v. *Stevens* [1910] 1 K.B. 1; 26 T.L.R. 5 distinguished.

CASE STATED by Saddleworth justices.

On June 23, 1954, an information was preferred by the police against the appellant, Roy Hinchliffe, alleging that he, on May 27, 1954, at Diggle, Saddleworth, Yorkshire, wilfully obstructed Police Constable William Charles Jones, then acting in the execution of his duty, contrary to section 2 of the Prevention of Crimes Amendment Act, 1885.

On July 21, 1954, the justices heard the information and found the following facts. The appellant was a student accountant who lived with his parents at fully licensed premises known as the Floating Light Hotel, Manchester Road, Diggle, Saddleworth. On May 27 at 11.17 p.m. Constable Jones was, with two other constables, on duty in uniform in Manchester Road. At the time the lights were on in the bar of the hotel and two cars were in its car park. The three constables saw the lights and the cars. Jones went to the front of the premises and the other two constables stood by a garage from which the rear of the premises was visible. About the same time the appellant arrived at the premises, garaged his car, knocked at one of the two front doors of the premises and said "It's me, Mum, it's all right." He stepped back from the door and saw Jones. Thereupon he knocked at the door again and said "The police are outside" and ran to the rear of the premises.

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Immediately afterwards Jones knocked at the door and got no reply. At the rear of the premises the appellant saw one of the other constables and said to him "You'll not catch them because "I've told them you are here" and some conversation passed between the appellant and that constable about getting in through a window. The appellant then returned to the front of the premises and shouted "Make sure you are clear before you open "the door" and a few seconds later, "The place is surrounded "by police." There was no further knocking on the door which at 11.25 p.m. was opened by the licensee of the premises. Jones and one of the other constables then entered the premises and found the licensee, his wife and a hotel resident in the bar. There were no glasses or intoxicating liquor in sight; the bar counter was wet. In a room beside the bar, the door of which was closed, were six persons one of whom was the licensee's daughter. They were not consuming intoxicating liquor. The licensee had objected to the police entering that room without his permission. Jones told the appellant that he had committed the offence of obstructing the police in the execution of their duty and the appellant replied: "It wasn't obstruction; I saw you "standing out there like a fool." Jones told him that he would be reported for the offence and the appellant replied "I only "shouted 'the police are here.'"

It was contended by the appellant (*a*) that it was an extension of the Prevention of Crimes Amendment Act, 1885, to say that warning could be an obstruction; (*b*) that the decision in *Betts* v. *Stevens* [1] only applied to a person employed and paid for the purpose of defeating the police; that the justices should take no notice of the fact that the police evidently suspected a breach of section 151 of the Licensing Act, 1953 [2]; that the appellant did not try to prevent the police from entering; that there was no reason why a son should not warn his parents of the presence of the police; and that the appellant had assisted the police to gain admission to the premises.

It was contended by the respondent (*a*) that there was nothing in the judgments in *Betts* v. *Stevens* that prevented the justices from deciding that speech could amount to obstruction; (*b*) that the words used by the appellant had had the effect of rendering both observation of and gaining admission to the premises more difficult than it would normally have been.

The justices were of the opinion (*a*) that it was not necessary for the prosecution to prove a breach of section 151 of the Licensing Act, 1953, and no breach was proved; (*b*) that at all material times Constable Jones was engaged in the execution of an ordinary police duty; (*c*) that the conduct of the appellant was calculated to impede and obstruct the police constable in

[1] [1910] 1 K.B. 1; 26 T.L.R. 5.

[2] Licensing Act, 1953, s. 151: "(1) A constable may at any time "enter licensed premises . . . for the "purpose of preventing or detecting the "commission of any offence against "this Act."

keeping observation on the licensed premises and that the words spoken by the appellant were the substantial cause of the police constable's not being admitted to the premises in a normal time after knocking for admittance. Accordingly, they convicted and fined the appellant who appealed to the Divisional Court.

The appellant appeared in person.
F. P. Neill for the police.

Case cited in argument (other than those referred to in the judgment): *Duncan* v. *Jones*.*

LORD GODDARD C.J. stated the facts and continued: The case made against the appellant is that, by giving the alarm in the way he did when he knew the police were outside the premises intending to go in to look round, he gave the people in the house the opportunity of delaying the police so that the traces of any offence, if an offence was being committed, could be removed. Section 151 of the Licensing Act, 1953, provides: "A constable may at any time enter licensed premises . . . for "the purpose of preventing or detecting the commission of any "offence against this Act." Therefore, the police have a right to enter and see whether or not there is any likelihood of an offence being committed. That is their right, and it is therefore their duty to enter the premises if they can see circumstances which call for investigation.

The case on which the defendant relies principally is *Bastable* v. *Little*,[1] a case decided in the early days of motoring, in which it was held that it was not an offence for an A.A. scout to warn motorists that they were entering a police trap, because there is no evidence that the people concerned were committing an offence, and there was no reason to conclude that by the time they reached the police trap they would be committing an offence. But that case was followed three years later by *Betts* v. *Stevens*,[2] in which it was decided that directly it was shown that an offence was being committed by a motorist by travelling more than twenty miles an hour when the scout gave him warning, then the scout was interfering with the police.

The appellant says that that means that he could not be convicted unless it was shown that there was an offence being committed, but to say that is to overlook section 151 of the Licensing Act, 1953. There is no similar section in the Road Traffic Act, 1930. Section 151 gives the police the right to enter licensed premises whether an offence has been committed or not. They can go in and see whether it is likely that an offence will be committed and, if they are detained from going in, that obstructs them in the execution of their duty because it

* [1936] 1 K.B. 218; 52 T.L.R. 26.

[1] [1907] 1 K.B. 59; 23 T.L.R. 38.

[2] [1910] 1 K.B. 1; 26 T.L.R. 5.

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gives the people concerned an opportunity, if they are committing an offence, to remove the traces. In fact, in police raids, it is essential that the raid should be done as quickly as possible without previous warning being given, otherwise there might as well not be a raid.

For these reasons, I think that the police, in the execution of their duty, intended to get into this hotel and that they wanted to get in there before anybody in the house had an opportunity of putting things away. If the police knocked at the door and the licensee did not open it for several minutes, the justices could have found that the licensee was obstructing the police. Obstructing, for the present purpose, means making it more difficult for the police to carry out their duties. It is obvious that the defendant here was detaining the police by giving a warning; he was making it more difficult for the police to get certain entry into the premises, and the justices were entitled to find as they did, and therefore the appeal is dismissed.

CASSELS J. I agree.

STREATFEILD J. I agree.

Appeal dismissed.

Solicitors: *Cummings, Marchant & Ashton for R. C. Linney, Wakefield.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

1955
Oct. 11, 12.

Lloyd-Jacob J. (sitting as an additional judge of Queen's Bench Division).

* HEARST *v.* CLARK.

[1952 H. 4728.]

Catering Wages—Minimum wage—Manager sharing profits—Contract by husband and wife to manage a café and to pay a weekly sum to the owner—Weekly sum earned insufficient to satisfy terms of contract—Wrongful dismissal—Whether contract within the Act—Scale of Remuneration—Catering Wages Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 24), *ss.* 1 (4), 9 (1)—*Wages Regulation (Unlicensed Place of Refreshment) Order,* 1953 (*S.I.* 1953, *No.* 1611)—*Wages Regulation (Unlicensed Place of Refreshment) (Amendment) Order,* 1955 (*S.I.* 1955, *No.* 386).

A husband and wife entered into a contract under which they became joint managers of a café, the arrangement being that they should share the profits of the business with the owner in agreed proportions. The receipts of the business did not provide a sum sufficient to enable the owner to receive his stipulated £15 a week, to provide the managers with reasonable remuneration, and to meet the outgoings. After being dismissed by the owner they brought an action for damages for wrongful dismissal, in which they contended

that the contract fell within the terms of the Catering Wages Act, 1943,[1] and that they were each entitled to remuneration as an "assistant in charge" in accordance with the terms of the Wages Regulation (Unlicensed Place of Refreshment) Order, 1953:—

Held, (1) that the arrangement between the parties constituted a contract of employment in the way of trade of the plaintiffs as workers such as to fall within the terms of section 4 (1) of the Act, which applied to the plaintiffs, whether they were engaged individually or as a number; (2) that under the regulations each of the plaintiffs was to be regarded as an "assistant in charge," and that their remuneration could be properly ascertained accordingly in assessing the damages.

Parkinson v. *H. & J. Plumpton* [1954] 1 W.L.R. 75; [1954] 1 All E.R. 201 distinguished.

ACTION.

In September, 1951, the plaintiffs, a husband and wife, orally agreed with the defendant to manage a café at Cambridge, of which the defendant was the owner. The basis of the general arrangement between them was that the defendant required a fixed amount to be paid to him each week, his only obligation being to pay the rent of the premises. All other expenses were being met by the plaintiffs, who were to receive the remainder of the profits, after paying the fixed weekly amount to the defendant. The parties agreed that the contract should be for one year certain and thereafter subject to three to six months' notice. The plaintiffs began their management of the premises in November, 1951.

The profits of the business did not reach a sufficient amount to enable the required sum of £15 a week to be paid to the defendant as well as a reasonable remuneration for the plaintiffs. Prolonged negotiations took place for the terms of the agreement to be made the subject of a written document, in accordance with a promise which the defendant had made; but he finally refused to execute such a document and dismissed the plaintiffs without notice before they had completed 12 months' service.

They commenced an action against the defendant claiming damages for wrongful dismissal and loss of remuneration; the question arose whether the contract came within the provisions of the Catering Wages Act, 1943.

Barry Sheen for the plaintiffs.

L. J. Solley for the defendant.

Cases referred to in argument: *Parkinson* v. *H. & J. Plumpton*[2]; *Pauley* v. *Kenaldo*[3]; *Short* v. *J. & W. Henderson Ld.*[4]

[1] Catering Wages Act, 1943, s. 1 (4): "For the purposes of this Act, "any worker who, for the purposes "of any undertaking or part of an "undertaking, performs any work in "pursuance of an arrangement "express or implied made by the "worker by way of trade with the "persons carrying on that undertaking shall be deemed to be em- "ployed by them in that undertaking "or part."

[2] [1954] 1 W.L.R. 75, 77; [1954] 2 All E.R. 201, 202.

[3] [1953] 1 W.L.R. 187, 191; [1953] 1 All E.R. 226, 228.

[4] (1946) 62 T.L.R. 427.

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LLOYD-JACOB J. stated the facts and continued: The plaintiffs voluntarily and willingly entered on an arrangement whereby their remuneration was to be the balance of profit derived from this business after the weekly payment had been made to the defendant and the other outgoings had been met, an arrangement which, as it turned out, was an extremely unfortunate one. They say and plead that, by reason of the Catering Wages Act, 1943, they are in fact safeguarded as to proper remuneration by the terms of that Act, and that on its true and fair construction they are and were at all material times, notwithstanding their bargain, to be entitled to receive such wages as are set out in the appropriate regulations made under the Act. In that connexion they are, of course, prepared to bring into account such amounts as they did in fact draw from the business for their maintenance.

The propriety of that claim rests on the construction of the Catering Wages Act, 1943. In approaching that construction I have had the advantage of being referred to two authorities in which various aspects of that Act have been canvassed, and one, on which the defendant places considerable reliance, is a judgment of Lord Goddard C.J. in *Parkinson* v. *H. & J. Plumpton*,[1] a certain passage in the judgment being said to decide that this Act does not apply in cases where the arrangement between the employer and the employee is, as here, one for the joint employment of two parties. I do not myself regard that judgment as deciding that point; it is true that Lord Goddard C.J. indicated that he did not think that the question of joint engagement was contemplated by the Act, an observation with which I find myself in complete agreement; but it by no means necessarily follows that, because joint engagements may not have been contemplated by the Act, the application of its words to particular circumstances may not in fact require that persons employed under a joint engagement must be found to be entitled to the remuneration required by the legislature. The other passage in the judgment [2] in which, as I think, Lord Goddard C.J. makes his meaning even more clear is where he points out that he cannot find any provision in the Act that, where there is joint employment, the joint remuneration is to be treated as divisible, again an observation with which I find myself in complete agreement. It must be remembered that those observations were made in a case in which the claim was by one of the two persons engaged jointly in the absence of the other and would require for its true determination an estimation of the amount of the joint remuneration which was to be attributed to the one party and the amount which was to be attributed to the other.

In the present case, as I have already indicated, both the employed persons are parties to the proceedings and no difficulty whatever is presented by any apportionment, for no apportionment is required. In those circumstances I do not find that the

[1] [1954] 1 W.L.R. 75, 77. [2] Ibid.

decision in *Parkinson* v. *H. & J. Plumpton* [3] is directly relevant to the issues which I have to decide, and accordingly I must necessarily approach the matter afresh.

Section 1 of the Act identifies the persons to whom the Act applies. They are referred to as "workers," and workers are defined in subsection (2) as "all persons employed in "any undertaking, or any part of an undertaking, which "consists wholly or mainly in the carrying on (whether for "profit or not) of one or more of the following activities . . .", and the following activities, it will be noted, include the supply of food or drink for consumption. There can, therefore, be no doubt whatever that the undertaking, namely, the café business in Mill Road, Cambridge, consisted, if not wholly at any rate mainly, in the supply of food or drink for immediate consumption, and if, as I have already held, these two plaintiffs were employed in that business, then, seeing that they are both of them persons, I must, as I understand the statute, hold that they are workers within the meaning of the Catering Wages Act. By subsection (4) of section 1 there is a provision that "any worker who, for the purposes of any undertaking or "part of an undertaking, performs any work in pursuance of an "arrangement express or implied made by the worker by way "of trade with the persons carrying on that undertaking shall be "deemed to be employed by them in that undertaking or part." The arrangement between the parties in this case was that the two plaintiffs should manage the defendant's business, but it was an arrangement entered into by way of trade, the operation of running and managing a café business being the trade or occupation in which all three of these parties were engaged, and in those circumstances, whether or not the agreement between the parties can properly be termed an agreement of employment, I am satisfied that the terms of section 1 (4) are so wide that persons in the position of these two plaintiffs, who in fact carried out the work of operating this café business, must be regarded as workers within the purview of the Catering Wages Act, 1943.

In respect of any such workers, the Act provides that the minimum remuneration to which they are entitled, notwithstanding any agreement to the contrary, is to be fixed by the appropriate machinery, and section 9 (1) provides that "If a "contract between a worker"—which expression I construe to mean a worker or workers—"to whom a wages regulation order "applies and his employer provides for the payment of less "remuneration than the statutory minimum," then that contract shall have effect as if for the agreed remuneration there were substituted the statutory minimum, clear of all deductions. If the employer in fact fails to pay a worker the statutory minimum, then he is liable on conviction to a substantial fine, and there is

[3] Ibid.

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a provision that employees who are denied the statutory minimum remuneration shall be entitled to receive the deficit.

It was urged in the present case that the contract between the parties was not a contract of employment. I do not need to say any more about that; from what I have already said it will be plain that the contrary conclusion is manifold. Secondly, it was submitted that the arrangement was not entered into by the parties by way of trade. In my view, there was here an agreement for the commercial employment by the defendant of the plaintiffs, and that I regard as an agreement entered into by way of trade; but it was suggested, and there is some colour for the suggestion, that, by reason of the arrangements between the parties, the agreement cannot be regarded as a contract of service, but ought to be put into that limited category of contracts which are compendiously referred to as contracts for services, and in that connexion the defendants relied on a judgment of Birkett L.J., sitting as an additional judge of the Queen's Bench Division, in *Pauley* v. *Kenaldo Ld.*[4] In his judgment the Lord Justice quotes a speech of Lord Thankerton, in which the indicia of a contract of service are set out, namely, the master's power of selection of his servant—clearly no question arises on that because both plaintiffs were selected by this defendant for the doubtful privilege of running his restaurant; secondly, the payment of wages or other remuneration—no question arises about that; thirdly, the master's right to control the method of doing the work; and fourthly, the master's right of suspension or dismissal. No question turns on the last, and so far as the third is concerned the requirement which the defendant endeavoured to put on the male plaintiff to enter up inaccurate books is a sufficient indication that he cannot now suggest that he was not in a position to exercise any right of control of the method in which one aspect of the conduct of this business, namely, the keeping of accounts, was to be conducted.

In those circumstances I entertain no doubt that on its true construction this Act applies to employees whether they are engaged individually or as a number. Difficulties arise because the determination of the precise minimum remuneration is left to be determined by statutory instrument, and the statutory instruments do not appear to have been drafted with the idea particularly in mind that the conduct of some of the duties falling within the Catering Wages Act might require for their completion more than one person. For example, if this had been a simple agreement between the male plaintiff and the defendant, there could have been no doubt that under the statutory instruments that applied at the relevant time he would have been entitled to the minimum remuneration appropriate to an assistant in charge; that is to say, he was aged 21 years or

[4] [1953] 1 W.L.R. 187, 191.

over, and he was performing the duties to which the appellation assistant in charge can properly be attributed, that is to say, wholly or mainly engaged in catering work and in direct control of a catering undertaking in which not more than four persons exclusive of himself are employed and who is immediately responsible for its operation. Such a person, in respect of a working week of 47 hours, would have been entitled in the early part of his employment to £5 2s. a week, and in the subsequent part of his employment to a sum slightly in excess of that. Nor could there be any doubt that, if the agreement had been between the female plaintiff and the defendant, she, too, because she accepted with her husband the obligation of controlling and running this business, would have been an assistant in charge, although the schedule appropriate to female workers provides that she would have received a less remuneration than that to which a male assistant in charge would be entitled.

It is suggested that there is here no provision which would cover the case of these two persons in that the definition of an assistant in charge requires that he shall be a person in direct control with not more than four persons other than himself employed. I can see no difficulty whatever in construing these regulations as meeting the conduct of a business where one assistant in charge is responsible for the control of the business during the 47 hours of the week for which he is prepared to accept the responsibility, and another assistant in charge is entitled to be treated as falling within the Catering Wages Act in respect of the remainder of the period of time in respect of which the catering business is kept open. In the present case there is no question that the business was running for a period of time far in excess of 47 hours a week. Under those circumstances no harm could conceivably be done to the defendant in regarding the two plaintiffs as being alternately responsible for the direct control of this catering establishment during the period which the Act provides and permits an assistant in charge to control it. Not that it makes much difference because, as one would have expected, the regulations carefully provide that, if the duties on which workers are engaged do not fall precisely within the definition sections of the various categories, then they are to fall within the provisions of " any other worker except manageress or shop " assistant," and I construe the expression " manageress or shop " assistant " to mean persons falling within the definition of those two expressions in the regulations themselves. Accordingly, I can see nothing in the regulations which would require me to reconsider my construction of the Catering Wages Act and so to construe it as to exclude these plaintiffs from the purview of its provisions.

That brings me to the next point, as to what in those circumstances is the category into which they fall, because, having determined that they can properly be regarded individually as an assistant in charge, it next becomes necessary to see into

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which of the various sub-divisions of that category they can be placed. Generally speaking, the sub-division is in one or other of three alternative headings: first, where the employer supplies the worker with full board and lodging for seven days a week; secondly, where the employer supplies the worker with neither full board nor lodging but supplies him with meals of good and sufficient quality and quantity while on duty; and thirdly, where the employer supplies the worker with neither meals nor lodging. The evidence establishes that these plaintiffs, although permitted to occupy certain rooms, were not provided with lodging. At some time there was some question of a few sticks of furniture being available in these rooms, and whether or not that was sufficient to exclude the operation of the Rent Restriction Acts I do not know and I am not called upon to decide. It is sufficient for my purpose to hold that the defendant here cannot contend that he provided these employees with lodging. Therefore it is necessary to hold that he cannot then take advantage of the minimum payments set out in respect of workers who are so provided. Nor can I hold on the evidence that the payments can fall within the category which relates to cases where the employer supplies the worker with neither meals nor lodging, for, as I understand the evidence, both these plaintiffs did receive their meals from the operation of the café business. In those circumstances the only remaining category is that which is referred to in the Schedule as column 3, and is in respect of the duties which these persons performed. I am satisfied that they would be and are entitled to receive the minimum remuneration set out in column 3 in respect of an assistant in charge aged 21 years or over, in the case of the male plaintiff under the appropriate category for male workers, and in the case of the female plaintiff under the appropriate category for female workers. In those circumstances their employment was one to which this Act relates and they are entitled to the balance between the minimum payment and the amount they have received, and I so hold.

Solicitors: *Waterhouse & Co. for Few & Kester, Cambridge; Oscar Mason & Co.*

J. L. D.

[CHANCERY DIVISION.]

* *In re* DORING. DORING *v.* CLARK.

1955
Oct. 19.

[1954 D. 2547.]

Wynn-Parry J.

Family Provision — Widow — Annuity — Partnership between testator and his brother—Annuity (nominated by will) payable, on death of partner, to widow by surviving partner during joint lives—Abatement if profits less than specified sum annually—Further provision—Any portion of annuity not received out of partnership funds payable out of residue during widowhood.

A testator by his will, in addition to bequeathing half the income of his residuary estate to his widow for life, bequeathed her an annuity of £500 a year payable to her during the joint lives of herself and the surviving partner out of the profits of a business forming the subject-matter of a partnership deed between himself and his brother. The annuity was bequeathed to her in the exercise by the testator of a right conferred on him by the articles of partnership and was liable to abatement if the profits amounted to less than £3,000 in any year. The widow applied to the court that further provision might be made for her maintenance:—

Held, that, while the court would not interfere with the quantum of the amount bequeathed, the provision made was, having regard to the contingencies relating to annuity, not reasonable, and that further provision should be made by a direction that there should be paid out of the income of the residuary estate an annuity at the rate of £500 per annum during widowhood, with a proviso that neither that annuity nor any part of it was to be payable except to the extent that that sum was not received under the provision contained in the partnership deed.

In re Franks [1948] Ch. 62; 63 T.L.R. 583; [1947] 2 All E.R. 638 distinguished.

ORIGINATING SUMMONS.

By his will, dated March 31, 1949, Eric Duncan Doring bequeathed to his wife, Jean Edmet McGill Doring, the whole of his personal chattels (which were valued for probate at £900) and a pecuniary legacy of £250. He also gave her a life interest in one half of his residuary estate which was estimated to produce £600 per annum and, subject to that life interest, he bequeathed his residuary estate to his brother and sister.

The testator also exercised a right which he had under a deed of partnership, dated January 1, 1948, between himself and his brother, which provided that, in the event of the death of a partner leaving a widow or fiancée or other person nominated by him in his will to receive an annuity, the surviving partner should pay to such person during their joint lives an annuity of £500, subject to abatement if the net profits of the business should be less than £3,000 in any year.

It was agreed between the parties to these proceedings that the value of the net estate of the testator, which had not

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so far been finally fixed, would amount to between £28,000 and £30,000.

A summons was taken out by the testator's widow under the Inheritance (Family Provision) Act, 1938, asking that reasonable provision be made out of the estate for her maintenance.

John Monckton for the plaintiff.

R. B. S. Instone for the executor of the will.

H. E. Francis for the brother and sister of the testator.

Cases referred to in argument: *In re Borthwick* *; *In re Inns*†; *In re Franks.*‡

WYNN-PARRY J. stated the facts and considered the evidence, and on the question whether the testator had made reasonable provision for the plaintiff, cited two passages (1) in *In re Borthwick* [1] and (2) in *In re Inns*,[2] and concluded that, in all the circumstances, and having regard to the principles which had been enunciated and applied by the court under the Act of 1938 he did not feel that he could interfere in this case so far as quantum was concerned.

His Lordship continued: There remains the second point, one which, from the point of view of the plaintiff, is the most important point in the case. The annuity of £500 is liable to cease altogether on certain contingencies—for instance, on the death of the surviving partner, the second defendant—and it is liable to abate if the net profits of the business out of which it is payable fall below £3,000 per annum. The question arises whether the testator, who had obviously given careful consideration to the amount of income received by the plaintiff, was reasonable in making the source of approximately one half of that income subject to such contingencies. He could safely have achieved his object of leaving her in receipt of an income of £1,100 a year if, for instance, he had given her the income of the whole of his residuary estate. I assume, however, and I think I am entitled to assume, on the facts, that his reason for not doing that was that he intended to benefit as well as the plaintiff not only his brother but his sister and, in order to benefit his sister, he, so to speak, threw the burden of the other half of his intended provision on the profits of the business, which is now owned by the brother.

That, no doubt, is a perfectly laudable intention, but is it reasonable to subject so much of the plaintiff's future income to the contingencies I have mentioned? I have come to the conclusion that it is not reasonable, and that on this part of the case I ought to interfere. I propose, therefore, to make the necessary

* [1949] Ch. 395, 400; [1949] 1 All E.R. 472.

† [1947] Ch. 576, 581; 63 T.L.R. 439; [1947] 2 All E.R. 308.

‡ [1948] Ch. 62; 63 T.L.R. 583; [1947] 2 All E.R. 638.

[1] [1949] Ch. 395, 400.

[2] [1947] Ch. 576, 581.

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declaration that further provision ought to be made for the plaintiff. I propose to order that there shall be paid out of the income of the residuary estate an annuity at the rate of £500 per annum during widowhood, with a proviso that neither that annuity nor any part of it is to be payable except to the extent that it is not received under the provision in the partnership deed.

It was urged on me by Mr. Francis that, if I should accede to any extent to the application of the widow, I should do no more than make a declaration that she should have further maintenance and stand the matter over generally to a future date, with liberty to apply on the authority of *In re Franks*.[3] In my view, however, that case is entirely distinguishable from the present case. In this case I am able to say that I think the widow ought to have £1,100 per annum, and all I am designing to do is to see that there is set up the necessary machinery whereby she will receive that sum during her widowhood. In *In re Franks*[3] it was not possible at the date of the hearing to quantify the amount of provision which should be made for the infant, Peter Franks. As I pointed out in the course of my judgment[4]: "it is clear that Richard Brandt the son of the "first marriage requires, and will for some time require, a "substantial part of the income of the estate for his maintenance "and education, while on the other hand, the infant Peter "Franks requires nothing now, but will require something "later." In my view, the reasonable view is that the widow requires now, and will continue to require, £1,100 per annum as income; therefore, I cannot regard *In re Franks*[3] as being in any respect a guide to me in this case.

Order accordingly.

Solicitors: *Wright, Son & Pepper; Edwin E. Clark & Son; John Bartlett & Son for Aldrich, Crowther & Bartlett, Brighton.*

J. L. D.

[3] [1948] Ch. 62.

[4] Ibid. 65.

[QUEEN'S BENCH DIVISION.]

* DAWSON *v.* PRESTON. LAW SOCIETY (GARNISHEES).

1955
Oct. 12.

Lord Goddard C.J., Ormerod and Glyn-Jones JJ.

Practice and Procedure—Garnishee proceedings—Attachable debt—Money awarded to the judgment debtor under a judgment, in the hands of the Law Society—Money liable to statutory charges—Exact amount not calculable at the time of the garnishee order nisi—Whether such money can be attached.

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Practice and Procedure—Garnishee proceedings—Procedure—Garnishee order absolute—Right of judgment debtor to appear at the hearing —Right of appeal—R.S.C., Ord 45, *r.* 1.

Legal Aid—Charge on property recovered—Garnishee—Order against Law Society—Legal Aid and Advice Act, 1939 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 3—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 16 (6).

On July 27, 1954, the Law Society, as administrators of the Legal Aid fund, had received £350, as a result of a judgment given in favour of a judgment debtor, in an action in which he was legally aided. On November 11, 1954, the judgment creditor obtained a garnishee order nisi, in respect of a judgment awarded in his favour against the judgment debtor, attaching the money in the hands of the Law Society. On April 27, 1955, the master made the order absolute finding that £66 14s. 6d. was due from the Law Society to the judgment debtor and ordering that sum to be paid to the judgment creditor. The judgment debtor appealed against that order:—

Held, dismissing the appeal, (1) that since R.S.C., Ord. 45, r. 1, required the garnishee order nisi to be served on the judgment debtor, he was entitled to appear at the hearing to make the order absolute, and, a fortiori, if he had a right to be heard when the order was made affecting him, he had a right of appeal; the Law Society, whose counsel desired to support the argument of the judgment debtor, but who did not serve a notice of appeal, had no locus standi.

(2) That the payment of money to the Law Society by virtue of a judgment in favour of a legally aided person to be held by them created a debitum in praesenti solvendum in futuro, and therefore an attachable debt, in favour of the assisted person, notwithstanding that at the time when the garnishee order nisi was made the exact sum might not have been calculated by reason of the Law Society's statutory charges on the money which might in certain circumstances entitle them to deduct certain sums.

O'Driscoll v. *Manchester Insurance Committee* [1915] 3 K.B. 499; 31 T.L.R. 532 applied.

APPEAL from Master Lawrence.

In 1954 the judgment debtor, Ronald Preston, as a legally aided person, brought an action to recover damages for breach of contract. The action was settled and on July 27, 1954, the agreed damages of £350 were paid to the Law Society, as administrator of the Legal Aid fund, under the provisions of the Legal Aid and Advice Act, 1949, and the regulations made thereunder. On August 5, 1954, £275 was paid out of the Legal Aid fund to the judgment debtor, on the Law Society being informed that the costs of the action when taxed would not exceed £75.

On November 11, 1954, the judgment creditor, D. J. Dawson, suing as a firm, obtained a garnishee order nisi. The judgment creditor's affidavit stated: "By a judgment of the court given "in this action and dated June 8, 1954, it was adjudged that I "should recover against the . . . judgment debtor, R. Preston, "the sum of £77 7s. and costs allowed at £8 8s. (2) The said "judgment still remains unsatisfied to the extent of £85 15s. "(3) The Law Society as administrators of the Legal Aid fund

" are indebted to the judgment debtor R. Preston in the sum of " £75 damages or thereabouts."

On February 16, 1955, an application was made to Master Lawrence for the garnishee order to be made absolute. The judgment debtor and the Law Society opposed the application. The master adjourned the matter in order that an inquiry might be held to ascertain to what amount the Law Society was indebted to the judgment debtor.

On April 27, 1955, an inquiry having been held, Master Lawrence made the garnishee order absolute, finding that £66 14s. 6d. was due from the Law Society to the judgment debtor, and ordered that sum to be paid to the judgment creditor.

The judgment debtor appealed against that order.

Frederick Hallis for the judgment debtor.
J. R. B. Fox-Andrews for the judgment creditor.
John Perrett for the garnishees, the Law Society.

Webb v. *Stenton* [1] and *O'Driscoll* v. *Manchester Insurance Committee* [2] were cited in argument.

LORD GODDARD C.J. Mr. Fox-Andrews took two preliminary points: first, that the judgment debtor was not entitled to appeal, and, secondly, that as the judgment debtor was not a person who could be said to be affected by the order, no appeal could in any event be entertained. By R.S.C., Ord. 45, r. 1, where garnishee proceedings are taken, the garnishee order nisi has to be served on the judgment debtor, and it must follow that he is entitled to appear on the hearing to make the order absolute and to submit any argument he might have. We pointed out in the course of Mr. Fox-Andrew's argument on this point that the judgment debtor might desire to show that there is no attachable debt.

In our opinion, from the mere fact that the rule relating to attachment of debts provides that the judgment debtor should be served not merely with notice of the proceedings but actually with the order nisi, it must follow that he has a right to be heard, and if he has a right to be heard and an order is made which affects him, I think he has a right of appeal.

There is one other matter: the Law Society gave no notice of appeal but were represented here by counsel, and we have to consider whether counsel had any locus standi. Counsel said that the Law Society had been served with the notice of appeal. We thought we could not hear the Law Society unless they were on the record either as appellants or as respondents. Apparently their counsel desired to support the argument Mr. Hallis put forward on behalf of the judgment debtor, but if they

[1] (1883) 11 Q.B.D. 518.

[2] [1915] 3 K.B. 499; 31 T.L.R. 532.

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wanted to take part in the argument it seems to the court that they ought to have served a notice of appeal against the order. The court gave them the opportunity of serving notice of appeal during the hearing, Mr. Fox-Andrews saying that he would not object, and they elected not to do so, and therefore we have not heard them.

[His Lordship stated the facts as set out above and continued:] It is not necessary, as far as I know, that the judgment creditor who is seeking to get an order of attachment on a garnishee should set out in his affidavit the exact amount which the garnishee owes to the judgment debtor. He only has to show the court by an affidavit that there is a debt due to the judgment debtor from the garnishee. The debts which can be attached are not only debts which are presently payable; they include also debts which exist in praesenti, although they may be debita in praesenti solvenda in futuro. The law with regard to the attachment of debts is put very concisely and neatly by Bankes L.J. in *O'Driscoll and Another* v. *Manchester Insurance Committee*[1]: "It is well established that 'debts "'owing or accruing' include debts debita in praesenti solvenda "in futuro. The matter is well put in the Annual Practice, "1915, p. 808: 'But the distinction must be borne in mind "'between the case where there is an existing debt, payment "'whereof is deferred, and the case where both the debt and "'its payment rest in the future. In the former case there is "'an attachable debt, in the latter case there is not.'"

As soon as the Law Society received the agreed damages they became an accounting party to the judgment debtor, the plaintiff in the action, on whose behalf they received the money. The money was not the Law Society's money and it never became the Law Society's money. The effect of the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950, is to impose a charge on that money in the Law Society's favour in order that they may reimburse the legal aid fund any additional sums of costs to which they had been put other than the costs which they recovered from the other side. The Law Society is paid solicitor-and-client costs which are not recoverable from the other side, and the Law Society therefore have the right to take those costs out of the money recovered; if they do not receive the full amount of the party-and-party costs from the other side they can still, if they see fit, take the balance out of the damages. If it were not for the fact that this charge were imposed, as soon as the Law Society received that money they would be liable to pay it over immediately to the person for whom they had been acting.

But because of this charge the Law Society, before they pay over the money, are entitled to find out how much the costs will be and such other matters as the law allows them to deduct.

[1] [1915] 3 K.B. 499, 516; 31 T.L.R. 532.

It may be that those costs in some particular case would absorb the whole of the damages recovered, but in the general case the costs of a successful plaintiff would not swallow up the whole of the damages. The Law Society are always liable to account to the assisted person for the moneys they have received. When a person finds out that an assisted person has been successful in an action and the money is payable to the Law Society, he knows that the Law Society are holding the money for and on account of his debtor. Thereupon it seems to me quite clearly a garnishee order on the Law Society will act as an attachment of the money in their hands but it will only attach to the money which is payable by the Law Society to the legally aided person. The fact that the amount they have to pay over has not been ascertained at the date of the order nisi is quite immaterial. If there is a debt, the fact that the debt has to be quantified does not make it any the less a debt which is owing although the amount which is to be paid may have to wait until some calculations or taxations are gone through.

As Glyn-Jones J. pointed out in the course of the argument, if it were not for the statutory charge imposed by section 3 of the Legal Aid and Advice Act, 1949, it would be the duty of the Law Society to pay over the money received to the legally aided person. The Law Society is given the right to reimburse themselves from the Legal Aid fund the amounts which are due to them and the balance is to be paid over to the legally assisted person.

It seems to me that this is a perfectly clear case. The money when it was paid to the Law Society and held by the Law Society was the plaintiff's money. They were bound to account for it. They were bound to hand over the money to him, although no doubt by virtue of the statutory charge which is given, they could retain it in their hands until the amount of the charge was found; it is a case of debitum in praesenti solvendum in futuro and debts which partake of that nature are and always have been attachable. In my opinion, there is no doubt here that the master was right in making the order he did. This appeal fails and will be dismissed with costs.

ORMEROD J. I agree. The argument of Mr. Hallis, as I understand it, is that an existing debt may be attached even although the payment of the debt is deferred to some future date. But if that debt is not ascertained at the time when the garnishee order nisi is made, it cannot be an existing debt unless all the factors are present at that time which enable it to be ascertained; and as in this case those factors could not be present because the Law Society, by virtue of section 3 of the Legal Aid and Advice Act, 1950, and the Legal Aid (General) Regulations, 1950, made under the Act, had the power of exercising their discretion in various ways and exercising it only at some future time, in those circumstances, it is submitted, this cannot be an

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existing debt. I cannot agree with that submission. It seems clear from regulation 16 (6) that it is the duty of the Law Society when money is paid into their hands under these circumstances, to pay the balance of the money to the assisted person after certain deductions have been made which are set out in the paragraph of the regulations. In those circumstances there is an existing debt because there is a liability on the Law Society, having received that money, to pay it over to the assisted person. It may be that by reason of the regulations and by reason of certain provisions of the Act, the Law Society have power to make deductions from that sum because of a charge which they may have, but that is merely a question of ascertaining the amount which has to be paid over to the assisted person and, as I see it, does not prevent the debt from being an existing debt at the material date. In these circumstances, I agree that this appeal must be dismissed.

GLYNN-JONES J. I agree.

Appeal dismissed.

Solicitors: *Gard, Lyell & Co. for Theodore Bell, Cotton & Curtis, Sutton; Wilkins, Rohan & Newman; James and Charles Dodd.*

C. J. E.

[COURT OF APPEAL.]

C. A.

1955

Oct. 10, 11, 31.

Singleton, Jenkins and Parker L.JJ.

* A. PROSSER & SON LD. *v.* LEVY AND OTHERS.

Rylands v. *Fletcher—Exceptions to rule—Consent to danger—Escape of water from stop tap in common passage way—Damage to tenant's stock on lower floor—Negligent system of water supply—Liability.*

The freehold owners of a large block of property granted to the plaintiffs a lease of the ground floor lock-up shop with the right to use lavatories on the second floor in common with other tenants. On the passageway of the second floor there was a wash-basin with a small section of redundant pipe from the main water supply pipe under it. This pipe was $3\frac{1}{2}$ inches above floor level, with an open end from which water was only prevented from escaping by a stop cock. The owners let the offices on the first, second and third floors to B. & Co., with rights of passage over common ways to reach their rooms and the right to use the lavatories in common with others, including the plaintiffs. At the date of the lease to B. & Co. the owner's estate agent had inspected the property and he knew of the existence of the basin and pipe on the second floor.

The plaintiffs suffered damage to their stock, furniture and equipment when in circumstances unknown the stop tap of the redundant pipe was left turned on and water seeped into their shop.

Held, that the defendants were liable for the damage, since (1) the tenants could not be taken impliedly to have consented to the installation as it existed; (2) the owners, being in occupation and control of the passageway where the redundant pipe was situated, and knowing or having means of knowing through their estate agent of its existence and condition, which rendered it a potential source of danger, were guilty of negligence in failing to take reasonable steps to prevent the escape of water in the event of the stop tap being accidentally turned on; and that the damage to the plaintiffs' goods followed from that negligence.

Held, further, that there was no evidence on which the court would be justified in holding that the escape of water was caused by the mischievous or deliberate act of a stranger.

Principle in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 applied.

Decision of Havers J. reversed.

Appeal from Havers J., sitting at Manchester Assizes.

The plaintiffs were the occupiers of a lock-up shop on the ground floor of 15, Market Street, Manchester, when on June 5, 1953, there was an escape of water from above and much damage was caused to the plaintiffs' goods and fittings. The owners of the premises were the first defendants, Alexander Levy, Sarina Levy and John T. Marshall, the trustees of the Levy Estate Trust. They had purchased the freehold of the premises in the year 1951, at which time the plaintiffs were occupiers of the ground floor under the terms of a lease which was still running on June 5, 1953. On July 2, 1951, the trustees had granted a lease of offices situate on the first, second and third floors of the building to the second defendants, Barder Morris Incorporated Ld., giving to these lessees the right (in common with all others to whom the lessors might give the like right) of ingress, egress and regress through or by means of the entrance doors, staircases and passages serving the first, second and third floors. On March 25, 1953, the second defendants, Barder Morris Inc. Ld., let to Mr. Leslie James Thorpe, trading as A. Robinson & Sons, the four offices situate on the second floor, together with a right of access thereto, by means of the common staircases and passages, together with the use (in common with all persons having the like right) of the lavatories and conveniences on the second floor.

The escape of water which damaged the plaintiffs' goods and effects in the ground floor shop took place from a pipe under a wash-basin in the passage way on the second floor. Beneath the basin, and only some three and a half inches above floor level, there was a redundant ½-inch copper pipe attached to the mains pipe, which presumably had been connected with another pipe which carried water to one of the offices. Only a small portion of the copper pipe remained. Towards the end of it there was a stop tap, but the end of the pipe was not closed. On the day in question the stop tap had at some unknown time and in some unknown way been knocked or turned on, with resulting damage to the plaintiffs' shop and goods, and they

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claimed damages from the Levy Estate Trustees and Barder Morris Incorporated Ld.

The action came before Havers J. at Manchester Assizes, and on March 21, 1955, he dismissed the action. He held that the owners were in occupation and control of the passage where the redundant pipe was situated; that they knew or had means of knowledge through their estate agent of the existence of the redundant pipe and its condition; that knowing, or having means of knowledge, of the redundant pipe and its condition they were negligent in not taking steps to prevent the escape of water from the pipe if the stop tap was accidentally turned on; but that as the proximate cause of the escape of water which caused the damage was, as he concluded, the mischievous or deliberate act of a stranger and not an accident, they were not liable to the plaintiffs for such damage. He dismissed the second defendants from the action.

The plaintiffs now appealed, claiming judgment against the Levy Estate Trustees.

Gilbert Paull Q.C. and *C. N. Glidewell* for the plaintiffs.

D. J. Brabin Q.C., *J. D. Cantley Q.C.* and *A. K. Hollings* for Levy Estate Trustees.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

Oct. 31. SINGLETON L.J., delivering the judgment of the court, read the findings of Havers J. as to the facts and continued: The escape of water took place from a pipe under the wash-basin in the passageway on the second floor. There is little evidence as to the use of this basin. So far as the evidence shows, it was not used by those employed by Barder Morris & Co. Ld., who only occupied one room on this floor. One assumes that it was used by the employees of A. Robinson & Sons, who occupied four rooms on the floor, but no witness was called from Robinsons. The position of the rooms and of the wash-basin is shown upon the plan, which also shows the design of the wash-basin and mirror above. The basin had a 1¼-inch lead waste pipe. The pipe which carried water to the basin was a ½-inch lead water pipe. Some three and a half inches above floor level there was a ½-inch copper pipe at right angles to the ½-inch lead pipe; only a small portion of the copper pipe remained. Towards the end of it there was a stop tap, but the pipe had an open end.

Havers J. said of this copper pipe: "This section of pipe "was completely redundant and served no useful purpose what-"ever. It had a thread end and the probability is that at one "time it had been connected with another pipe which provided "water for the office marked E on the plan. The stop tap "which is near the end of this piece of pipe was not designed

" for the purpose of stopping water coming out from this small " section of pipe; it had originally been used for stopping the " flow of water if a leak had occurred in the pipe connected to " it which supplied water to office E. The stop tap was a normal " type of stop tap approved by the Manchester Corporation " Waterworks Department and was a perfectly standard stop " tap on a ½-inch supply pipe. To open this stop tap fully you " had to make three or four turns. If it was turned so as to be " fully open and flow at maximum pressure, water would gush " out and this would be obviously noticeable to anybody who " turned it fully on. If the tap was opened slightly from its " closed position some water would come through. The volume " of course would increase as you opened it more and more until " you got maximum pressure when the stop tap was fully open.

" Now owing to its position so close to the ground—3½ inches " above the ground—and its position underneath the washbasin " and slightly to the right, I had evidence from Mr. Gomersall, " which I accept, that a cleaner sweeping the floor or anybody " mopping the floor, or even catching a foot against it while " washing, could knock it on. It could not accidentally be " knocked on completely, but it could be knocked on sufficiently " to cause water to start seeping out. By knocking against it " unintentionally in this way or by a cleaner touching it, it could " not be turned on more than half a turn. As soon as you start " to turn water comes out, which would be noticeable; indeed, " Mr. Gomersall said you would notice it far before as much as " half a turn had taken place, and with a half-turn the flow of " water would not be in excess of 50 per cent. of the maximum " flow. This stop tap is vertical when closed and you move it " to the left, anti-clockwise, to open it out."

At 5.45 a.m. on June 5 a call was received at the London Road Fire Station and officers from the fire brigade and police officers went to 15, Market Street. They could see through the windows that the ground floor part seemed to be sodden, and water in quantity was dripping from above. They went to the second floor and found that the escape was from the open end of the copper pipe. Mr. Harris, the assistant divisional officer of the fire brigade, was unable to say how far the tap was turned on. He described the flow of water in this way: " It was a very " lazy flow: no pressure behind it: sort of bubbling out and "gurgling"; and he said he would imagine that the stop tap was slightly turned on, unless the supply was at low pressure. P.c. Bowker said that the water was not coming out with fierce pressure; it was coming out in quantity, but not to spread all over the floor. He added that the tap was turned full on when he found it. He formed that impression from the feel of the tap: he did not check it by the number of turns required to turn on the tap to the full extent. The judge accepted the evidence of P.c. Bowker and said: " I find accordingly that " somebody during the night of June 4–5 turned on this stop

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" tap so that the water did flow out on to the floor. I find that " the person who did it turned it fully on and that it was not " accidental, but deliberately turned on."

We are not satisfied upon the evidence that it was satisfactorily established that the stop tap was fully turned on, though it does seem that it was turned on to an extent that would have been unlikely to happen from an accidental kick or knock. It is not clear what is meant by the words " during the " night." It appears from the evidence that the outside door of the building was locked each evening when the last person left and, if the ordinary practice was followed, it is unlikely that anyone would enter the building afterwards.

The basin was used by Robinsons. If someone turned on the tap and no water came, it is possible that he, or she, would try the copper pipe below and if no water came, it is equally possible that the person would omit to turn the stop tap to the off position. This might occur if the supply was cut off about the time the employees of Robinsons were leaving. And though the copper pipe was said to be of no use whatsoever, it is possible that one person might try to get water there while another was using the basin. There is no evidence to show whether the supply was cut off at any time during the evening of June 4, nor is there any evidence from anyone in the employ of Robinsons. We do not know how many were employed there, who was the last to leave, or who last used the basin. On the evidence, we should think it is more likely that the stop tap was turned on, and left turned on, by someone employed there than that someone entered after the place was closed and turned on the tap deliberately in order to cause damage. If perchance the stop tap was left turned on when the supply was off, trouble was bound to occur when the supply came on again.

It is unfortunate that the judge was left without any information from Robinsons and without any information as to who was last in the building and as to who locked the outside door, if it was locked. There is no doubt upon the evidence that the leaving of the copper pipe with the open end was wrong and constituted a source of potential danger, for there was no sink or means by which the water could be carried away without causing damage. Again, the evidence does not show when the alteration was done, or by whom. Mr. Adams, a plumber of experience, who was called on behalf of the plaintiffs, said that the pipe ought not to have been left in the way it was: it should have been taken off the rising main altogether and the main then soldered up, or a brass cap specially made for such a purpose should have been fitted on to it. He said: " I should not think " anybody in his right mind would have it like that," and, in reply to the judge, " Unless a lunatic." Mr. Gomersall, an architect, who gave evidence before an examiner, said in answer to these questions: " What is your opinion as to the manner in " which that tap and pipe were at the time when you saw them?

"How would you describe them? (A) I would say that the "plumber who had disconnected that branch service should have "put a screwed stop or plug in the end of the pipe to stop any "water coming out from the end of the pipe if the stop tap "happened to be turned on, which is quite a normal procedure. "(Q) There is nothing difficult about it? (A) Oh, no. (Q) What "was the potential situation, that not having been done? (A) A "cleaner sweeping the floor or anybody mopping the floor, or "even catching their foot against it whilst they were washing, "could knock it on—not completely, but sufficient to cause "water to start seeping out. (Q) Left in that way, would you "say it was a proper or safe system? (A) Certainly not. (Q) "How would you describe it? (A) As a potential danger. "(Q) Was it a danger which would or would not have been "obvious to anyone who had taken the slightest chance to look "at it? (A) I do not think a lay person would have noticed it "perhaps, but certainly a plumber should notice it and not leave "it like that."

Mr. Fieldhouse, an estate agent, called on behalf of the trustees, was asked questions on this when he was cross-examined by Mr. Laski, and he said it was a possible source of danger.

The findings of Havers J. upon this are set out at page 9 of his judgment. The judge said: "Now the trustees through Mr. "Fieldhouse knew of the existence of this basin and of this pipe "with a stop tap on it and the open end. They certainly had "the means of knowing it had this stop tap on it and an open "end. In my view, they ought to have realized it was a source "of potential danger to persons occupying the lower floors if it "was accidentally knocked on. I accept the evidence of Mr. "Adams and Mr. Gomersall. I think leaving the pipe in this "condition 3½ inches above the floor and close to the basin with "a stop cock and open end was a very slipshod and inefficient "piece of plumbing. There was no drain to take away water if "it was left on and if it was left on accidentally, as might well "happen, in one of the ways indicated by Mr. Gomersall, the "water would come out on to the floor, and if negligently left "on it would in course of time seep through the floors to the "ground floor and do damage. I am satisfied that there was a "duty upon the trustees to take reasonable care to prevent the "escape of water and I think that they ought to have foreseen "the possibility that this stop tap might be accidentally turned "on in one of the ways Mr. Gomersall described, and that they "were negligent in failing to take reasonable care in not adopting "one or other of the methods of preventing water escaping which "Mr. Adams and Mr. Gomersall described."

Thus the judge was satisfied that there was negligence on the part of the trustees, or of their agent, in regard to the water supply in the building. He said that if he was satisfied that the tap was accidentally or unintentionally turned on he would have

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been disposed to find that the plaintiffs had established a case against the trustees, but—"As it is, however, I am satisfied "that this turning on of this tap must have been a deliberate "and mischievous act." He added: "I have not had the "advantage of having Messrs. Robinsons called before me or "any of their servants or employees. I do not know whether or "how often they used this basin on the second floor. I do not "know at what time their employees left on the material date "or what the condition of the property was when they did last "leave. I am quite satisfied as regards the second defendants "that neither Mr. Barder, Mr. Driver, nor Miss Dobson "deliberately turned this stop tap on. It may have been caused "by the mischievous act of one or other of the occupiers of the "building or by a stranger who came in from outside, or possibly "it may have been caused by somebody who came in when the "door was left open. It is quite impossible for me on the "evidence to say who it was that did in fact turn this stop tap "on."

We cannot accept as accurate the finding that the turning on of the tap was a deliberate and mischievous act. It is, of course, possible that someone deliberately and mischievously turned on the tap, though we do not regard that as so likely to happen as that someone tried the tap, and, failing to get water, forgot to turn it off. One ought not to assume a deliberate act with the intention to do damage if there are other equally likely explanations. It seems to us upon the evidence that there exists complete uncertainty as to how the escape came about. If the judge was entitled to draw the inference that the damage was caused by the deliberate and mischievous act of some person unconnected with the trustees, we would agree with him that the trustees are not liable in damages. As we take a different view upon the facts, we must consider the law upon the subject.

The general rule in regard to damage caused by the escape of water from one man's land onto that of another was stated in the judgment of the Exchequer Chamber, delivered by Blackburn J. in *Fletcher* v. *Rylands*,[1] in these terms: "We think "that the true rule of law is, that the person who for his own "purposes brings on his lands and collects and keeps there "anything likely to do mischief if it escapes, must keep it in at "his peril, and, if he does not do so, is prima facie answerable "for all the damage which is the natural consequence of its "escape." This statement of the law was expressly approved in the House of Lords[2] and cannot be challenged. There are, however, exceptions to the rule. If the plaintiff has consented to the source of danger and there has been no negligence on the part of the defendant, the defendant is not liable, and the same applies if the water is maintained for the common benefit of both the plaintiff and the defendant.

[1] (1866) L.R. 1 Ex. 265, 279.

[2] Sub nom. *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

It is not necessary to cite the older authorities: they are admirably summarized in two judgments of Goddard L.J. The first is *Kiddle* v. *City Business Properties Ltd.*[3] In that case the plaintiff was the occupier of a shop which formed part of a building belonging to the defendants, who had demised the shop to him. The shop was situated in an arcade, the glass roof of which was the property and under the control of the defendants. Rain-water from this roof ran into a gutter over the plaintiff's shop and was carried to the sewer by a piping which ran down the side of the shop. Owing to an accumulation of rubbish in the piping, rain-water escaped from the gutter, found its way into the plaintiff's shop, and damaged his stock. The defendants had made adequate arrangements for the inspection and cleansing of the gutter and piping, and there was no negligence on their part. It was held that, in the absence of negligence, the defendants were not liable to the plaintiff in an action for nuisance for allowing the water to escape onto his premises as (1) the plaintiff's shop formed part of a larger building belonging to the defendants and he must be held to have taken the shop as it was and could not complain that the building was not constructed differently; and (2) the arrangements for the collection and carrying away of water from the glass roof to the sewer was for the joint benefit of both the plaintiff and the defendants.

The Lord Justice was unable to find that there was any neglect of duty on the part of the defendants and, after referring to certain of the authorities, he said: "But all these cases arose between "adjoining owners whose holdings were entirely independent the "one of the other. There is another line of authority which has "to be considered where the water has escaped from a place "where it has been brought with the consent or for the common "benefit of both parties. I need refer to no more of the cases "than *Carstairs* v. *Taylor*,[4] *Ross* v. *Fedden*[5] and *Cockburn* v. "*Smith*.[6] It is now settled law that where the plaintiff and the "defendant occupy parts of the same building, whether it be two "floors of a warehouse, two sets of offices, or two flats, and water "which is laid on to the building escapes and does damage, the "person from whose part the escape takes place is not liable in "the absence of negligence. The reason for the escape is imma-"terial as long as the exercise of reasonable care would not have "prevented it, and it seems to me that the true reason is most "clearly stated in the judgment of Baron Martin in *Carstairs* v. "*Taylor*,[4] where he says: 'Now, I think that one who takes a "'floor in a house must be held to take the premises as they "'are, and cannot complain that the house was not constructed "'differently.' So here the plaintiff has taken part of the defen-"dants' premises with a sloping roof outside down which rain

[3] [1942] 1 K.B. 269, 273, 274; [1942] 2 All E.R. 216.
[4] (1871) L.R. 6 Ex. 217.
[5] (1872) L.R. 7 Q.B. 661.
[6] [1924] 2 K.B. 119; 40 T.L.R. 476.

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" must run to the gutter provided to carry it off, and it therefore " follows that, if the flooding from the gutter occurred without " negligence on the part of the landlords, the latter are not liable."

The second is *Peters* v. *Prince of Wales Theatre (Birmingham) Ld.*,[7] in which case the plaintiff leased from the defendants shop premises forming part of the defendants' building which contained a theatre and a rehearsal room, the defendants covenanting (inter alia) to keep the exterior of the demised premises in good and tenantable repair and condition. When the lease was granted the plaintiff knew that the rehearsal room was fitted with a system of sprinklers, which also extended to his shop, designed to discharge automatically large quantities of water in case of fire. Owing to an exceptionally severe frost, and not to any default on the part of the defendants, the sprinklers burst and water percolated to the plaintiff's shop and damaged his goods. In an action by the plaintiff against the defendants for damages it was held (1) that the defendants had not broken their covenant to keep the exterior of the demised premises in repair since the covenant must be construed as referring to every exterior part of the demised premises, to the exclusion of what was not demised, and the sprinklers were no part of the demised premises; (2) that the doctrine in *Rylands* v. *Fletcher*[8] did not apply as the plaintiff had impliedly consented to the presence of the sprinklers. The plaintiff's claim, therefore, failed.

The judgment of the Court of Appeal was given by Goddard L.J., who reviewed the authorities from *Carstairs* v. *Taylor*[9] onwards, and said at pp. 77 and 78: " A case almost identical " on its facts with the last is *Blake* v. *Woolf*,[10] where the judg- " ment of the Divisional Court was delivered by that most learned " and accurate lawyer, R. S. Wright J. He said: ' In this case " ' the plaintiff, by taking these premises with water laid on to " ' them and accepting his supply of water from the defendant's " ' cistern, must be taken to have assented to water being kept " ' on the premises by the defendant.' He then cited the cases " to which we have referred, and held that, as there was no " negligence proved the defendant was not liable. The same " result followed in *Rickards* v. *Lothian*,[11] although in that case " the emphasis was laid on the supply of water for water-closets " and lavatories being a necessity, and, indeed, a landlord's duty, " in modern life. So there is unbroken authority from 1871 to " 1913 that where the plaintiff and defendant occupy different " floors of one building and water laid on to the building escapes, " the party from whose rooms the water escapes is not liable in " the absence of negligence.

" The latest case on the subject is *Kiddle* v. *City Business* " *Properties Ld.*,[12] where it was decided that this matter was

[7] [1943] K.B. 73; [1942] 2 All E.R. 533.
[8] (1868) L.R. 3 H.L. 330.
[9] L.R. 6 Ex. 217.
[10] [1898] 2 Q.B. 426.
[11] [1913] A.C. 263.
[12] [1942] 1 K.B. 269.

" now settled law, the reason for which was most clearly stated " in the passage from the judgment of Baron Martin in *Carstairs* " v. *Taylor*.[13] In truth, it appears to depend on consent, and " it seems to us that the fact that in most of the cases, at any " rate, the benefit of the water or the gutters was common to both " parties is really an element, although, no doubt, an important " element, in showing that there was consent. The contractual " relationship between landlord and tenant, or the willingness of " the plaintiff to take a lease of part of a house so constructed " that at the time when he takes his lease other occupiers are " being supplied with water, removes the case from the sphere " of the common law doctrine laid down in *Rylands* v. *Fletcher*.[14] " This explains why the plaintiff failed in *Carstairs* v. *Taylor* [13] " and succeeded in *Humphries* v. *Cousins*.[15] "

From these judgments it appears that there are two important elements for consideration, namely, negligence and consent. In the case of an ordinary water supply in a block of premises each tenant can normally be regarded as consenting to the presence of water on the premises if the supply is of the usual character. It cannot be said that he consents to it if it is of quite an unusual kind, or is defective or dangerous, unless he knows of that. Havers J. said: " I do not think, therefore, that in the light of " that evidence it can be taken that the plaintiffs gave any implied " consent to the existence of that particular section of pipe. They " must, as I say, have been taken to have impliedly consented to " the installation of a water supply." It appears to us that they cannot be said to have consented to the set-up or installation as it existed at the time the damage was caused. Over and above this, negligence on the part of the defendants which causes or contributes to the damage takes the case out of the exception to the rule in *Rylands* v. *Fletcher*.[16] It cannot be disputed that the leaving of the pipe in the condition in which it was constituted negligence, as the judge said.

The trustees owed a duty to the plaintiffs. To determine whether there was a breach of that duty it is not necessary to look further than to the words of Baron Alderson in *Blyth* v. *Birmingham Waterworks Co*.[17]: " Negligence is the omission to " do something which a reasonable man, guided upon those con- " siderations which ordinarily regulate the conduct of human " affairs, would do, or doing something which a prudent and " reasonable man would not do." The leaving of the copper pipe in the position, and in the condition, in which it was was something which no reasonable person would do, and the damage to the plaintiffs' goods was damage of a kind which might naturally follow from it.

In *Haynes* v. *Harwood* [18] Greer L.J. said: " There can be

[13] L.R. 6 Ex. 217.
[14] L.R. 3 H.L. 330.
[15] (1877) 2 C.P.D. 239.
[16] L.R. 3 H.L. 330.
[17] (1856) 11 Exch. 781, 784.
[18] [1935] 1 K.B. 146, 156; 51 T.L.R. 100.

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"no doubt in this case that the damage was the result of the "wrongful act in the sense of being one of the natural and "probable consequences of the wrongful act. It is not necessary "to show that this particular accident and this particular damage "were probable; it is sufficient if the accident is of a class that "might well be anticipated as one of the reasonable and probable "results of the wrongful act."

In order to excuse themselves, the trustees must show that the escape of water was due to the act of a subsequent conscious volition. It is clear from the decision of the Privy Council in *Dominion Natural Gas Co.* v. *Collins* [19] that the onus of showing this is upon them. If they can show that the proximate cause of the damage is the malicious act of a third party against which no precautions would have been of use they are not liable in damages: see *Rickards* v. *Lothian.*[20] It appears to us that they have not approached this stage. The position is one of complete uncertainty. It does not excuse the trustees if the stop tap was negligently left on by a third party. As to which see the judgments in *Philco Radio and Television Corpn. of Great Britain Ld.* v. *J. Spurling Ld.*[21] Unless it can be established that the act was at the least "a deliberate and mischievous act," to use the words of Havers J., the trustees are not absolved. And, as we have said, we do not consider that that finding of the judge was warranted upon the evidence which was given.

Mr. Paull, on behalf of the appellant plaintiffs, put the case in another way. He submitted that it was clear that the trustees had not taken all reasonable precautions to prevent an escape of water and that such reasonable precautions would have prevented the damage suffered by the plaintiffs. Consequently, he claimed, the plaintiffs were entitled to succeed on their claim. We prefer to look upon the case in the way already stated. The trustees were the owners of the building and the occupiers of the part on which the basin and copper pipe were. They were found to be negligent in relation to the pipe from which the escape occurred. The immediate cause of the escape remains wholly unexplained.

The position might have been made much clearer if further evidence had been called. Having regard to the way in which the case was left, we consider that the plaintiffs were entitled to succeed. Their appeal should be allowed and judgment should be entered for them for the amount of damages agreed, with costs in this court and in the court of first instance.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Manches & Co. for David Blank, Alexander & Co., Manchester; Gardiner & Co. for A. W. Mawer & Co., Manchester.*

A. W. G.

[19] [1909] A.C. 640; 25 T.L.R. 831.
[20] [1913] A.C. 263.
[21] 65 T.L.R. 757; [1949] 2 All E.R. 882.

[COURT OF APPEAL.]

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Nov. 7.

Denning, Hodson and Morris L.JJ.

Husband and Wife — Divorce — Discretion — Exercise — Only matters proved to be taken into account—Matters relevant in discretion statement—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.

By the proviso to section 4 (2) of the Matrimonial Causes Act, 1950, the court "shall not be bound to pronounce a decree of "divorce and may dismiss the petition if it finds that the petitioner "has during the marriage been guilty of adultery. . . ."

The wife petitioner in an undefended petition for divorce had previously been married to an American, who had divorced her on the ground of adultery. In her discretion statement the wife admitted having committed one act of adultery with one P., and continued "save as aforesaid I have never committed adultery." In a confession statement which was put in, the husband alleged that the wife had committed adultery with P. on numerous occasions, which the wife denied in evidence.

The trial judge, while finding the wife's case proved, criticized her discretion statement as untrue in view of the previous divorce; professed himself not satisfied that there had been only one act of adultery, refused to exercise his discretion, and dismissed the petition. On appeal:—

Held, (1) that in refusing his discretion the judge had given weight to irrelevant and unproved matters, for a discretion statement had reference only to acts of adultery committed during the marriage in suit, and there was no evidence on which he could find that the wife had been guilty of more than one act of adultery; (2) that a decree nisi should be pronounced, and the matter referred to the Queen's Proctor for investigation.

Observation of Lord Simon in *Blunt* v. *Blunt* [1943] A.C. 517, 526; 59 T.L.R. 315; [1943] 2 All E.R. 76 applied.

APPEAL from Judge Reid, sitting as a special commissioner.

The facts are stated in the judgment of Denning L.J.

Alan Lipfriend for the wife.

The husband did not appear.

DENNING L.J. The petitioner in this case married her husband on March 8, 1947, when she was 18 years of age and he was 19. At that time she was the divorced wife, we were told, of an American serviceman. In these proceedings she sues her second husband for divorce on the ground of his adultery. His adultery is established. He is living with another woman by whom he has a child. But, nevertheless, the judge has refused to exercise his discretion in the petitioner's favour.

The first point arises on the wife's discretion statement. The wife in her discretion statement said that on one occasion in October, 1951, she committed adultery with Peter Cunningham at 36, Harp Road, Hanwell, and then said: "Save as "aforesaid I have never committed adultery." The judge

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criticized that sentence. He said that it was inaccurate, because she herself had been divorced for adultery by her previous husband. It seems to me that in these proceedings the prior divorce for adultery was irrelevant. Section 4 of the Matrimonial Causes Act, 1950, which confers a discretion on the court, says that the court "shall not be bound to pronounce a "decree of divorce and may dismiss the petition if it finds that "the petitioner has during the marriage been guilty of adultery." Those words show that the only relevant adultery is adultery during the marriage. The discretion statement should be construed in the light of the statute. On its proper construction, it meant: "Save as aforesaid I have never committed adultery "during the marriage." So read it was not inaccurate. It should not be taken against the petitioner in any way.

The second point—the point on which the commissioner refused a decree—arose out of the fact that the husband, in a statement which he had made, alleged that his wife had committed adultery on numerous occasions with a man named Pete. The judge asked the petitioner about that statement, and she denied that there were numerous occasions. She said: "That is "just lies." The judge was not satisfied. He said: "I am "not satisfied about this story about the single act of adultery. "I am not satisfied in this case that the petitioner has shown "me the frankness which somebody who asks for the discretion "of the court ought to apply." On that account he refused to exercise his discretion in her favour.

It is plain, on the wording of the Act, that, in order to refuse a decree, the only adultery upon which the commissioner can act is adultery which he "finds" to have been committed, that is, adultery which is proved or admitted before him. In this case, there was only one single act of adultery proved or admitted before the court. Suspicion of other acts is not enough. Suspicion that she is telling an untruth is not enough.

Let me take a case which often happens. A petitioner may not put in a discretion statement at all. But yet the other spouse may have made a statement, not on oath, saying that the petitioner has committed adultery with other people. The judge cannot on that statement refuse to exercise his discretion in the petitioner's favour. He can only refuse a decree if he "finds" the petitioner guilty of adultery during the marriage. His proper course is to put the statement before the petitioner to see if she admits it or not. If she denies it and he is still not satisfied where the truth lies, his proper course is to send the case for the Queen's Proctor to make inquiries.

In this present case, in my judgment, the commissioner ought not to have dismissed the petition altogether. If he was not satisfied and had his suspicions aroused then the proper course for him to have taken would have been for him to send the case to the Queen's Proctor.

That, indeed, is I think the course that this court should

take today. In my judgment, in view of the one admitted act of adultery, the court should exercise its discretion and a decree nisi should be pronounced on the grounds of the husband's adultery, which has been clearly established, but, nevertheless, the court should send the matter to the Queen's Proctor so that he can look into it and see if there are any steps which he thinks he ought to take. I think the appeal should be allowed accordingly.

HODSON L.J. I agree. This is an appeal against the refusal of the judge to exercise discretion. In *Blunt* v. *Blunt* [1] Lord Simon said in this connexion [2]: "If it can be shown that the "court acted"—I will leave out words which do not apply—"in "that it either gave weight to irrelevant or unproved matters or "omitted to take into account matters that are relevant, there "would, in my opinion, be ground for an appeal." In this case, Mr. Lipfriend says, I think with justification, that in one respect the judge gave weight to an irrelevant matter, because the petitioner had sworn that she had never committed adultery save as admitted in her discretion statement, whereas in fact she had previously been divorced from a former husband on the ground of adultery. I think the construction of what she said is quite plain. I think that she only intended to refer to the particular marriage and ought not to be taken as referring to an irrelevant marriage, namely, her previous marriage. Indeed the only relevant adultery on her part (as section 4 of the Matrimonial Causes Act, 1950, says) is adultery during this marriage.

That is not to say that I wish in any way to criticize the form in which the statement was drawn. It was drawn in a form which Mr. Lipfriend tells me is commonly used in compliance with rule 28, sub-paragraph (1) of the Matrimonial Causes Rules, 1950, which directs that the statement is to set out particulars of the act of adultery committed and all the facts which it is material for the court to know for the purpose of the exercise of its discretion. It would be highly undesirable if the court were to endeavour to lay down lines or indicate forms to be rigidly followed in such cases.

I am afraid that the commissioner allowed himself to be influenced by a misconstruction of that sentence of the petitioner's, because he said in his judgment, that although he would agree that in one sense he was not concerned with it, he did feel that he was concerned that she should tell the truth in her discretion statement, and he did refer to the fact that that particular paragraph was not accurate. So one cannot, I think, avoid the conclusion that he was in some respects influenced by that matter.

The other complaint which Mr. Lipfriend makes (which is, I think, well founded) is that the judge paid attention to an

[1] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76.

[2] [1943] A.C. 517, 526.

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unproved matter. The unproved matter was this, that although she herself had admitted adultery once with a man called Pete, her husband, in a statement which he had given to an inquiry agent and which he did not support by evidence, alleged that she committed adultery more than once with Pete. The judge also heard during the course of the evidence of the existence of a diary which the petitioner had kept apparently containing references to Pete. He was left in this position, that he would not accept her statement that she had only committed adultery on one occasion with Pete. Mr. Lipfriend says that that is tantamount to saying, in the light of the husband's statement, that he was finding her guilty of further adultery without evidence.

One does not wish to say anything which would lead any trial judge to suppose that it was not for him to ascertain the facts and make up his mind as to whether or not a witness is telling the truth, and to see, so far as he is able (difficult though it is, and must necessarily be, in these undefended cases) that the court is not deceived. Yet in this case, in the state of the evidence as it stands I feel that the commissioner, the husband not having given evidence in support of his charge of adultery, should have pronounced a decree in the exercise of the court's discretion and sent the matter to the Queen's Proctor for investigation; and I think that that is the course which the court ought to take.

I am not, of course, excluding the possibility that the commissioner might have refused to exercise discretion on some ground other than his refusal to accept the wife's evidence. However, he did not state any other ground upon which the discretion was refused.

Therefore, I agree that in this court we ought to substitute our decision for his for the reasons which I have given and for those which my Lord has given, and that the matter should be dealt with in the way that has been indicated.

There was a third matter referred to by Mr. Lipfriend, namely, that the circumstances in which the wife left her husband were left in rather an unsatisfactory state. Of course, that is a material matter to consider in considering whether or not the discretion should be exercised. The judge did say that the wife's proceedings before the magistrate, which she had taken on the ground of desertion after she had apparently left her husband, were dismissed for some reason; and the commissioner adds that he was not told why. That is not quite accurate, because in the wife's evidence a leading question was put to her which she agreed with giving a reason for the dismissal of those proceedings. However, I do not think that that is a particularly important matter in this case. The circumstances of the separation were not fully investigated, and I think it would have been well if they had been more fully investigated.

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But the main matters for consideration, I think, are those to which I have earlier referred and I think, therefore, that the appeal should be allowed.

MORRIS L.J. I am in agreement with the judgments which my Lords have delivered, and I do not think I can usefully add anything.

Appeal allowed.
Decree nisi.
Cause referred to the Queen's Proctor for investigation.

Solicitor: *Harold Stern & Co.*

F. R. D.

[CHANCERY DIVISION.]

1955
Nov. 11.

* PRACTICE DIRECTION. (APPEALS FROM JUSTICES UNDER THE GUARDIANSHIP OF INFANTS ACTS.)

Infant—Custody—Appeal from justices—Leave to appeal out of time—R.S.C., Ord. 55A, *r.* 6 (2).

In cases in which leave to appeal out of time is required the proposed appellant's solicitors must apply to Roxburgh J.'s clerk for a date on which the judge will hear the application. Notice of motion for that date (NO FEE) must then be served on the proposed respondent, a copy being lodged at Room 136. Unless the proposed respondent's solicitor accepts service of the notice of motion on behalf of his client, personal service on the proposed respondent must be effected. The motion will be heard in court and will be listed as a "Motion by Order." If leave is granted, the originating notice of motion will then be issued according to the rules and the matter will proceed in the ordinary way.

This direction supersedes the note to R.S.C., Ord. 55A, r. 6 (2), in the Annual Practice.

By direction of Roxburgh J.

W. S. JONES,
Chief Registrar,
Chancery Division.

November 11, 1955.

[PROBATE, ETC., DIVISION.]

1955
Oct. 26.

Wallington J.

* IN THE ESTATE OF ALBERTI, DECD.

Conflict of Laws—Immovable property—Assignment—Will—Revocation—Real estate in England—Disposition only revocable by English law—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *ss.* 9, 20.

Whatever the domicile of the testator, no document can revoke a valid testamentary disposition of real estate in England unless it has been executed in accordance with the provisions of the Wills Act, 1837.

A testator executed a will and codicil in accordance with English law while resident in England, whereby he disposed inter alia of all his real estate in England. He later made a holograph will in Switzerland which was valid by the law of Switzerland but which was not executed in accordance with the provisions of the Wills Act, 1837. By that will he revoked all former wills although he did not in terms dispose of real estate in England of which he died possessed:—

Held, that, as the revocation in the Swiss will did not comply with section 20 of the Wills Act, 1837, it did not revoke the previous disposition of the deceased's real estate in England.

PROBATE MOTION for grant of letters of administration to real estate in England.

By a will dated April 21, 1939, made and executed in England in accordance with section 9 of the Wills Act, 1837, the deceased, Pietro Alberti, who was born in Switzerland and was then in business at Worthing, Sussex, gave, devised and bequeathed all his real and personal estate, except real estate or any share of real estate in Switzerland to which he might be entitled at his death to his executors, Barclays Bank Ld. upon trust for his niece, Serafina, and his nephew, Guido, in equal shares beneficially as tenants in common. The deceased returned to and remained in Switzerland throughout the war, and returned to England in 1946, with the intention of clearing up his affairs and returning permanently to Switzerland. In fact, he remained in England, paying periodical visits to Switzerland until February 2, 1953. By a codicil dated October 28, 1946, also made and executed in England in accordance with section 9 of the Wills Act, 1837, which recited that Serafina had died, the deceased directed that the residue of his estate should be held in equal shares in trust for his niece Adelaide and his nephew Guido.

On February 15, 1952, the deceased made, in Switzerland, a holograph will valid by the law of Switzerland but not executed in accordance with section 9 of the Wills Act, 1837, by which he revoked and cancelled all former wills and disposed of his estate in England and Switzerland, and of his real estate in Switzerland in favour of his nephew, Guido, his nephew's wife, Maria, and their five children, and of his niece Adelaide. This will did not in terms dispose of the testator's real estate in England. The deceased

died on February 23, 1953, domiciled in Switzerland, leaving him surviving in addition to Guido and Adelaide three other nephews and nieces. These were the only persons entitled to his real estate in England in the event of an intestacy. At the date of his death the deceased owned a freehold house in England, arrangements for the sale of which were not completed until after he had died. The value of the real estate in England consisted of £3,000, being the proceeds of the sale.

Guido and Adelaide, by their attorney, Barclays Bank Ld., applied on motion for " a grant of letters of administration with " the English will and codicil annexed " for their use and benefit on the ground that, as the Swiss will was not executed in accordance with section 9 of the Wills Act, 1837, it was inoperative to revoke the English will and codicil so far as they disposed of the testator's real estate in England.

The application came before Mr. Registrar Wilkinson, who refused it, setting out his reasons for doing so and directing that the matter be referred to the judge on motion.

Clifford Mortimer for the applicants.

The other nephews and nieces entitled in the event of intestacy did not appear and were not represented.

H. Clifford Mortimer. Dicey's Conflict of Laws (6th ed., p. 529) states that all rights over immovables are governed by the lex situs and further (at p. 535) that every question as to the devolution of immovables, whether on intestacy or by will, is governed by the lex situs. It is submitted that if the formalities required for a devise of immovables situated in England are those required by the testamentary law of England, namely, section 9 of the Wills Act, 1837, a will disposing of English land could only be revoked in the manner required by English testamentary law, namely, according to the provisions of section 20 of the Wills Act, 1837. *In the Estate of Gossage* [1] is authority for the proposition that " . . . the power of " revocation is merely another aspect of the power of disposi- " tion. . . . " It is, however, stated in Tristram and Coote's Probate Practice (20th ed., p. 91) that " . . . it would seem that " a testator who, by a will made strictly in accordance with the " law of his domicile, *specifically* revokes all previous wills, " effectively revokes a will valid to pass realty in England, even " though his last will may not be valid to dispose of English " realty." The passage purports to be developed from *In re Cartwright*,[2] but in that case the subsequent will containing a revocation clause was not valid according to the law of the testator's domicile, and was admissible to probate only by virtue of Lord Kingsdowne's Act. In *In re Bradby* [3] the testator died domiciled in France, leaving real estate in England. He had

[1] [1921] P. 194, 202–3; 37 T.L.R. 302.

[2] (1939), unreported motion.

[3] (1936), unreported motion.

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In the Estate of Alberti, decd.

executed a will in English form disposing of his real and personal estate, but subsequently made a will valid according to French law disposing of all his estate. It was held that the French will did not revoke the English will as far as the English real estate was concerned. It is submitted that in *In re Bradby*[3] the law was correctly applied, and that it should be followed.

Wallington J. I entirely agree with the submissions made by Mr. Mortimer and grant letters of administration with the English will and codicil annexed, limited to the English real estate.

Solicitors: *Vizard, Oldham, Crowder & Cash for Parker & Bangor-Jones, Worthing.*

E. J.

[3] (1936), unreported motion.

[Court of Appeal.]

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1955
Nov. 14.

Denning, Hodson and Morris L.JJ.

*BURFORD *v.* BURFORD.

Husband and Wife—Divorce—Discretion—Exercise—No finding on issue of desertion—Refusal of court to exercise discretion on petitioner's admission of adultery—Duty of court to find for or against petitioner on matrimonial offence alleged before exercising discretion—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (1) (2).

Husband and Wife — Divorce — Practice — Answer — Amendment — Husband's petition for divorce on grounds of desertion—Admission of adultery by husband in evidence—Application by wife for leave to amend answer and cross-charge adultery—Refusal of leave to amend—Grounds for refusal of leave to amend held insufficient—Order for new trial.

A husband petitioning for divorce on the grounds of his wife's alleged desertion asked the court to exercise its discretion under section 4 of the Matrimonial Causes Act, 1950, in his favour in respect of his adultery with a named woman. By her answer the wife denied the desertion but did not pursue her defence until at the hearing the husband admitted to further adultery with another woman. The wife thereupon applied for leave to amend her answer in order to ask for a divorce on the ground of her husband's adultery. The commissioner refused leave to amend (a) because the husband did not consent to it and (b) because the second named woman would not like to be named in the wife's cross petition. He made no finding on desertion, refused the exercise of the court's discretion to the husband, and refused the wife leave to amend her answer:—

Held, (1) that the court was not entitled to consider the exercise of its discretion under the proviso to section 4 until it had reached a conclusion as to whether the desertion had been proved; (2) that, although the grant of leave to amend was a matter within

the discretion of the court, the reasons for refusing leave to this wife to amend her answer were insufficient to justify such refusal; and that accordingly there must be an order for a new trial in order that justice might be done to both parties.

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APPEAL from an order of Mr. Commissioner Edgedale Q.C.

The wife of a marriage which took place in 1949 left her husband on May 7, 1951, and refused thereafter to live with him, despite letters from him asking her to come back. After three years had elapsed, the husband presented a petition for divorce on the grounds of her desertion, and filed a statement admitting that he had committed adultery with an American woman, now believed to be in the United States. By her answer the wife denied the desertion, and she set up various other matters in her defence, but she did not pursue. She indicated, inter alia, that during the period when the alleged desertion was running, she and her husband had had sexual intercourse on a number of occasions. The husband did not deny those ocasions but said that they had occurred when he had been trying to get his wife to come back and set up home with him again, and that, in consequence, they did not prevent the desertion from running in his favour. In the course of his evidence, the husband told the court that he had committed adultery with another woman, now living in this country. Counsel for the wife thereupon asked for leave to amend her answer in order to cross-charge the husband with adultery and pray for a divorce herself. That application was refused by the commissioner who, in an interlocutory observation, said that unless the other side consented to the amendment he could not allow it; and he accepted as a further reason for refusing the leave to amend a suggestion by counsel for the husband that the second named woman would not like it if she were named in the wife's answer.

At the conclusion of the hearing on July 28, 1955, the commissioner made the following order: "The commissioner "having taken the oral evidence of the petitioner and of the "witness produced on his behalf in support of the petition . . . "the respondent having filed answer . . . but not defending the "suit at the hearing pronounced . . . that he made no finding "in respect of the matters alleged in the said petition, and that "since the celebration of the marriage between the parties the "petitioner had been guilty of adultery and refused to the "petitioner the exercise of the discretion conferred on the court "by section 4 of the Matrimonial Causes Act, 1950,[1] and refused

[1] Matrimonial Causes Act, 1950, s. 4: "(1) On a petition for divorce "it shall be the duty of the court to "inquire, so far as it reasonably can, "into the facts alleged . . . (2) If "the court is satisfied on the evidence "that—(*a*) the case for the petition "has been proved; . . . the court "shall pronounce a decree of divorce, "but if the court is not satified with "respect to any of the aforesaid "matters, it shall dismiss the "petition: Provided that the court "shall not be bound to pronounce a "decree of divorce and may dismiss "the petition if it finds that the "petitioner has during the marriage "been guilty of adultery. . . ."

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"to the respondent leave to amend her said answer by alleging "the adultery admitted by the petitioner and dismissed the said "petition."

The husband appealed.

J. E. S. Simon Q.C. and *C. J. T. Pensotti* for the husband.
Ifor Lloyd Q.C. and *John Mortimer* for the wife.

The following cases were referred to in the argument: *Stone* v. *Stone* [2]; *Blunt* v. *Blunt*.[3]

DENNING L.J. I will ask Hodson L.J. to deliver the first judgment.

HODSON L.J. read the order of the commissioner, stated the facts set out above, and continued: The case was concluded by the commissioner refusing to make any finding at all on the husband's case of desertion, because (as I think is plain from his judgment) he was shocked by the circumstances of the husband's own adultery.

I do not propose, having regard to the course which I think must be taken here, to say anything about the husband's own adultery; but it seems to me that, the adultery having been admitted, it was not open to the commissioner to take the course that he did, namely, to refuse to exercise his discretion without coming to a conclusion whether or not desertion had been proved. I say that, because section 4 of the Matrimonial Causes Act, 1950, provides for the duty which the court has to perform on the hearing of a petition for divorce, and subsection (2) provides that if the court is satisfied on the evidence that the case for the petition has been proved, the court shall pronounce a decree of divorce, but if the court is not satisfied it shall dismiss the petition.

It is only, in my judgment, in cases where the court is satisfied on the evidence that the case has been proved that the following proviso comes into operation: "Provided that the "court shall not be bound to pronounce a decree of divorce and "may dismiss the petition if it finds that the petitioner has "during the marriage been guilty of adultery." That was this case; but the commissioner was not in a position to consider the question of discretion without deciding the matter of desertion first; and, indeed, that is not only right, I think, according to the plain reading of the statute, but it makes good sense as well, because in order to determine whether or not the discretion of the court ought to be exercised in the petitioner's favour the court ought at the same time to make up its mind as to the circumstances in which the parties separated, and whether or

[2] [1949] P. 165; 64 T.L.R. 542.

[3] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76.

not (as Mr. Simon rightly put it) it was indeed the wife who was to blame for breaking up the home. That task the commissioner did not perform, and the question, therefore, arises as to what ought to be done.

I must mention another matter. When the petitioner went into the witness-box and disclosed that he had committed adultery with two women—one of them being an American woman who was probably abroad, and the other a woman whose name was given and who was said to be living in this country—the wife's counsel thereupon asked for leave to amend, in order to cross-charge adultery with the women and ask for a divorce herself.

That application for leave to amend was refused. Of course, it is in the discretion of the court to decide whether or not leave to amend should be given, but, so far as appears, no good reason in this case was given for refusing leave to amend. The first reason which the commissioner put forward in an interlocutory observation was that unless the other side consented he could not do it. That was not a good reason. The second reason, suggested to him by Mr. Pensotti on behalf of the husband and, presumably, accepted by him, was that it would not be a very good thing from the point of view of the woman who would have to be named if leave to amend were given, because she would not like it. That does not seem to be a very good reason for refusing leave to amend.

In all the circumstances of this case, the husband being anxious to have the finding, to which he claims to be entitled on the issue of desertion, the only course open to this court, I think, is to order a new trial. Mr. Simon has urged that his case on desertion is clearly proved, and that we ought to substitute our finding for the absent finding below, and put the matter right. The difficulty about that is that we should be asked to exercise our discretion in addition, and it seems to me that as the matter now stands that might produce injustice upon the wife. It looks very much as if she should have had leave to amend below, and then both issues would have been before the court which had to consider the question of discretion—on the one hand, the wife's desertion and, on the other hand, the husband's adultery; and it would have been open to the court to grant a decree to one or other, or to both, or to neither. But, having regard to the way in which this case has gone, this court cannot really put the matter right. It now appears that, faced by the refusal of leave to amend, and having succeeded in getting the husband's petition dismissed, the wife could not appeal against that decision becaue she had been successful in the case, and she has herself presented a petition for divorce based on her husband's admitted adultery with the second woman referred to by him in his evidence.

If we order a new trial the effect of that will be that the husband's case can come on with the wife's case. In my view,

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the only way of producing a just result is that each party should have the opportunity of having their cases heard. The order of Mr. Commissioner Edgedale must be set aside and a new trial ordered.

DENNING L.J. I agree.

MORRIS L.J. I agree.

Order of commissioner set aside. New trial ordered.

Solicitors: *Hall, Brydon, Egerton & Nicholas; Savory, Pryor & Blagden.*

M. M. H.

[PROBATE, ETC., DIVISION.]

1955
Nov. 7.
Willmer J.

* DIRPHYS (OWNERS) *v.* SOYA (OWNERS). THE SOYA.

Shipping—Collision—Damages for detention—Vessel under charter—Rise in freight market during detention of vessel—Vessel delayed from trading under enhanced freight rates in subsequent charter—Measure of damages.

The plaintiffs' vessel *Dirphys*, while on a voyage to London for loading under a charter, dated October 13, 1950, was in collision with the defendants' vessel *Soya*. The *Dirphys* was diverted to Rotterdam for repairs, which occupied a period of 20 days. While the *Dirphys* was undergoing repairs, the plaintiffs fixed the vessel under a charter, dated January 18, 1951, for a voyage subsequent to the voyage on which she was then engaged, and at a much enhanced freight rate, owing to a sharp rise in the freight market. But for the collision, the *Dirphys* would have completed the earlier charter and entered upon the subsequent charter 20 days earlier. The net rate of profit under the charter, dated October 13, 1950, was £144 3s. 10d. per day, and that under the subsequent charter was £819 17s. 4d. On the question of the measure of damages to be awarded to the plaintiffs in respect of the detention of their vessel during the period of repair:—

Held, that the loss of profits arising from the detention of a vessel was a question of fact, to be proved with reasonable certainty, and was not a matter on which the court was entitled to speculate. A claim for loss of profits, at the enhanced rate, was not proved with reasonable certainty, and was thus a speculation and too remote to be considered a consequence in law of the detention. An average of previous and subsequent voyages should not be resorted to, since it had not been proved that, but for the collision, the plaintiffs would have had any use of their vessel during the period of detention, other than that under the charter, dated October 30, 1950. Accordingly, the measure of the plaintiffs' damages for loss of profits was the equivalent of 20 days' detention at the rate of £144 3s. 10d. per day.

Report of the registrar confirmed.

The Argentino (1888) 13 P.D. 191 and *Strathfillan S.S. Owners* v. *Ikala S.S. Owners*. *The Ikala* [1929] A.C. 196 applied.

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THE SOYA.

MOTION in objection to the registrar's report.

The plaintiffs' vessel *Dirphys* was in collision with the defendants' vessel *Soya*. By an agreement of terms of settlement, the respective claims of the vessels were referred to the Admiralty registrar. At the time of the collision, the *Dirphys* was under a charter whereby a net profit of £144 3s. 10d. was earned per day. Owing to a sharp rise in the freight market during the period of detention, the net profit earned by the *Dirphys* in the subsequent charter was £819 17s. 4d. per day.

Before the registrar, the plaintiffs claimed 20 days' detention at the rate of £819 17s. 4d. per day, contending that, as a result of the collision, they had been delayed by 20 days from engaging their vessel upon a voyage at the profitable rates existing at the beginning of 1951 in the Far East. The defendants contended that the rate should be that under the charter, dated October 13, 1950, or alternatively, the mean between that rate and the rate of the voyage previous to the collision, being £203 10s. 9d. per day.

The registrar held that, for the purposes of ascertaining the loss of profits during the period of detention, the *Dirphys* could not be regarded as a free ship, since she was proceeding under a charter at the time of the collision, and the loss of profits fell to be determined under that charter. The net profit on that voyage was £8,939 16s. 5d., and the voyage was of a duration of 82 days, inclusive of the 20 days' detention at Rotterdam. The plaintiffs earned this sum in 82 days, giving a net daily profit of £109 0s. 5d., whereas, but for the collision, this profit would have been earned in 62 days, giving a net daily profit of £144 3s. 10d. The measure of the plaintiffs' loss was the difference between these two figures, amounting to £35 3s. 5d. multiplied by 82. The delay in arriving at Bombay may have deprived the plaintiffs of the opportunity of engaging their vessel in highly profitable trade in the Far East earlier than they in fact did, but that is a speculation and too remote a consequence in law to carry damages.

The plaintiffs moved that the decision of the registrar, in so far as it concerned damages for loss of profits, be set aside or varied. The plaintiffs contended that, in disallowing the plaintiffs' claim in full, the registrar was acting against the weight of evidence; that there was evidence on which the registrar should have found that but for the collision with the *Soya*, the *Dirphys* would have been fixed in January, 1951, for a charterparty commencing on or about March 10, 1951, from Dungun to Japan, or would have been fixed in January and March, 1951, with charterparties at rates similar to, or better than, those in the charterparty of January 18, 1951; the registrar was in error in fact and in law in taking 82 days instead of 62 days in calculating

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the amount of the plaintiffs' loss; the registrar was wrong in law in basing his decision on "the charter under which she (the *Dirphys*) was proceeding"; and in holding that, although the delay in arriving at Bombay may have deprived the plaintiffs of the chance of becoming engaged in highly profitable ventures in the Far East earlier than they were so engaged, this was a speculation and too remote in law to carry damages.

K. S. Carpmael Q.C. and *R. F. Stone* for the plaintiffs.
H. V. Brandon and *D. L. Rait* for the defendants.

The following cases and authorities were cited in argument: Roscoe's Measure of Damages in Maritime Collisions, 3rd ed., pp. 87, 91 and 108; *The Argentino* [1]; *The Ikala* [2]; *The Mediana* [3]; *The Volturno.* [4]

WILLMER J., having stated that the only question raised in the objection related to the measure of damages to be awarded to the plaintiff in respect of the detention of their vessel during the repair of the collision damage, continued: It is common ground that, in consequence of the collision, the plaintiffs' vessel, the *Dirphys*, was detained for 19¾ days. For the purpose of ease of calculation, everybody, including the registrar, has taken that as being substantially equivalent to 20 days.

In respect of those 20 days it is, I think, not unimportant to observe that, in addition to the loss of profit which has been the subject-matter of this dispute, there has been a substantial allowance in respect of the costs of running the vessel which were thrown away. That, I think, is a matter which is not to be lost sight of. Actually, as far as that figure is concerned, although I do not quite know how it is arrived at, the registrar appears to have taxed down the sum which was originally claimed; but that has not been the subject of argument before me. All I am concerned with on this appeal is the amount which, over and above that, should be awarded for loss of profits.

The matter arises in this way. At the time of the collision the *Dirphys* was proceeding in ballast, bound for London, where she was due to load a cargo of sugar under a charterparty for carriage to Bombay. In consequence of the collision she was diverted to Rotterdam where the collision repairs were executed and, having completed the repairs, she then went on to London and was in time to load her cargo under the charterparty for Bombay.

As a result of that voyage, which lasted until March 21, 1951, the *Dirphys* made a profit of £8,939 odd which, calculated on a daily basis, and excluding the 20 days whilst the vessel was immobilized under repair, produced a daily rate of £144 3s. 10d.

[1] (1888) 13 P.D. 191.
[2] [1929] A.C. 196.
[3] [1899] P. 127.
[4] [1921] 2 A.C. 544; 37 T.L.R. 969.

Although the registrar in his reasons has, if I may say so, stated it in rather a roundabout way, he has, in fact, adopted that figure as his measure for the daily rate to be allowed for loss of profit.

The plaintiffs' claim is based upon the subsequent history. The arresting thing that happened was that during the early part of 1951 freight rates generally climbed very steeply; in particular there was a very profitable trade, which I suspect was not entirely unconnected with the Korean war, between India, Malay and the Far East.

On January 18, 1951, during the period while the *Dirphys* was actually under repair at Rotterdam, a charterparty to carry iron ore from the port of Dungun, in Malay, to Japan, was concluded, which was to come into operation at the conclusion of her voyage to Bombay.

It was stated in that charterparty, which was for a vessel to be nominated (and one in respect of which the *Dirphys* was in fact nominated), that the vessel to be nominated was expected to be ready to load about March 17. The *Dirphys* was not ready to load under the charterparty until March 31, but she carried out that charterparty although a little later than expected.

The result of that was an extremely profitable voyage in which, during the course of 36 days, the owners made a net profit of £29,515, which gives an average daily rate of profit of £819 odd.

The plaintiffs' contention, both before the registrar and before this court, was to the effect that, in assessing the loss of profit that ought to be awarded to these owners for detaining the vessel during the 20 days of repair, regard should be had to the very substantial margin of profit earned upon this subsequent voyage, the engagement for which was actually negotiated during the period when the vessel was undergoing repair.

Moreover, the case for the plaintiffs goes a little further than that because, among the documents presented to the registrar, there were accounts in respect of two further voyages subsequent to the one to which I have referred, and, in the case of both these subsequent voyages also, a very high rate of profit was shown, averaging in both cases substantially more than £800 per day.

It is on the basis that the daily rate ought to be calculated at something in excess of £800 per day that the plaintiffs arrive at the large claim for £17,000 odd by way of damages for detention.

As the learned registrar said in the reasons for his decision, the plaintiffs' argument was perfectly simple. Having lost 20 days before loading in London, she was 20 days behind time at Bombay and, therefore, she lost 20 days' profit at the high rates then prevailing in the Far East, as evidenced by the charterparty of January 18, 1951, and the subsequent charters.

All the authorities, I think, recognize that questions of this sort must, in the last resort, resolve themselves into questions of fact. It is a matter of fact to assess what the injured party

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Willmer J.

has in fact lost by reason of the detention of his ship. It is elementary, of course, that it is for the party claiming damages for the loss of use of his vessel to prove to the satisfaction of the court both the fact of the loss and the amount of the loss.

It is not, in the circumstances, particularly helpful to refer at length to authorities, but I think I may refer to two short statements, both of which have been referred to during the course of the argument, and which, as I see it, crystallize the question that the court has to decide in a case of this character.

The first authority I want to refer to is that contained in the well-known and often-quoted words of Bowen L.J. in *The Argentino* [1]: "A ship is a thing by the use of which money may "be ordinarily earned, and the only question in case of a collision "seems to me to be, what is the use which the shipowner would, "but for the accident, have had of his ship, and what (excluding "the element of uncertain and speculative and special profits) "the shipowner, but for the accident, would have earned by the "use of her."

The only remark I venture to make in passing upon those well-worn words is with regard to the special exception which the learned Lord Justice makes in the case of "uncertain and "speculative and special profits." It is, I think, implicit in his statement of the law that it is for the plaintiff to prove his loss of profits at any rate as a matter of reasonable certainty.

If that is the correct interpretation of what was said by Bowen L.J., it marries very well with what was said by Viscount Sumner in *The Ikala* [2]: "A ship's day is not like a unit of "currency, always good for so many shillings. It has to be "proved that, in doing the shipowner the wrong of laying his "ship idle at the time in question, work, which she would other-"wise have done during the time, went undone to his measurable "loss or was only done by resorting to other expedients at a "measurable outlay."

If I seem to emphasize the use in two places by Viscount Sumner of the word "measurable," it is for the purpose of stressing what, as I said before, is implicit in Bowen L.J.'s words, that loss of profit is a matter to be proved or measured with reasonable certainty, and not a matter on which the court is entitled to speculate.

The plaintiffs contend that they have proved a loss of over £800 a day for 20 days as a matter of reasonable certainty. Counsel for the defendants, on the other hand, applying himself to the question posed by Bowen L.J. in *The Argentino*,[3] as to what was the use of his ship which the shipowner would have had but for the accident, contends that, but for the accident, this ship, during those 20 days, would in point of fact have been pursuing her voyage between London and Bombay in pursuance of the earlier charterparty. On that basis the defendants admit

[1] (1888) 13 P.D. 191, 201.
[2] [1929] A.C. 196, 205.
[3] 13 P.D. 191, 201.

that the plaintiffs are entitled to recover some loss of profit, but they submit that the fair loss of profit to take is represented by the average daily profit made on that particular voyage, excluding, for the purpose of arriving at that figure, the 20 days that were lost during repairs.

But, as I said, the plaintiffs' claim that what they lost was 20 days at the enhanced rate of profit of over £800 per day. The argument is put in this way: but for the collision, the voyage from Bombay would have been completed 20 days earlier; the fixture from Dungun to Japan would equally have been arranged to begin 20 days earlier, and the result would have been that the plaintiffs would have enjoyed a further 20 days of trading at the extremely profitable rates which appear to have been maintained throughout at least several months of the year 1951. Persuasive as the plaintiffs' argument is, I am not satisfied that, by proving the facts they have proved, they have shown with any reasonable certainty that there was a loss of profit on anything like this scale.

It may very well be true that, but for the collision, the *Dirphys* would have started her profitable Far Eastern trading, if I may so describe it, 20 days earlier than in fact she did; but whether in the long run the plaintiffs would have been any better off has been left, as far as I can follow the evidence, as a matter of complete speculation. If the plaintiffs could have proved that, because of those 20 days' detention, they lost the opportunity of a complete voyage at those enhanced rates, then that would have been a measure of damage which I could well understand. But I do not know, on the evidence which has been given, what the ultimate outcome of this loss of 20 days may have been. For all that I know, that loss of 20 days may, in fact, have cost the plaintiffs nothing at all. All the engagements to which the ship was committed were in fact carried out. There is nothing to show, one way or the other, what would have been the result if the programme had all been accelerated by 20 days. For all that I know, different rates of freight might very well have been agreed in relation to the subsequent charters if the loading had in each successive case been 20 days earlier. It is, I suppose, even conceivable that, working it out over a long period, the plaintiffs may have been left actually better off, having regard to the rates prevailing on the particular dates when their various commitments were negotiated.

I mention these considerations as tending to confirm the view at which the registrar arrived, that the loss of profit at this very enhanced rate which the plaintiffs are claiming, and claiming on the basis of the subsequent charterparties into which they entered, was too speculative and too remote to be taken into consideration as a consequence in law of the detention in respect of which this claim arises.

Attractive as the plaintiffs' argument is, and attractively as it has been presented by Mr. Carpmael, I cannot persuade myself

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that the registrar was wrong, in all the circumstances, in coming to that conclusion.

The only question therefore remaining is whether I ought to leave the award of damages as it is, namely, calculated on the basis of the profit actually earned in the course of the voyage on which the vessel was engaged at the time of the collision, or whether I ought to look to the period both preceding and succeeding the collision voyage and average the daily profits so as to get a fairer basis of comparison. If I am to do that, a further question arises: how many voyages ought I to go back and how many voyages ought I to go forward? I have given very careful consideration to that and, on the whole, I am not prepared to depart from the method adopted by the registrar, namely, that of assessing the loss of profit on the basis of the voyage on which the vessel was actually engaged at the time of the collision.

I come to that conclusion largely because, as I have said, in answering the question raised by Bowen L.J. in *The Argentino*,[4] the only answer I can give as to what use the shipowner would have had of the vessel during the period of detention, is that he would have used her for prosecuting the voyage from London to Bombay; and, if he had so used her during 20 days, he would have been earning a profit at the rate of about £144 per day. I cannot say that the learned registrar was wrong in arriving at that figure and, accordingly, I dismiss the objection and confirm the registrar's report.

Registrar's report confirmed.
Leave to appeal granted.

Solicitors: *Holman, Fenwick & Willan; Thomas Cooper & Co.*

A. S-R.

[4] 13 P.D. 191, 201.

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Singleton, Jenkins and Parker L.JJ.

[COURT OF APPEAL.]

*GREGSON *v.* HICK HARGREAVES & CO. LD.

Factory — Dust — Elimination — "All practicable measures" — Substantial quantity of dust—Visible dust not dangerous—Invisible dust dangerous—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 47 (1).

The defendants had employed the plaintiff as a moulder in their iron foundry from 1934 to 1951. In January, 1951, he was

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[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

certified as suffering from silicosis. Substantial quantities of dust were given off at three stages of the process of dismantling loam moulds. Up to the time when the plaintiff's condition was diagnosed the defendants did not know of the danger of the dust, and it was discovered that although the visible dust given off was not injurious, an invisible dust containing silica remained in the atmosphere which, breathed in over a long period, might severely damage the lungs and cause silicosis. The cause of the plaintiff's silicosis was inhalation of this silica. Protective masks were provided for some employees only at one stage of the dismantling process.

On a claim by the plaintiff for breach of section 47 (1) of the Factories Act, 1937, Donovan J. held that the defendants had taken all practicable measures to overcome the dangers of which they had contemporaneous knowledge and gave judgment for the defendants. The plaintiff appealed.—

Held, that, as a substantial quantity of dust was given off at three separate stages of the process, and the defendants had failed in their duty to take all practicable measures by not providing masks for those moulders likely to come into contact with the dust, or instructing them to keep away from the places where a substantial amount of dust was given off until such dust was gone, the defendants were in breach of section 47 (1). That section required employers to take all practicable steps if a substantial quantity of dust was given off, and it was no defence to employers who failed to take all practicable steps against visible dust to contend that what caused the damage was invisible dust given off at the same time of which they had no knowledge and whose dangerous qualities were unknown to them. Accordingly, the defendants were liable to the plaintiff.

Decision of Donovan J. [1955] 1 W.L.R. 1025; [1955] 2 All E.R. 860 reversed.

APPEAL from Donovan J.

The plaintiff, Robert Gregson, contracted silicosis while employed as a moulder in the defendants' iron foundry. He claimed damages for breaches of section 4 (1) and 47 (1)[1] of the Factories Act, 1937. On the appeal the plaintiff relied solely upon section 47 (1).[1]

The facts are fully set out in the judgment of Singleton L.J.

Fenton Atkinson Q.C. and *Godfrey Heilpern* for the plaintiff.
H. I. Nelson Q.C. and *C. M. W. Elliott* for the defendants.

The following cases were cited in argument: *Adsett* v. *K. & L. Steelfounders and Engineers*[2]; *Crookall* v. *Vickers-Armstrong*

[1] Factories Act, 1937, s. 47 (1): "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom. . . ."

[2] [1953] 1 W.L.R. 137; [1953] 1 All E.R. 97n.; affirmed [1953] 1 W.L.R. 773; [1955] 2 All E.R. 320.

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Ld.[3]; *Richards* v. *Highways Iron Founders (West Bromwich) Ld.*[4]

SINGLETON L.J. The plaintiff is a man just under 60 years of age, and he was employed by the defendants at their factory in Bolton as a moulder. The defendants have a large foundry in which they make castings of various kinds, some of them being heavy and big. Everyone says that they are good employers in the best sense of the term. The plaintiff brought an action against the defendants alleging that he had suffered injury to his health through their negligence or breach of statutory duty. Donovan J., who had the case before him at the assizes at Manchester in April of this year, gave his considered judgment on May 3, and by that judgment he held that the defendants were not responsible in damages. The plaintiff appeals to this court.

The plaintiff had been employed by the defendants for many years; from the year 1934 until 1951 he was continuously employed in this same factory; he had been employed by the defendants on and off before that date, and he had been engaged in the same sort of work for most of the time after his service in the first world war. In January, 1951, he was certified as suffering from pneumoconiosis, and it is agreed that he was then and is now suffering from that species of pneumoconiosis which is called silicosis. It is further agreed that this disability has arisen out of and in the course of his employment by the defendants. His claim against the defendants was for damages which he alleged were due to the defendants' breach, or breaches, of sections 4 and 47 of the Factories Act, 1937.

He had worked for many years as a moulder. During certain of the moulding processes dust is given off. In the course of his judgment Donovan J. said[1]: "The present case has revealed, "it seems for the first time, that dust from loam may contain "silica; that is, minute fractured particles of sand floating in the "air which, breathed in over a long period, severely damage the "lungs. This is what has happened to the plaintiff." Thus, one has it proved or admitted that the illness from which the plaintiff was found to be suffering, and from which he is still suffering, was caused through the inhalation of minute fractured particles of sand floating in the air, and that that happened during the course of his employment with the defendants.

There were several questions raised in the course of the hearing before Donovan J. In this court Mr. Atkinson directed our attention to one part of section 47 of the Factories Act, 1937, and said, quite frankly, that he was not raising any other point. There have been a number of decisions of the courts both under section 4 and section 47 of the Act, some of which have been

[3] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.

[4] [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205.

[1] [1955] 1 W.L.R. 1025, 1026; [1955] 2 All E.R. 860.

cited to us; but I do not think that in the present case they are of very great help. I come directly to section 47 of the Act in order to consider its provisions. It is headed: "Removal of dust "or fumes," and subsection (1), as far as is material, reads: "In every factory in which, in connection with any process "carried on, there is given off any dust or fume or other impurity "of such a character and to such extent as to be likely to be "injurious or offensive to the persons employed, or any substantial "quantity of dust of any kind, all practicable measures shall be "taken to protect the persons employed against inhalation of the "dust or fume or other impurity and to prevent its accumulating "in any workroom . . ." That part of the section which I have read has two distinct branches; the first deals with "dust or "fume or other impurity of such a character and to such extent "as to be likely to be injurious or offensive to the persons "employed," and the second refers to "or any substantial "quantity of dust of any kind"; and in either case "all practic- "able measures shall be taken to protect the persons employed "against inhalation of the dust or fume."

Mr. Atkinson does not place any reliance on what I have described as the first branch of the section; he recognizes that upon some of the authorities there might be considerable difficulty in his way. He relies on the second part, and in particular on the words "or any substantial quantity of dust "of any kind." He submitted to the court that it was quite clear that in certain parts of the processes which were carried on in this foundry there was given off a considerable quantity of dust; and, that being so, he submitted that the employers were under a duty to take "all practicable measures to protect the persons employed against inhalation of the dust." He submitted further that upon the evidence it was clear that the defendants had not taken all practicable measures to protect the persons employed against such inhalation.

The shop in which the plaintiff was employed to work was some 300 feet long and 45 feet wide, and moulding was done in different parts of the shop. The work which was done was mostly the making of large castings, and there were employed both moulders and labourers. The castings are made in large moulds which are built up for the particular castings. The times at which dust is given off in quantities are said to happen on three different occasions. The judge said[2]: "With regard "to the second category of dust dealt with by section 47 (1), "namely, 'a substantial quantity of dust of any kind,' the "position is this: such a quantity of dust is given off in the "moulding shop when the following operations are carried on" —"Such a quantity," at that point in his judgment, clearly means a substantial quantity—"(i) The removal of certain steel "grids embedded in the mould. This takes place after casting

[2] [1955] 1 W.L.R. 1025, 1028.

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"and while the mould is still warm. The removal of these "grids breaks part of the mould and dust ensues. The heat of "the mould causes this dust to rise vertically and most of it "escapes through the roof windows. (ii) The breaking down "of the mould by manual labour after casting has taken place "and the mould is no longer required for similar castings. "(iii) The tipping up by a crane of the heavy steel plate on "which the mould was originally built up. This is the final stage "of the breaking-up operation and it gets rid of the residue of "the debris of the mould in one operation, on to what is called "a dust ruck. All these operations take place in the moulding "shop."

Thus Donovan J. found that in each of those three operations there was given off a substantial quantity of dust. The question which arises is: Did the defendants take all practicable measures to protect the persons employed against inhalation of the dust? One measure which can be taken is to provide a mask which would cover the nose and the mouth of the person employed, and which would thus prevent inhalation of the dust. Mr. Atkinson submitted that the persons who were near or within range of the place at which the dust was given off in any one of the processes I have mentioned ought to have been provided with and made to use masks, or at least ought to have been warned and directed not to remain near the place at which the substantial quantity of dust was given off.

The judge dealt with the three occasions on which dust in his view would be given off in substantial quantities in this way[3]: "The measures which the defendants took to protect "workpeople against inhaling the aforesaid dust were these. "When the steel grids were being removed from the mould, "masks were provided for and were worn by the men doing "this job. To these masks a tube some 30 feet long was fitted, "and the other end of the tube usually tied to a stanchion some "five or six feet from the ground, the idea being that the "worker should breathe uncontaminated air. So far as anyone "could tell, this was the result. This mask and tube were "primarily a protection against fumes which were released when "the grid was taken away from the casting, though they served "to protect against the inhalation of dust as well. Due to the "heat, any one man could work only two minutes or so at this "job and would then be relieved by another moulder who would "wear the same mask, as a rule, as the man he relieved. "While waiting to take their turns, the other moulders would "stand around the job, and one of the plaintiff's contentions "is that they were not protected at all while so waiting. I am "satisfied that no such moulder was ever inconvenienced by "dust while so waiting. There were no complaints. The dust, "as I say, rose vertically with the heat and the waiting moulders

[3] [1955] 1 W.L.R. 1025, 1029.

" were free to stand where they liked while awaiting their turn " at the work of dislodging the grids." There were six moulders employed; at one point it was suggested that there were six standing in the vicinity at the same time, and I am not sure whether the total number of moulders was six or eight. Two moulders at one time went down inside the mould, and the others were waiting nearby. A considerable quantity of dust was given off, as the evidence shows, when the grids were pulled up. The grids are pulled out by a crane. Mr. Gregson, the plaintiff, was asked some questions upon this, and he said that two men would go down, they could only remain there for about two minutes; they took it in turns, and when the other men were waiting their turn they would be standing a few yards away. It would appear that the next two men had to be near so that when the first two men had done their two minutes turn and came up they would be ready to go down. If a substantial quantity of dust was given off by the operation of pulling up the grids, it is obvious that the men would be in some risk of inhaling dust unless some precautions were taken. The two men who were down in the mould were provided with masks; those who were standing near were not provided with masks, nor were they given any instructions, so far as I can find from the evidence, that they should keep some distance away so as to be out of range of the substantial quantity of dust. No precaution was taken to prevent them inhaling dust, apart from the fact that the premises were ventilated. They were found by the learned judge to have been well ventilated, although it is a fact that soon after this trouble arose a better and more elaborate system of ventilation was introduced. It is said by Mr. Nelson that practicable means had been taken by way of ventilation. In my view it would have been possible for the employers to take further steps than that, and their duty to take all practicable measures in such circumstances would include either the provision of masks for those men who were waiting by, or instructions to the men who were waiting to keep away from the place where the substantial quantity of dust was given off until it had gone. They did not take those steps, and it appears to me that, in that respect, they did not fulfil that which was their duty under the statute. The judge said [3]: " While waiting to " take their turns, the other moulders would stand around the " job, and one of the plaintiff's contentions is that they were " not protected at all while so waiting. I am satisfied that " no such moulder was ever inconvenienced by dust while so " waiting."

It is a little difficult to see how far that finding goes, though it is right to say upon the evidence that there was nothing to show inconvenience, or it may be that no one had complained of inconvenience at that stage; but the duty under the statute

[3] Ibid.

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is to take all practicable measures to protect the persons employed against inhalation of the dust. It appears to me that there were further practicable measures which could have been taken, such as were mentioned in some of the evidence which was given, in particular in that of Mr. Hepburn, a witness who had been a factory inspector at one time and chairman of a joint standing committee in connection with foundries to review problems in the industry. Mr. Hepburn was asked: "In 1938 "what form of masks were there available and recommended "for use?" and he answered: "In 1938 the Factory Depart- "ment approved a new and important type of respirator which "was developed by the Ministry of Supply and a registration "number was taken out. It was approved after the most "exhaustive tests had been carried out"; he added that it was the Mark IV respirator, which he said is still in use although it has been slightly improved. Then he was asked: "Was a "mask of that type available to the ordinary employer? (A.) "In 1938 it was put on the market and the staff of factory "inspectors were instructed to advise people to get it." In another part of his evidence he said: "I do not think it would "be bearable to wear it continuously, but certainly it should be "worn for short periods." In cross-examination he was asked: "When you speak about respirators being approved by the "Ministry in 1938, what were they approved for? (A.) They "were approved for the purpose of preventing the wearer from "breathing dust into the lungs, which would be injurious to "health. (Q.) Well, now, did the Ministry, or the department "who approved them, recommend their use in iron foundries "in 1938 and from that time onwards? (A.) Yes, the Chief "Inspector gave approval of them"—and then he said that it was the Home Office who recommended them. He was further cross-examined as to the difficulty of using them and he said: "It was part of a policy for factory inspectors to recommend "respirators to firms for the use of their workers to prevent "them from breathing this dust"—and a little later he added: "I should say they have all been advised at some time or other "by an inspector of factories." Later he said he did appreciate that there were difficulties if a man had to wear a Mark IV mask the whole day. Mr. Nelson, on behalf of the defendants, put to him: "I noticed you said yesterday that it is not to "wear all day long? (A.) I suppose not, no. It is meant to "cover periods where the dust is excessive and is not being "removed by general ventilation. (Q.) You see, in this case "we have been told that the dust, or rather the knock-out, "would continue for as long as two days. (A.) There is nothing "to prevent a man from wearing it for two days. It is so "designed as to give very little resistance to breathing, and "for that purpose you will notice that there is a double filter "on it, whereas the usual patterns up to that date had just a "single canister fitting. The whole principle of this respirator

"is a large breathing area for settling in the air so as to give "as little resistance." In further answers he said: "I am "suggesting that it is for the use primarily of those people who "are near to the dust exposure," and he was asked: "Such "as the labourers who are doing the work? (A.) And that the "other dust that is in the atmosphere—floating in the atmo-"sphere of the foundry—should be dealt with by good circulation "of air as required by section 4. (Q.) I think it sounds as though "you are agreeing with the suggestion I was going to make. "It would be absurd to suggest that the plaintiff at one end "of this loam moulding shop should wear a mask while the "labourers, some half of the way down the shed are knocking "out? (A.) I would not suggest that for one moment. (Q.) It "is not practicable? (A.) Oh, yes, it is practicable to wear it." Another answer he gave was: "If the ventilation of the whole "was not adequate then the alternative practical means was "the wearing of a respirator. (Q.) In this case what you are "saying is that the real trouble here was that the ventilation "was not adequate? (A.) It was not adequate, in my opinion, "but at the same time, from the evidence we have heard that "six men were standing waiting their turn to go down into "this core, they would be as much exposed to this dust as a "man inside, because the casting is hot at the time and the "hot air rises up above just like the position I am in standing "here. The core is like this and the men are standing round "and they get the dust round them." I would add that the defendants' foreman, Mr. Hardman, when he gave evidence, said that the men who were waiting would be fairly near. Furthermore, it was not suggested by the defendants that the Mark IV respirator, or some other form of mask, would not be a help against the inhalation of dust.

It appears to me rather as though these employers, and no doubt other employers, looked upon this branch of the Factories Act as creating a duty only to provide against dust or fume or other impurity of such a character and to such an extent as to be likely to be injurious; they did not realise that the dust which was given off in their factory contained silica. The protection given by the Act is not only against impure dust or fume, but there is protection to be given against inhalation if any substantial quantity of dust of any kind is given off. Here there was a substantial quantity of dust given off, and the provision of a Mark IV respirator or a mask of a similar kind would have been something which would have helped to prevent this workman inhaling dust.

The judge in dealing with the second operation said[4]: "As "regards the breaking down of a mould when no longer required, "this was done by labourers and not by moulders. The "labourers were not made to wear masks, though they were "available, nor were the labourers pressed to wear them. If "the plaintiff had been a labourer who had had to do this work,

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" different considerations might arise. But as a moulder the " plaintiff was 60 to 70 yards from where this process, known " as 'knocking off,' was done and there was nothing to suggest " that any dust was reaching him and being inhaled by him." Thus the learned judge recognized that different considerations would arise if the plaintiff had been a labourer who had to break down the mould. It seems that he would find that the labourers, in such circumstances, should be provided with masks while doing the breaking down, for there was a substantial quantity of dust given off when that was being done, and it was the duty of the employers to take all practicable measures to protect those employed by them against inhalation of the dust. But Donovan J. thought that that did not apply to the plaintiff, who was a moulder, because, according to his view of the evidence, the plaintiff was 60 to 70 yards from the place at which the operation known as knocking off was done, and there was nothing to suggest that any dust was reaching him and being inhaled by him.

When Mr. Hardman, the foreman of the shop and the responsible official with the defendants, was asked about these three operations he gave some answers which I propose to read. He was asked first about the easing of the bars and the pulling out of the grids, and he agreed that there was a substantial quantity of dust given off then. He was asked: " The next " stage is the knocking off process "—that is the second process I have mentioned—" and is it right that with the big castings " the labourers come and knock to pieces the main part of the " mould actually in the pit where the casting has been done? " (A.) They break it down in the pit where it has been done. " (Q.) And that is, of course 10 or 15 feet from where a moulder " is working at some other job? (A.) Yes, approximately "—10 or 15 feet, the defendants' foreman said. It may be that Donovan J. had not a note of that part of the evidence, for in his judgment he says[4]: " But as a moulder the plaintiff was " 60 to 70 yards from where this process, known as 'knocking " ' off,' was done." That may have had something to do with the conclusion at which the learned judge arrived.

The witness was asked further: " (Q.) And then labourers " come in with crowbars and pick-axes, do they not? (A.) No " picks, only spades and crowbars. (Donovan J.): Is the casting " still inside the mould at this stage? (Mr. Fenton Atkinson): " Yes, the casting is still inside, is it not? (A.) Yes. (Q.) This " is only a small mould, but I suppose three or four of them set " to work and they bash it to pieces with these implements they " have got? (A.) Yes. (Q.) That must give a substantial " quantity of dust? (A.) It does in a way, but we must not " forget that the men who are doing the job do not like the dust " and naturally they keep it down as much as they possibly can,

[4] [1955] 1 W.L.R. 1025, 1029.

" and you will hear them argue 'Keep that dust down, boys.' " (Q.) They grouse about the dust, do they? (A.) Between themselves; never complain to me about it. (Q.) I know there is a " difference between private grousing and official complaint. " (A.) Yes. (Q.) But amongst themselves they regard it as a " pretty dusty job? (A.) Yes, to be honest, yes. (Q.) I suppose " you will say there is a substantial quantity of dust given off " at that stage? (A.) There is some given off. (Q.) That is a " very mild way of describing it? (A.) Well, substantial—can be. " (Q.) At any rate, the moulders who are not doing the job " themselves may be working quite close enough to get the dust? " (A.) They could. (Q.) Very often would be? (A.) Well, very " often would only be once in six weeks. (Q.) But this breaking " up goes on for how long, several hours? (A.) It takes up one " complete day to strip the outside of that mould, from half-past " 7 until 7 o'clock in the evening. (Q.) Then the rubble, or " whatever I should call it, which is left when the labourers have " broken up the mould at the pit is loaded into tubs, is it not, " and transported to your dirt ruck by the crane? (A.) The " material is put in the tubs and taken away as they are breaking " it down. (Q.) And it is going on all the time? (A.) All the " time, yes. (Q.) And that you agree, is one of the things " that gives rise to dust when the tubs are tipped out? " (A.) Yes. (Q.) I suppose shovelling the material into the tubs " will give rise to a substantial amount of dust, will it not, and " then there are the later stages of the process carrying it to— " do you call it the dirt ruck? (A.) Yes." Later the witness was asked: " (Q.) Was there one large pit approximately 50 feet " from the dirt ruck? (A.) Yes. (Q.) In which castings were " cast? (A.) Yes, one large pit will be about 50 feet from the " dirt ruck. (Q.) Is that a place where the plaintiff would " frequently have to work? (A.) He would work there if he was " making castings that would require to go into that pit." And later again: " (Q.) At any rate, are we agreed so far that at " varying stages of the operation with these big castings, a " substantial amount of dust was given off? (A.) Yes." The foreman's evidence agreed to some extent with the plaintiff's evidence as to the different processes, and with the estimate of time that the plaintiff gave for these different processes. The plaintiff has said that the men inside the mould who had to get the grids away would be occupied on that work for most of the day, and that the knocking off, or the breaking up process, would take two days or more.

If the plaintiff was employed, as Mr. Hardman said, 10 or 15 feet from the place where the knocking off was going on, it is quite a different thing to being employed 60 or 70 yards from it. If it was necessary, in the judge's view, for the labourers to be protected by the provision of respirators or masks, equally, I should have thought, precautions ought to have been taken in respect of a moulder who was perhaps 10 or 15 feet away; he

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ought to have been provided with a mask or he ought to have been warned of the risk and told to keep out of the way when the concentration of dust was heavy; but it was not regarded by his employers as necessary to provide him with a mask or to give him any particular warning.

The same applies, as I think, to the third process, the final tipping, as to which the judge said[5]: "With regard to the "final tipping of the plate, this is the operation which gives off "most dust. It takes place about twice a month, and when it "was being done the doors were opened and the moulders were "sent out of the shop until the resulting cloud of dust—which "at times might fill the whole shop for a few moments—had "dispersed. It was, whenever possible, done on a Saturday "morning, when few moulders were in the shop." It does appear from that passage in the judgment that more precautions were taken when that was done than during either of the other processes which I have mentioned. "The doors were opened "and the moulders were sent out"—that was questioned upon the evidence, but the judge found that "the moulders were sent "out of the shop until the resulting cloud of dust—which at times "might fill the whole shop for a few moments—had dispersed." There is nothing to show who told the men when they could come back. However, the work was done, when possible, on a Saturday morning when there were few moulders about.

It is upon those three processes which were carried out in the shop that Mr. Atkinson, on behalf of the plaintiff, submits that it is clearly shown that the defendants did not perform their duty under the statute. Mr. Atkinson submitted that in relation to each of the processes, if a moulder was near the work which was being done, he ought to have been provided with a mask; a mask is something which is recognized as preventing, or at least lessening, the risk of inhalation; and he added that if employers have in their shop a process which gives off any substantial quantity of dust of any kind they are under a duty to take all practicable measures to protect the persons employed against inhalation of the dust. They ought, he submitted, to provide masks; furthermore, they ought to have taken some steps to warn the men not to be near the accumulation of dust which was there at a particular time, and here neither of those things was done. Upon the judge's findings in the early part of his judgment, upon the admission as to the plaintiff's illness, and the finding as to the cause of it, Mr. Atkinson submitted that the judgment ought to have been in favour of the plaintiff. He said it was clear that the plaintiff's illness was caused by inhalation of dust, and that the defendants could not be heard to say that their breach of the statute was not the cause of the damage; in other words, he submitted that once there was proved a breach of the statute, followed by damage of a kind which the

[5] [1955] 1 W.L.R. 1025, 1029.

section is designed to prevent, the onus was then upon the defendants to show, if they could, that if they had taken all practicable measures the damage would not have occurred. He added that the defendants did no such thing; they called no medical evidence, and upon the findings of the judge there ought to have been judgment for the plaintiff.

Mr. Nelson, on the other hand, submitted that upon the evidence as a whole it was shown that the defendants had taken all practicable measures to prevent the inhalation of dust. He said that the two men who had to go inside the mould in order to get out the grids were provided with masks; furthermore the defendants watered their floor, and when the tipping process was going on the men were sent out, and that work was done as a rule on a Saturday morning. He submitted that that showed that the defendants had taken all practicable measures to prevent inhalation of the dust. He drew our attention to the fact that Mr. Hepburn, the witness for the plaintiff, said that masks or respirators were for use primarily by people who were near to the dust, and that is quite right. No one could successfully contend upon this evidence that if there was given off a considerable quantity of dust at one end of this 100 yards long shop, everyone down to the other end of the shop should be provided with a mask. Against that, if there be workmen quite near to the point at which a substantial quantity of dust is given off, there is a duty to take all practicable measures to prevent their inhaling the dust. They are at risk because they are near; they are near because of the nature of their work, they have to be there, and the duty upon the employers is to take all practicable measures. Those measures appear to me to include a warning to the men to keep away while the substantial quantity of dust is there and, I think, the provision of respirators or masks for the men who have to be close to the place at which the substantial quantity of dust is given off, and the men ought to be instructed to wear their masks at that time.

I recognize that that places a considerable obligation upon the defendants. I understand they are now undertaking that duty. It was argued at one time that they ought not to be found to have so high a duty upon them, because no one knew of the risk of silica in this class of work, but that question to my mind does not arise. On the latter part of the section on which Mr. Atkinson relies, he is entitled to say there was given off a substantial quantity of dust, and thus the employers were under a duty to take all practicable measures to protect the plaintiff and others employed against inhalation of the dust. I am inclined to think that Donovan J. might have taken a different view except for the mistake in the distance in one case, on the defendants' own admission. I see no difference between the position of a labourer engaged in the second process and that of a moulder who is working 10 or 15 feet away from that labourer. As Mr. Nelson has said, it is really a question of degree. I am

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satisfied upon this evidence that the defendants did not fulfil the duty they owed to this workman under section 47 of the Factories Act, 1937. I am further satisfied upon this evidence that the court ought to hold that the damage which accrued to the plaintiff arose from that breach. It follows that, in my opinion, the appeal ought to be allowed and judgment be entered for the plaintiff.

JENKINS L.J. I agree. It is clear that the defendants' iron foundry was, within the meaning of section 47 (1) of the Factories Act, 1937, a factory in which a process was carried on, namely, the process of moulding, in connexion with which substantial quantities of dust were given off. It follows that, as from the commencement of the Factories Act, 1937, the defendants were under a statutory duty to their workmen employed on this moulding process to take all practicable measures to protect them against inhalation of the dust. The question in this case is whether the defendants have discharged their statutory duty in that regard to the plaintiff, a man who was employed as one of their moulders.

The judge came to the conclusion, if I understand him correctly, that the defendants had in fact already taken all practicable measures, and that there was nothing further they could be called upon to do under the section. In reaching that conclusion the judge described the three stages or phases in the moulding process which produced significant quantities of dust, and he dealt with them in this way: The first was the easing process, which involved two men having to go into the mould to break out the grids. As to that, the judge pointed out that the two men who were actually working in the mould were equipped with respirators, and as to the others he said that the dust produced rose vertically and that these men need stand no nearer than they chose to the source of the dust. As regards the second process, the knocking out process, which undoubtedly produced a great deal of dust, the judge thought that moulders at all events, as distinct from labourers, were not affected by that because it took place 60 or 70 yards away. As my Lord has pointed out, that distance is inaccurate, and on the evidence of Mr. Hardman, the defendants' foreman, the defendants cannot put it higher than, say, 20 feet away. Finally, there was the tipping up process, which was the end of the knocking out. In that case, as the learned judge observed, the men were told to leave the shop, the doors were opened, and the men were supposed to stay outside until the dust, which for the time being filled the foundry, had settled or dispersed.

As to the precautions taken in these three stages, speaking for myself I can only regard those taken in the third as adequate. As the plaintiff pointed out with regard to the easing off, the men waiting while two of their number were inside the mould breaking out the grids, could not be far away because they would

be wanted to take their turn. The judge's reference to the dust going up vertically came from Mr. Hardman's evidence, but other witnesses described it differently. The plaintiff and another man named Gregory, gave evidence to the effect that the dust spread about a great deal, and the plaintiff's expert, Mr. Hepburn, said that the dust came up and diffused and there was no strong current of air. In my view, it is impossible to hold that in this easing off operation the dust rose in a course so completely vertical, and with such rapidity, that a person standing within a few yards of the ascending dust was not exposed to any risk of inhalation.

Accordingly, in my view, there were at least two phases in this moulding process which did involve exposing the workmen, and, in particular, the moulders, such as the plaintiff was, to the inhalation of dust; and, with respect to those two phases of the process at least, it cannot, in my view, be said that all practicable measures were taken to protect the men against the inhalation of dust.

It follows, in my view, that this appeal should succeed. In reaching a contrary conclusion, the judge seems to have founded himself to some extent on the fact that the injurious constituent in the dust produced in an iron foundry is what is known as free silica, which consists of minute fractured particles of sand, the presence of which in iron foundry dust has only recently become known. The judge, taking the view that all practicable measures had been taken against the dust which the defendants could see, or of the existence of which they knew, came to the conclusion that they could not be held liable for damage done by the silica dust, which was treated by him as a distinct and invisible cloud of minute particles. With respect to him, I think it is wrong for the present purpose to treat the silica dust as separate from the rest. No one, I apprehend, would suggest that under section 47 employers such as the defendants are required to guard against elements the existence of which is unknown and the presence of which cannot be detected. The defendants' duty under the second branch of the section is to protect against dust so far as practicable. That, as it seems to me, means to protect against the ordinary, visible, dust arising in the course of the foundry operations. Once it became known that there was some other noxious element produced by the process, it would be their duty under the first branch of the section to guard against it; but, prima facie, as matters stood at all events in 1938, their duty was simply to prevent so far as practicable the inhalation of dust, that is to say, the dust manifestly produced by their moulding operations. In my judgment, however, if they had taken all practicable measures to prevent the inhalation of that dust, the result in all probability would have been to protect the plaintiff against the injurious element in that dust in the shape of free silica, even though the presence of that injurious element may not have been known.

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As my Lord has observed, the section is divided into two branches, the first of which refers to "any dust or fume or other "impurity of such a character and to such extent as to be "likely to be injurious or offensive to the persons employed," whilst the second branch, with which we are here concerned, deals simply with dust of any kind, and provides that where there is "any substantial quantity of dust of any kind, all practicable "measures shall be taken to protect the persons employed against "inhalation of the dust."

Cases of this sort may be said to bear to some extent heavily on employers, certainly cases covering periods, say up to 1950, because it has only comparatively lately become known that the dust produced in an iron foundry contains this noxious constituent in the shape of free silica; but their duty is clearly set out in section 47. It is to take all practicable measures to protect their workpeople from the inhalation of dust, and their duty to do that does not depend on the question whether the dust is known or believed to be noxious or not.

I will only add in conclusion one word about a submission made by Mr. Nelson with regard to the damages. He pointed out that the plaintiff had been employed as a moulder by the defendants and others for a considerable number of years before 1934, and for a still greater number of years down to the commencement, in 1938, of the Factories Act of 1937, which created the statutory duty sued upon. Mr. Nelson pointed out that silicosis is a disease which is produced by contact with free silica, involving more or less continuous contact over a long period, and he invited us to infer merely from the dates that this plaintiff had already contracted silicosis in 1938. There was, so far as I have been able to discover, no medical or other evidence whatever to show from what time the plaintiff's disability should be treated as having begun. It is a matter upon which we cannot speculate; we cannot treat it as progressing by degrees from year to year from the moment of his first employment in an iron foundry. I take it that the length of time required to contract this disease, and the progress made by the disease when contracted, must vary greatly from case to case, and it is impossible for us, without any evidence, to come to any conclusion on the matter. In my view the damages should be dealt with on the footing that the plaintiff's disability is wholly attributable to the period of his employment with the defendants.

PARKER L.J. I have come to the same conclusion. I confess that I have considerable sympathy with the employers in this case. Until the plaintiff became ill, they did not know, and it was not suggested that they ought to have known, that the dust which was given off in the course of certain processes carried on in their factory was injurious. They had no reason to think it would do more than to cause some discomfort if the workmen got

too close to it. Thus, to a large extent they left it to the workmen to stay away from any concentration of dust and, where this was impossible, as in the case of the men going down into the mould, they provided masks, and in the case of the tipping of the plate they got the workmen to leave the building. They were, as the judge found, enlightened employers, anxious to introduce all possible amenities for their workmen, and who, if the workmen complained, would have sought to remedy the position.

However that may be, the sole question here is whether they have, on the facts of this case, fulfilled their duty under the statute, it being clear that in, at any rate, three processes a substantial quantity of dust was given off. Their duty under section 47, in those circumstances, was to take all reasonable measures to protect the workmen against inhalation. The meaning of the word "practicable" has been discussed in several recent cases. The introduction of the word, as qualifying the measures to be taken, clearly negatives an absolute duty to protect against inhalation, since only measures which, in the light of current knowledge, are feasible can be regarded as practicable. Nevertheless, it seems to me that the words "practicable "measures," as opposed to the other expression to be found in the Act "so far as is reasonably practicable," imports a high duty.

The learned judge, as I understand him, is saying this: Having regard to the ventilation provided, and having regard to the position in which the men were allowed to work, they were not inhaling dust given off in substantial quantities in those three processes, and accordingly no special or further measures were called for. He appears to treat the dust, which has turned out to be dangerous and which is in fact of such fine particles as to be invisible, as something apart from what may be called the visible dust. Thus he says this[6]: "Then, unhappily, the truth "became known that some invisible dust must have remained "in the atmosphere and was of such a kind that breathing it "over a long period of years, albeit in small quantities, had "produced silicosis in the plaintiff." Speaking for myself, I do not think on the evidence that such a view was justified. Upon that point, Mr. Rogers, who was an expert called by the defendants, was asked this question by Mr. Nelson in re-examination: "You said that it is not the breathing of this visible dust which "constitutes the danger of silicosis, it is some other dust? "(A.) Yes, it is the breathing of the dust which is less than five "microns in size, which is the dust you cannot see. (Q.) Which "is not visible? (A.) It is not a heavy dust. It does not fall in "still air, it does not fall at any appreciable rate and, conse-"quently, if you have any current of air out of the building at "all it will get carried on that current." So it would appear to

[6] [1955] 1 W.L.R. 1025, 1030.

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be the case that if the ventilation in the foundry was proper—and there is a finding here that it was—then this invisible dust would be carried out with the current of air. But the matter does not quite rest there, because Mr. Rogers was further questioned by the learned judge and he was asked: "Therefore, "I suppose, if you reduce the amount which is inhaled you reduce "the risk of silicosis? (A.) Yes. As far as I understand the "conditions, to get a dangerous atmosphere you have to have "something of the order of 2,000 particles of silica or dust per "cubic centimetre. In other words, it has to be a fairly sub-"stantial dust cloud." It seems to me, therefore, that the danger in fact was that a man would be within range of substantial quantities of visible dust given off in one of these processes, and that in inhaling the dust he would be inhaling some of this dangerous silica. The facts in this case show that the plaintiff must have so inhaled.

The learned judge, as I think, was misled in the passage to which my Lord has referred when he said that in the knocking off process, which is the occasion for the breach on which Mr. Atkinson so strongly relies, the moulders (of whom the plaintiff was one) were 60 to 70 yards away. It is quite clear, as the defendants' foreman himself said, that in the case of heavy castings a moulder might well be within 10 to 20 feet. Mr. Nelson rather suggested that that was probably a rare occurrence, but on the evidence of the foreman, as I read it, it was something which regularly occurred every six weeks when one of these very large castings was knocked off, and when it did occur it occupied no less than two days. If the learned judge had had that passage in the evidence in mind, it appears to me that he might well have thought—as, indeed, he envisaged in the case of the labourers—that such a moulder ought to have some protection. The obvious protection that leaps to the mind is a mask, or that the men should be asked to move to a different part of the factory whilst the knocking off process was taking place.

Once that position is reached, and once it is shown that the defendants are in breach, it seems to me that the onus is then upon them to show that no practicable step would have prevented the damage. As regards that, as I have said, the provision of a mask is the obvious measure. There was no suggestion in this case that any mask, other than a Mark IV mask, would have been used if a mask had to be provided for this purpose; and, although no direct evidence was given, it seems to have been assumed, if only by the absence of cross-examination of Mr. Hepburn, that a Mark IV mask would have prevented the inhalation of these very small particles.

Mr. Nelson did advance the argument that, even if his clients were liable, this was merely a case of aggravation of a disease which must have existed before July 1, 1938. It is sufficient to say with regard to that argument that there are no facts found and no evidence upon which that argument can be advanced.

Before leaving the case, I would like to say that in my view there is considerable unreality in these cases, in that nobody can possibly tell whether a mask, if provided, will ever be worn. Those who have had experience of these cases are always having evidence put before them that even when a danger is appreciated by employers and workpeople alike, it is almost impossible to get the men to wear the masks which are provided. Where, as in this case, no danger was appreciated by anybody, it may well be almost impossible to get the workmen to wear them. But, the onus being on the defendants, once a breach is proved, and there being no evidence in this case as to whether a mask would or would not be worn, it is impossible to speculate as to what would happen. By the defendants' breach the plaintiff has never had the opportunity of choosing whether he will or will not wear a mask. For these reasons, as well as for the reasons given by my Lords, I would allow this appeal.

Appeal allowed.

Solicitors: *W. H. Thompson; Carpenters for G. Keogh & Co., Bolton.*

[CHANCERY DIVISION.]

1955
Nov. 18.
Danckwerts J.

* *In re* YOUNG, DECD. WESTMINSTER BANK LD. *v.* STERLING.

[1955 Y. 681.]

Charity—Poverty, relief of—Club members—Trust to provide grants and pensions to members of a members' club "who may fall on "evil days"—Validity.
Charity—Public—Section of community.

A testator by his will provided: ". . . I give my residuary "estate . . . to the trustees of the benevolent fund of the S. Club "upon trust to be used by them as they shall in their absolute "discretion think fit for the assistance of any of my fellow members "by way of pensions or grants who may fall on evil days. . . . "In the event of the S. Club at the time of my death not being "in existence or ceasing to exist at any time after my death . . . "I give my residuary estate subject to any pensions which may "have been granted by the S. Club and secured thereon to the "trustees of the pension fund of" [a named society].

On a summons to determine, inter alia, the validity or otherwise of the gift to the trustees of the club, it was argued that the gift failed because members of the club were not to be regarded as a part of the public, and it was not therefore a valid charitable trust:—

Held, (1) that the gift was a valid charitable gift for the relief of poverty.

Gibson v. *South American Stores (Gath & Chaves) Ld.* [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985 applied.

(2) That the beneficiaries were the members of the club from time to time throughout its existence.

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ADJOURNED SUMMONS.

The testator, Ernest Young, who died on February 10, 1952, by his will dated August 19, 1946, after appointing Westminster Bank Ld. to be the executor and trustee thereof, gave all his property of whatsoever nature and kind and wheresoever situate unto his executor upon trust for sale and conversion with the exception of his copyrights and royalties, to invest the proceeds of sale and to collect the periodical payments in respect of his copyrights and royalties and add the payments in respect thereof to the capital of his estate ("the residuary estate"). The testator directed the "income and produce" of the residuary estate to be paid to his brother "William John Young and my "sister Kathleen Hilda Young in equal moieties for their respec- "tive lives and the life of the survivor," and subject to the life interests aforesaid the testator gave his residuary estate "to the "trustees of the benevolent fund of the Savage Club, 1, Carlton "House Terrace, London, S.W.1, upon trust to be used by them "as they shall in their absolute discretion think fit for the "assistance of any of my fellow members by way of pensions or "grants who may fall on evil days."

Clause 8 of the will provided: "In the event of the Savage "Club at the time of my death not being in existence or ceasing "to exist at any time after my death subject to the life interest "of my said brother and sister I give my residuary estate "subject to any pensions which may have been granted by the "Savage Club and secured thereon to the trustees of the pensions "fund of the Incorporated Society of Authors, Playwrights and "Composers. . . ."

The testator was a widower leaving neither father nor mother nor issue surviving him. His brother named in the will predeceased him. His sister died on November 1, 1952. So far as had been ascertained the testator left no brother or sister surviving him except Kathleen Hilda Young, and no descendants of any dead brothers or sisters.

The residuary estate of the testator was of the value of £17,900, or thereabouts.

The Savage Club was an old and well-known club in Carlton House Terrace. The testator was at the date of his death and had been for many years before a member of the Savage Club.

The plaintiff bank took out the present summons for the determination, inter alia, of the question whether the gift of the testator's residuary estate to the trustees for the time being of the benevolent fund of the Savage Club was (a) a good and valid charitable gift, or (b) for reasons of remoteness or otherwise was in whole or part invalid.

Wilfrid Waite for the plaintiff bank.

W. J. Mowbray for the trustees of the Savage Club benevolent fund.

R. J. S. Thompson (*F. B. Alcock* with him) for those claiming an intestacy.

In re Whorwood,* not referred to in the judgment, was cited in argument.

DANCKWERTS J. stated the facts and continued: It has been argued on behalf of those who claim on intestacy that the gift to the trustees of the benevolent fund of the Savage Club fails on the ground that it is not a valid charitable trust because the members of the Savage Club are not to be regarded as a part of the public so as to make it a public charitable trust.

In *In re Compton*[1] the Court of Appeal treated what are known as "the poor relations cases" as an exception to the general rule that charitable trusts to be valid must confer benefits upon the public or a portion thereof. In those cases, which are of some antiquity, gifts by testators in favour of poor relations have been held to be good, notwithstanding the general proposition to which I have referred. The Court of Appeal suggested, however, that it was not a decision which should be extended. Notwithstanding what was said in the Court of Appeal in that case, in *Gibson* v. *South American Stores (Gath & Chaves) Ld.*,[2] the Court of Appeal held as a valid charitable gift a gift for the relief of poverty in respect of the employees of a limited company.

I am unable to see what distinction there is in principle between a gift of that nature to the employees of a limited company and a similar gift to the members of a club. It is a members' club which seems to constitute a class bound together by as much the same principles in the one case as in the other. The words "for the assistance of any of my fellow members by "way of pensions or grants who may fall on evil days" are plainly for the relief of poverty. Accordingly, it seems to me that this is a valid charitable trust, as was the trust in *Gibson's* case.[2]

As regards the meaning of the words "of my fellow members," it is perfectly true that if those words were given their narrowest meaning the benefit of the bequest would be confined to the members of the Savage Club who were members of the club either at the date of the testator's will or possibly at the date of his death; but I do not think that the testator was using these words in that limited sense but in the broader sense of the members who are members of the club "to which I belong." It seems to me that that is clearly indicated in clause 8, where the gift over takes effect not on the final demise of the survivors of the members who were members when he died, or anything

* (1887) 34 Ch.D. 446; 3 T.L.R. 307.

[1] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[2] [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985.

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Young, decd., *In re.* Westminster Bank Ld. *v.* Sterling.

of that sort, but on the Savage Club itself ceasing to exist. Consequently, in my view, what the testator had in mind was a fluctuating class of persons, the members from time to time of the Savage Club throughout its existence.

Declaration accordingly.

Solicitors: *Bentley Taylor & Stevens; Rubinstein, Nash & Co.; Doyle, Devonshire & Co. for Molineux, McKeag & Cooper, Newcastle-upon-Tyne.*

J. A. G.

[COURT OF APPEAL.]

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* BRITT *v.* BRITT.

[1954 D. No. 529.]

Denning, Hodson and Morris L.JJ.

Husband and Wife—Divorce—Cruelty—Acts of cruelty after cohabitation has ceased—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1).

A husband who left his wife in 1950 assaulted her on two occasions in 1952, once when he returned temporarily to the matrimonial home and once when he met her in the street:—

Held, that the assaults constituted cruelty for the purposes of the Matrimonial Causes Act, 1950, irrespective of the fact that they took place after cohabitation had ceased.

Passage in Rayden on Divorce, 6th ed., p. 523, that "Acts of "cruelty which have taken place after cohabitation has ceased may "be taken into account provided they are within the ambit of the "marital relationship," based on dicta of Lord Merrivale P. in *Simcock* v. *Simcock* [1932] P. 94, 96; 48 T.L.R. 374 explained.

Appeal from Judge Charlesworth, sitting as a special commissioner in divorce at Newcastle-upon-Tyne County Court.

A husband and wife were married in 1938, but in 1950 the husband left the matrimonial home. In August, 1952, he arrived without warning to spend the night in the home, but the wife left when he arrived. When she returned on the following day to fetch her necessaries, he assaulted her and then went away. In September of the same year he assaulted her as she was getting off a bus. He then disappeared and she had no further knowledge of his whereabouts.

In 1954 the wife filed a petition for divorce on the grounds of cruelty, and alleged that there had been acts of cruelty prior to the husband's departure in 1950, as well as the acts complained of in 1952 after he had ceased to live with her. She asked for the exercise of the court's discretion in respect of her own adultery. The petition was not defended.

The county court judge, on April 13, 1955, said that the cruelty alleged could be divided into two sections, cruelty until the middle of 1950 and cruelty thereafter. He found that no cruelty had been proved up to 1950; but while finding that the acts of cruelty in 1952 were proved, and saying that if they had occurred when the parties were living together he would have held that they constituted cruelty, he decided (on the basis of observations by Lord Merrivale P. in *Simcock* v. *Simcock*,[1] and a passage in Rayden on Divorce (6th ed., p. 523) that "Acts of "cruelty which have taken place after cohabitation has ceased "may be taken into account provided they are within the ambit "of the marital relationship"), that the acts complained of could not be said to be cruelty for the purposes of the Matrimonial Causes Act, 1950. He accordingly dismissed the wife's petition, but added that, if he had held otherwise, he would have exercised his discretion in the wife's favour.

The wife appealed.

A. B. Hollis for the wife.

The husband did not appear and was not represented.

The cases cited in argument are referred to in the judgments.

DENNING L.J. The parties married in 1938, when they were both very young, and they had two children, born in 1939 and 1941. They finally separated in 1950, when the husband left the home. His wife said that he had been very cruel to her before they separated; but her evidence on that point was not corroborated and the commissioner was not prepared to act on it; but after he had left the house, he came back in August, 1952, and he then struck her such a blow that it gave her a black eye and injured her. He hit her also on meeting her in an omnibus in September, 1952. Her evidence as to the assaults on those occasions was corroborated by an inspector of the Society for the Prevention of Cruelty to Children, who saw the marks on her; and, further, the inspector saw the husband and wife together about the previous charges of cruelty, which the husband then did not deny.

The commissioner said that he was not satisfied as to the cruelty before they separated in 1950; but he was satisfied that there were these assaults and blows in 1952, after they had separated. Nevertheless, he held that that was not a sufficient ground for divorce. He based himself on a passage in Rayden on Divorce (6th ed., p. 523), which states "Acts of cruelty "which have taken place after cohabitation has ceased may "be taken into account provided they are within the ambit of "the marital relationship." The commissioner, taking that as an accurate statement of the law, held that these two acts of

[1] [1932] P. 94, 96.

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cruelty took place outside the ambit of the marital relationship, and dismissed the petition.

That passage in Rayden is based on some observations made in *Simcock* v. *Simcock* [1]—observations which were only obiter dicta and thrown out as a suggestion without much consideration. I do not think that they accurately represent the law. Indeed, there is a decision of Bucknill J. in 1907, *Kunski* v. *Kunski and Josephs*,[2] where a judicial separation was granted on the ground of acts of cruelty which had taken place while the parties were separated under a deed. I see no justification in law for introducing the qualification that the acts must take place within the ambit of the marital relationship. The court has simply to inquire, within the words of the statute, whether the husband has treated his wife with cruelty; it does not matter whether it takes place while they are living together or while they are living apart; if he has treated his wife with cruelty, she is entitled to her decree. But that is subject, in the present case, to the fact that she has to admit that after he left she went and lived with another man and had a child by him. That is a matter for the court to consider in the exercise of its discretion, but in this case the commissioner said he would have exercised his discretion. I think that he was quite right in saying so. This husband has disappeared and cannot be traced, and it is only proper that in all the circumstances of the case the discretion should be exercised in the wife's favour.

I think that the appeal should be allowed and the decree nisi granted on the ground of the husband's cruelty, the court exercising its discretion in the wife's favour.

HODSON L.J. I entirely agree. The commissioner was prepared to find cruelty in this case, but thought that he ought not to do so because at the time the assaults in question were committed the parties were living apart; and he was led to take that course through a passage in Rayden which reads: "Acts of cruelty "which have taken place after cohabitation has ceased may be "taken into account provided they are within the ambit of the "marital relationship."

That passage is based on an observation of Lord Merrivale P. in *Simcock* v. *Simcock*,[3] in which the Divisional Court had before it an allegation of persistent cruelty, and in that connexion Lord Merrivale said: "It may well be"—it was an obiter dictum—"that, if the husband and wife were living apart and as "to some matter not concerned with the marital relationship "there were acts of violence, it would have to be considered "whether they were acts of violence within the statute, "or whether they would support a charge of persistent cruelty "within the statute; because the statute does undoubtedly deal

[1] [1932] P. 94, 96; 48 T.L.R. 374.
[2] (1907) 23 T.L.R. 615.
[3] [1932] P. 94, 96.

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" with, and is no doubt limited to, the relations of husband and " wife."

As I read that dictum of Lord Merrivale, I think he had in mind the statute with which he was concerned, which had to do with persistent cruelty, and he was wondering whether, if a husband knocked his wife about in the street after he had left her, and had previously assaulted her while they were living together, the husband could then be regarded as persisting in the previous course of conduct. It does not seem to me to support the wide proposition on which the commissioner based his decision, namely, that cruelty as such must be within what is called the ambit of marital relationship.

I agree that the appeal should be allowed. That involves the exercise of the discretion of the court in favour of the petitioner, which the commissioner said he was prepared to do, provided he was justified in finding cruelty in this case.

MORRIS L.J. I entirely agree. I would only add that the passage in Rayden to which reference has been made comes under the heading " Persistent cruelty " only in the part dealing with the Summary Jurisdiction Acts, 1895 to 1949, and does not come in the part of the volume dealing with questions of dissolution.

Appeal allowed.
Decree nisi granted.

Solicitors: *G. E. C. Dougherty for J. M. Gregory-Jones, Newcastle-upon-Tyne.*

M. M. H.

[COURT OF APPEAL.]

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Evershed M.R., Birkett and Romer L.JJ.

[1952 S. No. 3081.]

Practice and Procedure—Summary procedure under Order 14*—Part of claim—Final judgment signed under Order* 14, *r.* 1, *in respect of part of claim—Plaintiff not entitled to apply for judgment under Order* 14, *r.* 1, *in respect of balance of claim—R.S.C., Ord.* 3, *r.* 6, *Ord.* 14, *rr.* 1, 4.

The plaintiff had demised to the defendant a manor house and land at a rent of £600 per annum. By special indorsed writ the plaintiff claimed a declaration that the tenancy of the premises had been terminated, possession, £900 rent accrued due to January 21, 1952, damages for use and occupation, and costs. By an order dated August 14, 1952, the plaintiff was granted leave under R.S.C., Ord. 14, r. 1, to sign final judgment for £900 and it was further ordered that execution be stayed, with liberty to restore. In July, 1955, the plaintiff took out a second summons under Order 14 and the master, by an order dated July 26, 1955,

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granted to the plaintiff leave to sign final judgment for possession of the land, together with mesne profits from June 27, 1952, the date of the issue of the writ, at the rate of £600 per annum until possession and the stay of execution was removed. McNair J. dismissed the defendant's appeal from that order:—

Held, that Order 14, r. 1, did not, on its true construction, contemplate more than one application for summary judgment by a plaintiff (except in cases of mistake or the like or where fresh material was discovered); that a plaintiff could not issue a second summons under Order 14 after there had been final judgment in the action on an earlier summons; and that, except for the purpose of working out the order which had already been obtained on August 15, 1952, the action was then at an end.

Decision of McNair J. reversed.

APPEAL from a decision of McNair J., affirming a decision of Master Burnand.

The following statement of facts is taken from the judgment of Evershed M.R.: This action (1952 S. No. 3081) was started by the plaintiff, Mrs. Joan Emily Stainer, by specially indorsed writ dated June 27, 1952, in accordance with Order 3, r. 6. The statement of claim recited that the plaintiff was the owner of a certain mansion house known as Awbridge Danes, and further recited a series of facts which (so far as relevant) led to this, that the defendant, Mrs. Mildred Tragett, was in possession either under a contract of tenancy or under some similar title, whereby (according to the allegation) she was obliged to pay a rent of £600 per annum, payable in equal half-yearly proportions on July 1 and January 1 in each year. The statement of claim stated (and this was not in issue) that the rateable value of the premises was such as to take it altogether out of the Rent and Mortgage Interest (Restrictions) Acts. The plaintiff then prayed for a declaration, first, that the tenancy had been forfeited or lawfully terminated, the reason being non-payment of the rent alleged; second, for possession of the premises; third, under two of the paragraphs in the claim, for £900, being in effect, 18 months' rent due up to and including January 1, 1952, instalment; and, finally, for damages for use and occupation from the dates therein mentioned. The date of the issue of that writ was June 27, 1952—very shortly before the next rent instalment became due (according to the allegation) on the following July 1.

That writ having having been issued and duly served, the plaintiff then proceeded, on July 28, 1952, to take out a summons under Order 14, r. 1,[1] which summons was as follows: "Upon

[1] R.S.C., Ord. 14, r. 1: "Where "the defendant appears to a writ of "summons specially indorsed with ". . . a statement of claim under "Order 3, r. 6, the plaintiff may on "affidavit made by himself or by any "other person who can swear "positively to the facts, verifying the "cause of action and the amount "claimed (if any liquidated sum is "claimed), and stating that in his "belief there is no defence to the "action except as to the amount of "damages claimed if any, apply to a "judge for liberty to enter judgment "for such remedy or relief as upon "the statement of claim the plaintiff "may be entitled to."

r. 4: "If it appear that the "defence set up by the defendant

"reading the affidavit of George Leopold Lush let all parties "concerned attend the Master in Chambers" on the date mentioned at the time mentioned "on the hearing of an application "on the part of the plaintiff that she be at liberty to sign final "judgment in this action against the defendant for the amount "indorsed on the writ, with interest, if any, and costs." When the matter came on on August 14, 1952, after an adjournment, before Master Lawrence, he (as is the practice in these matters) proceeded to indorse his order as follows: "Judgment for £900. "Execution stayed until leave of this court"; and there followed symbols which clearly meant "Liberty to restore; costs in the "cause; certificate for counsel," and then he initialled it. In accordance with that direction, the plaintiff's solicitors drew up an order which followed the direction, namely, an order for the sum of £900 to be paid by the defendant to the plaintiff; but also including directions that execution for the £900 should be stayed till further order, with liberty to the parties to restore, and that the costs of the application be costs in the cause, "save that the "costs of one adjournment be the plaintiff's in any event. "Certificate for counsel."

More than three years had elapsed since November of 1952. So far as litigation between the two parties was concerned, the court was informed that in the intervening time they had not been idle. The defendant had, or suggested that she had, a counterclaim, which, according to the terms of the agreement made between the parties, was a subject-matter for arbitration. Part of the intervening period had been employed on that arbitration. The award has not yet been taken up, because the claimant in the arbitration, the defendant, has been unwilling to pay the necessary fees; and the plaintiff also, perhaps not unnaturally, has been unwilling to pay the fees herself. According to the evidence, no further sums of rent have been paid at all by the defendant; nor has she paid any part of the £900 for which judgment was obtained against her.

The next step was that a notice was served by the plaintiff's solicitors upon the defendant's then solicitors on May 19, 1955: "Take notice that the above-named plaintiff intends to proceed "in this action one month after the date hereof." That was a notice given pursuant to Order 64 and occasioned by the long dormancy of the proceedings. The plaintiff at some stage took to the master the original proceeding, the original summons; she also prepared a fresh summons under Order 14, r. 1, dated July 1, 1955, asking for possession and by way of mesne profits for the equivalent of the rent since June 27, 1952, the date of the issue of the writ. Master Burnand was then of opinion that the

"applies only to a part of the plaintiff's claim, or that any part of his "claim is admitted, the plaintiff shall "have judgment forthwith for such "part of his claim as the defence "does not apply to or as is admitted ". . . . And the defendant may be "allowed to defend as to the residue "of the plaintiff's claim."

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plaintiff could not proceed by way of restoration or otherwise, upon the first summons of 1952; and he with his own hand proceeded to amend the second summons by adding to it, after that part of it which related to possession and mesne profits, the words " and that the stay of execution imposed by the order of " August 14, 1952, be removed."

In that amended form, that second summons was served upon the defendant; and in due course she, first alone and later by counsel, attended before Master Burnand. It was clear that she was never given any notice of the restoration of the first summons; and the matter with which the master dealt was exclusively the matter raised by the second summons as amended. Upon that summons the order dated July 26, 1955, was made: " It is ordered that the plaintiff be at liberty to sign final judg- " ment in this action for possession of the land . . . Awbridge " Danes " (which was described) " together with mesne profits " at the rate of £600 per annum from June 27, 1952, until " possession " (and that amounted to over £1,800) " and costs to " be taxed." And it was further ordered that the plaintiff should recover against the defendant possession of the land.

The defendant appealed to McNair J. and the point taken on her part was that the original summons and the order made upon it, having regard to their respective terms, exhausted any rights or remedies available to the plaintiff in this action, " 1952, " S. No. 3081," save only so far as it remained available by virtue of the liberty to restore given by Master Lawrence in August, 1952, for the limited purposes for which the liberty had been given. McNair J. rejected that suggestion and on August 2, 1955, dismissed the appeal. He gave the Court of Appeal no reasons for his judgment. The court was informed that a stay of execution having been refused, the plaintiff had regained possession of Awbridge Danes, and that some execution had been levied.

The defendant appealed.

Stephen Terrell and *Andrew Bateson* for the defendant.

J. H. Inskip for the plaintiff.

The following cases were referred to in the argument in addition to those mentioned in the judgment: *Kiely* v. *Massey* [2]; *Cristel* v. *Cristel* [3]; *Hoystead* v. *Commissioners of Taxation* [4]; *Ord* v. *Ord* [5]; *Dewar & Sons Ld.* v. *Winder* [6]; *Brunsden* v. *Humphrey* [7] and *Sanders* v. *Hamilton*.[8]

[2] (1880) 6 L.R.Ir. 445.
[3] [1951] 2 K.B. 725; [1951] 2 All E.R. 574.
[4] [1926] A.C. 155; 42 T.L.R. 207.
[5] [1923] 2 K.B. 432; 39 T.L.R. 437.
[6] (1895) 12 T.L.R. 54.
[7] (1884) 14 Q.B.D. 141.
[8] (1907) 96 L.T. 679; 23 T.L.R. 389.

EVERSHED M.R. This appeal has raised a question on the true effect of Order 14, r. 1; and it is perhaps surprising that there is no guidance in the books on the particular matter which has been most discussed before us.

[His Lordship stated the facts, and read R.S.C., Ord. 14, r. 1, and continued:] Mr. Inskip, for the plaintiff, has contended that, according to the language of Order 14, r. 1, the order contemplates (where the writ, strictly speaking, covers more than one cause of action) that a series of applications may be made under Order 14, r. 1, for judgment upon the distinct causes of action, leaving it to the plaintiff to proceed from time to time on all or any of the causes of action at his pleasure. To take an extreme case, if the specially indorsed writ were for six instalments of a debt due on specified past dates of £50 each, totalling £300, the order contemplates (according to the argument) that a plaintiff could take out a summons for final judgment on one instalment and later take out five more applications for judgment on the other five. True it is, in such an extreme case, as Mr. Inskip concedes, that the court might regard the proceeding as being abusive of the court's process; but, so far as the wording of the order is concerned (he says), such a method of attack is inherent in the language.

Mr. Inskip drew attention to the variation in the phrasing, "cause of action," which has to be verified, and "action," and again, "statement of claim"; and, paraphrasing the order, he says that a plaintiff may, in the case I have supposed, where there are, let us say, two separate causes of action strictly so called, verify one of them, state that in his belief there is no defence to either of them, and then apply to the judge for liberty to enter judgment for the remedy or relief to which upon the statement of claim, in so far as it relates to that one of them, the plaintiff may be entitled.

I cannot so read the order. It seems to me, on the face of it, that what is contemplated is that, in the special Order 3, r. 6, cases, for which special provision is made for specially indorsed writs, the rules contemplate that a plaintiff may, if he verifies his cause of action (or, if there is more than one, his causes of action) and that there is no defence to any part of his action, then say to the court: "Give me judgment at once for what "I am entitled to" (that is, "for *all* I am entitled to") "on "the statement of claim." It may happen that when the matter comes, upon such an application, before the master, the master may think (particularly after any evidence has been filed by the defendant) that there is a defence either to one of the causes of action or to part of the one cause of action. He may then (and so much is clear from rule 4 of Order 14) give judgment for part of the relief claimed and give liberty to the defendant to defend—conditionally or otherwise—upon the other parts of the claim. It is quite clear that what a plaintiff cannot do is, having issued such a writ, then swear an affidavit in effect saying: "Well,

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" as to part of the claim as a matter of fact the defendant has " got a defence if he chooses to take it; but as to the rest he has " not, and I ask for judgment for that." It has been laid down in Ireland (in the case, for example, of *Lord Bellew* v. *Markey*,[1] to which we were directed; and it is stated in the notes in the Annual Practice, 1955, p. 175) that that is a procedure outside the scope and purpose of Order 3, r. 6, and Order 14. You can only invoke these rules, in other words (and Order 14 is confined to cases under Order 3, r. 6) where you can show that at any rate in your belief there is no defence to any of the matters for which you are claiming. Thus it is that, whatever remedy, in the end of all, a plaintiff asks for or may obtain, a condition precedent to an application under Order 14, r. 1, is affidavit evidence verifying " the cause of action," and also stating that in the plaintiff's belief (or the belief of the deponent) there is no defence at all to the action.

The view which I have suggested seems to me strongly borne out by the language of Order 3, r. 6 (1) and (2) itself. Sub-rule (2) provides: " Where a landlord seeks to recover possession " of land, with or without a claim for rent or mesne profits, " against a tenant whose term has expired or has been duly " determined by notice to quit, or has become liable to for- " feiture." Sub-rule (3): " Where the plaintiff seeks to recover " possession of a specific chattel with or without a claim for the " hire thereof or for damages for its detention." Then rule 6 goes on, " the writ of summons may, at the option of the plain- " tiff, be specially indorsed with or accompanied by a statement " of his claim or of the remedy or relief to which he claims to be " entitled."

Those last words, " remedy or relief to which he claims to be " entitled," are echoed in the language in Order 14, r. 1; and though it may be strictly true, for some purposes no doubt, that a claim for arrears of rent is a distinct cause of action from a claim for a declaration of forfeiture, and a claim for damages for detinue may be distinct from a claim to recover possession of a specific chattel, yet for the purposes of these orders I think that, each of the instances I have cited, is treated as a single matter, the subject of one action, which may be brought within the orders.

If I am right, the result is that where, in such a case as this, a plaintiff has sued for possession and arrears of rent, then, if he chooses to apply under Order 14, he must ask for such relief as he is entitled to, or such of that relief as he wants. I do not, of course, for one moment wish to dispute that the master, when he deals with the case, may say, for one reason or another, that it is not appropriate or just to give such a plaintiff all he seeks then and there: he may give him liberty to sign judgment for part of the claim and adjourn the rest of the summons. He

[1] (1878) 2 L.R.Ir. 185.

may (as I have already mentioned) under rule 4 of Order 14 give leave to defend as to part, with liberty to sign judgment as to the rest.

The forms of the orders he may make are illustrated in the same volume of the Annual Practice, 1955, p. 2680. Romer L.J. drew attention to them. For example, there is an example of an order under Order 14, "where the crown sues in respect "of death duties"—"It is ordered that the plaintiff be at "liberty to sign final judgment in this action for the amount "indorsed on the writ, with interest." On the opposite page there is a different type of case, where the defendant is given liberty to defend. In those cases it is to be noticed that the word "final," where the plaintiff is given liberty to sign judgment for some part of his claim, is omitted. Thus the orders, numbered 9 and 9A, give liberty to defend as to the whole or part of the claim, and then there is liberty to sign judgment as to the balance, but not, as I say, expressed in the form "final "judgment."

Now, it is to be observed that on this application, made in July, 1952, the plaintiff asked in terms, for "liberty to sign "final judgment in this action"; and it would appear quite plain that the draftsman of the summons may have had a form before him to guide him, but certainly did not have in his mind the terms of the writ which the plaintiff had issued. It will be remembered that what was sought was "liberty to sign final "judgment in this action against the defendant for the amount "indorsed on the writ, with interest, if any." There was no interest claimed on the writ. There was a claim in the writ for damages, which appears to have dropped from view altogether. And there was a claim in the writ for possession but no reference at all to it in the summons. On that summons the order made was an order "that the plaintiff be at liberty to sign final judg-"ment in this action." What I have called the condition precedent to any application under the order had in truth been complied with, for the affidavit of George Leopold Lush, to which the summons referred, had not only verified the cause of action (or, Mr. Inskip supposes, the causes of action) but also positively stated that in his view there was no defence to them or any part of them. In those circumstances, and on the facts of this case, I must say that it looks to me perfectly clear, unless the thing can somehow be explained, that the plaintiff was saying: "I want final judgment in this action for £900, and "I am not troubling about anything else—possession or damages "or anything." Whether she meant that is much more doubtful. Indeed, Mr. Inskip says that it was a slip on somebody's part. Not unnaturally, the passage of three years has buried the true facts of what occurred when the two parties were before the master in an obscurity from which they cannot be rescued.

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I agree with Mr. Inskip that the indorsement by the master, "costs in the cause," seems to suppose that the action was not finished; but, having regard to the terms of the summons and the order, I cannot construe that, conformably with the terms of Order 14, r. 1, as meaning that it was in the contemplation of anybody, and particularly of the court, that the plaintiff would thereafter at her pleasure or leisure issue another summons under Order 14, r. 1, for possession. The words may be related to the circumstance that the defendant was then intimating that she had a counterclaim. More likely, as I think, the master decided that he could give immediate liberty to sign judgment for the £900, but, as he was granting a stay of execution, he thought it better to adjourn, until the matter had been restored, and the question determined whether execution would have to proceed, the award and the taxation of the costs.

In my judgment, the notice under Order 64 having been given, it is now open to the plaintiff to restore that summons; and Mr. Terrell has conceded that, if the plaintiff does restore it, he would have no answer to an order on the summons so restored (a) removing the stay of execution, and (b) directing a taxation of all the costs incurred in relation to the action up to and including that summons and the proceedings on it, and an order that those costs should be paid by the defendant to the plaintiff. But in my judgment the master, with all respect, was wrong to say that that summons was now in effect exhausted and dead; and, indeed, if he were right, I do not follow what he intended to do about the costs of the action which had been incurred up to and including that first summons. I think also that he was wrong to amend the plaintiff's second summons, so as to add to it an application to stay the execution ordered by the first summons; and I think, finally, with respect to him, that he was wrong to have made an order for possession on the second summons. For the reasons which I have intimated, I do not think that in this case it was open, or is now open, to the plaintiff, having proceeded as she did, to apply by a fresh summons or at all in the action "1952 S. No. 3081" for possession as claimed on that writ. I therefore disagree also with the view of McNair J. who dismissed the appeal to him. I think that the master and the judge should have dismissed this second summons and that the order made upon it must be accordingly discharged.

The defendant has moved or been moved out of possession of these premises and some execution (as it is said) has been levied in respect of the £2,700 which, at any rate, according to the unanswered testimony of Mr. Lush, she owes by way of rent. Mr. Terrell says that it is very hard on her, since a school was being conducted on the premises and the pupils have had to go away to some other place. It is unnecessary, of course, and, indeed, it would not be right, for me to embark upon considerations of hardship or of the moral claims which either of

these ladies may have in their apparently long protracted and somewhat bitter warfare with each other. Suffice it to say that in the circumstances as known to me, I confess that I am unmoved by the fact that the defendant has left these premises and even that some execution has been levied in respect of the large sum of money which she appears to owe, not forgetting the £900 for which judgment has been signed against her. All we can do, in the somewhat remarkable circumstances of this case, is to say that the order on the second summons ought not to have been made, and to set aside the judgment which was obtained accordingly. The parties will then be left with such rights and remedies against each other as the law may provide. It is fairly certain that the plaintiff may issue a new writ against the defendant. Quite plainly she is in no way estopped or embarrassed by her first judgment from proceeding against the defendant in respect of the rent which has got into arrear since July 27, 1952, or from asking for possession on that ground. Those are matters which no doubt in due course will be dealt with. But the matter before us is limited to the order made by the master and affirmed by the judge upon the second summons, and I think that that judgment and order should be set aside, and that this appeal should be allowed.

BIRKETT L.J. I am entirely of the same opinion, and in view of the full judgment of the Master of the Rolls, it is quite clear that I need add very little to what has already been said. I think that in any event the presentation of this case, through no fault of counsel, has been very unsatisfactory; and I have said once or twice during the argument that one is really left in a state of great uncertainty as to some of the principal facts. In form, the appeal here is against the judgment of McNair J., who affirmed the order of Master Burnand, and that was that the plaintiff be at liberty to sign final judgment in this action for possession of the land specified, together with the mesne profits from June 27, 1952, and removing the stay of execution which had been placed there in the year 1952. There are many reasons why I think it is unsatisfactory. I understand from what has been said here that no rent whatever has been paid since the year 1950, when the plaintiff first went into possession under a tenancy at will, upon the terms which were embodied in a lease subsequently entered into. That lease was for six years, and, as I understand it, will end in July of next year; but during the whole of that time up to June, 1955, £2,700 was the amount of the rent, of which not a penny had been paid. The only matter set against it in 1952 was that the plaintiff said: "Oh, but I have had to pay over "£1,000 for the repair of the premises." When the matter came before the master in 1952, although the statement of claim had set out very fully what the claims of the plaintiff were and the terms, the rent, the power to re-enter, damages, and so on, the

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summons was confined to the sum of £900, the amount of the rent in arrear.

It is really a very singular thing, because, as my Lord has pointed out, by the summons of July 28, 1952, which was returnable originally for August 7, though the order was in fact made on the 14th (there having been an adjournment), it is " on the hearing of an application on the part of the plaintiff that " she be at liberty to sign final judgment in this action against " the defendant for the amount indorsed on the writ, with " interest, if any, and costs," and no word is said about any other matter. The affidavit that was made by Mr. Lush in support of that summons was made on July 25, presumably for the hearing on August 7, and there Mr. Lush most plainly stated: " The defendant . . . is justly and truly indebted " for the amount of rent, £900: " The said plaintiff is also entitled to " possession of the said premises by reason of the matters herein- " after stated," and then he goes on to restate those matters, clause 4 of the agreement, and the forfeiture, and so on. Then he says that the plaintiff, for those reasons, is entitled to possession, and the particulars of the claim for rent and possession appear by the statement of claim endorsed on the writ.

When the defendant answered that, as she did, on August 12—that is after the first adjournment; presumably the adjournment was sought for that reason—she dealt and dealt only with the question of the rent—not a word about possession or damages or anything else; just the rent. Upon that, when the matter came finally before the master on the 14th, he made the order which has been the subject-matter of so much discussion in this court and which my Lord has read.

Why I think the matter is unsatisfactory primarily is this: August 14, 1952, is now a long time ago, and there is nobody on either side who can really help us about what happened before the master on that day. Attempts have been made to assist the court by trying to get to know what did happen. For example, Mr. Hobson, the counsel who appeared upon that occasion, was asked what did happen, and he said (and one understands it perfectly well), " I was there, but it is so long ago that I have " not the remotest notion of what happened," so quickly do these things fade from the mind. Therefore, we are left with this order: " That the plaintiff be at liberty to sign final judgment in " this action "—" *final judgment* "—" against the defendant for " £900," the amount claimed on the writ. There is nothing about interest, nothing about damages, nothing about possession. " And it is further ordered that execution upon the said " £900 be stayed until further order, and that the parties may " be at liberty to restore, and that the costs of this application be " costs in the cause, save that the costs of one adjournment be " the plaintiff's in any event. Certificate for counsel."

Of course, one has had to speculate in some degree as to why the order was made in that form. Many matters have emerged

at this hearing, some quite lately. For example, it was only within the last hour or so that I understood that the defendant had a school at this mansion house and premises, with 35 pupils, and that she had now been turned out because of the order made by Master Burnand, and that the pupils had been taken to some other premises: furthermore, that, as to a certain portion at any rate of the money, there had been an execution levied in respect of it. In 1955 there came the order of Master Burnand, which was affirmed by McNair J.

In all these circumstances, I think that the situation is still a little unsatisfactory, but so far as the facts are known, I agree with what the Master of the Rolls has said with regard to the matter. I think that on the three matters which were mentioned by him, the master was wrong, and consequently the judge in affirming the master (without giving any reasons) was also wrong, and that the course which my Lord indicated was the course to be followed and ought to be followed in this case. I think that this appeal to that extent ought to be allowed.

ROMER L.J. I agree, and have very few words to add to what my brethren have said. Order 14, as is well known, provides a means whereby a plaintiff, who brings an action under Order 3, r. 6, can get a summary judgment in his favour where there is no defence to the action, if he swears that in his belief there is no defence to the action; and he can then get leave to sign judgment without more ado. But, in my opinion, Order 14, r. 1, which provides for that procedure, does not, on its true construction, contemplate more than one application by a plaintiff who desires to take advantage of the opportunity which the order provides—except, of course, in cases of mistake or the like (such as happened in *Sykes Brewery Co.* v. *Chadwick* [2]), or where fresh materials are discovered (as in *Wagstaff* v. *Jacobowitz* [3]). I do not propose to read the rule again; my Lord has read it; but it does not appear to me that it envisages more than one application for summary judgment by a plaintiff. But be that as it may, I am well satisfied, at all events, that a plaintiff cannot issue a second summons under Order 14, after there has been final judgment in the action on a summons which he has issued earlier, for the simple reason that, except for the purpose of working out the order which has been already obtained, the action is at an end.

Such was the position in the present case. The plaintiff by her summons specifically asked for liberty to sign final judgment in the action against the defendant for the amount endorsed on the writ, and the amount endorsed on the writ was £900. In pursuance of that application, that is precisely the relief which she got: she was given liberty to sign final judgment in the action for £900 and she did so. It appears to me that the

[2] (1891) 7 T.L.R. 258.
[3] [1884] W.N. 17.

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inevitable consequence of, or inference from, that is that she was waiving the other relief which appeared on her specially endorsed writ, namely, a claim for a declaration of forfeiture and an order for possession, and that the action was at an end. I think that that is confirmed by the reference to the forms in the Annual Practice, 1955, p. 2680, which the Master of the Rolls has already made, which seem to draw a clear distinction between a "final" judgment, where no question of defending any part of the action to trial is concerned, and judgment simpliciter, where a defendant is given leave to defend part of the action. Consequently, it seems to me that on those grounds, at all events, the plaintiff was not entitled to issue this second summons.

A possible alternative, or, at all events, what appeared to me at one time to be a possible alternative, having regard to the form which the summons took, and the form of the affidavit in which the plaintiff said there was no defence either to the claim for the arrears of rent or to the claim for possession, and the form of the order, which provides for "Costs in cause," was that the case was, in some loose sense, being regarded as a reflection, as it were, of an application under Order 14, r. 4, which provides for a plaintiff signing judgment in respect of part of his claim and the master giving liberty to the defendant to defend the other parts of the claim. As my brother Birkett has said, we do not know what happened before the master either on the first occasion or on the adjournment when the order was made, and it is largely a matter of speculation; but, even assuming that that was the kind of idea that was present in the minds of the parties, that the plaintiff should sign final judgment for £900, and that the defendant should defend as to the other issues, that still would be of no avail to the plaintiff because, as I have already indicated, I do not think myself that she could apply twice, and her remedy (if any) on that footing would be, when she found that the defendant was not putting in a defence on the other issues, to make an appropriate application founded on default in delivering a defence. It would not entitle her to make the second application which she has made under Order 14.

I agree with the order that my brethren propose.

Appeal allowed.

Solicitors: *Victor Mischon & Co.; Vizard, Oldham, Crowder & Cash for Whitehead, Vizard, Venn & Lush, Salisbury.*

B. A. B.

[CHANCERY DIVISION.]

*WISEBURGH *v.* DOMVILLE (INSPECTOR OF TAXES).

1955
Oct. 25, 26.

Harman J.

Revenue—Income tax—Profits of trade—Damages—Proceedings by agent for breach of contract terminating agency agreement—Compromise of proceedings on payment of agreed damages—Compensation received by agent for loss of agency—Whether taxable as profits of trade.

A manufacturers' agent entered into an agreement with a company to act as their agent for a certain period. The company dismissed him without giving him due notice and he brought an action against them, claiming damages for breach of contract, an account of the commission due, and payment thereof. The action was settled on terms agreed between the parties which were embodied in an order under which the agent was to receive £4,000 as damages for breach of the agreement and costs, and it was ordered that he should recover nothing in respect of the claim made by him for commission and expenses.

The General Commissioners decided that the sum of £4,000 was taxable profits for the year in which it was actually received. On appeal:—

Held, dismissing the appeal, that the sum received represented compensation for the profit which the taxpayer would, or might have, made out of the agreement between the breach and the due ending date, and, as such, represented income corresponding to the commission which he would have received if the agreement had been allowed to run.

Van den Berghs Ltd. v. *Clark* [1935] A.C. 431; 51 T.L.R. 393; 19 T.C. 390 and *Barr, Crombie & Co. Ltd.* v. *Inland Revenue* (1945) 26 T.C. 406; 1945 S.C. 271 considered.

APPEAL from the Commissioners for the General Purposes of the Income Tax Acts for Manchester.

The case stated, so far as relevant, provided: The taxpayer appealed against assessments to income tax made on him in the years 1949–1950 and 1951–1952 in respect of his profits as an agent. The question for determination by the commissioners was whether the sum of £4,000 received by him in respect of the ending of an agreement with a principal, Gordon Mills Ld., was wholly or partly taxable.

The following facts were proved or agreed: The taxpayer was appointed sole agent of Gordon Mills Ld. under an agreement made on April 2, 1942, between the company and the appellant. On or about July 1, 1948, there was a breach of the agreement by the company in the circumstances set out in the pleadings. Before the arising of these circumstances the taxpayer reasonably expected the agreement to continue for several years. His appointment as agent could at that date under the terms of the agreement have been lawfully determined by the company by notice expiring on October 20, 1949.

Proceedings were instituted by the taxpayer whereby he claimed: damages for breach of contract; that an account be taken of the commission and expenses due to him under the

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terms of the agreement; and payment of the amount found due on the taking of the account.

The company filed a defence to the claim and paid £4,000 into court. One of the assertions in the defence was that the taxpayer was not entitled to any commission or expenses.

The action was ultimately settled (without any account being taken) on terms agreed between the parties, which were embodied in an order of the Manchester District Registrar, dated April 20, 1950, whereby it was ordered that the taxpayer should be at liberty to enter judgment against the company for the sum of £4,000 as damages for breach of agreement and for the costs of the action; that he should recover nothing in respect of the claim for commission and expenses; and that the sum of £4,000 paid into court by the company should be paid out to his solicitors in satisfaction of the sum of £4,000 damages. Before the settlement of the action the taxpayer was advised by leading counsel that the claim to commission would have to be abandoned; and this advice was accepted by him and he gave his counsel a free hand to settle the action on that basis.

Commission on orders obtained before, but delivered after July 1, 1948, would have amounted to £3,128. A sum of £807 was due in respect of commission for June, 1948, for goods delivered during that month.

From a statement produced to the commissioners by a representative of the Crown it appeared that the loss of the agency with the company meant the loss of about half the taxpayer's income. It also inflicted damage to his goodwill and meant that the company dealt directly with the customers introduced by him.

On behalf of the taxpayer it was contended (inter alia): (1) The agreement of April 2, 1942, was the principal source of his earnings, was one of the only two sources which he had at the time of the dispute, and was one of the three permanent agencies which he had possessed. (2) The agreement was wrongfully determined, and the £4,000 was paid for breach of contract. (3) The taxpayer sustained damage to his business structure because of such breach of contract, and the £4,000 was paid and received in respect of that damage. (4) The agreement might have continued indefinitely, and the £4,000 was paid and received with that fact in view. (5) The £4,000 could not be related to any fiscal year or years. (6) The £4,000 was not taxable, as it was a capital receipt of the taxpayer's business. (7) Alternatively, if the £4,000 was paid in respect of commission, as the Inland Revenue contended, it was, to the extent of £3,935, a receipt of the taxpayer's business for the accounting period ended March 31, 1949, and the remaining £65 was not a revenue receipt at all.

On behalf of the Crown it was contended (inter alia): (1) The taxpayer received £4,000 as damages, defined in the particulars of claim as commission that would have been earned by October 20, 1949. The agency for the company was not fundamental to his business organization and the £4,000 was not for

the loss of an enduring asset. The loss was to be regarded as a normal incident of the business carried on by the taxpayer and the sum of £4,000 will be a receipt on revenue account for the year ending March 31, 1951, the basis year for 1951–1952.

Alternatively, the taxpayer was entitled under the agreement to commission amounting to £3,935, in respect of £807 commission due for June, 1948, and £3,128 commission on orders obtained before the goods being delivered after July 1. Notwithstanding anything in the order made by the Manchester District Registrar, the £4,000 paid to the taxpayer by the company was in respect of that commission and expenses.

The commissioners gave their decision as follows: "So far "as they are questions of fact we find as facts, and so far as they "are questions of law we hold: (1) The taxpayer, according to "his returns, carried on business as a manufacturers' agent as "at the time he was engaged by Gordon Mills Limited and con-"tinued as such during the whole of the engagement and after "October 20, 1949. (2) According to his statement of claim in "his action against Gordon Mills Limited he claimed that he had "lost the commission which he would otherwise have earned "between July 1, 1948, and October 20, 1949. (3) The terms of "the agreed judgment had no bearing whatsoever on the question "whether the amount awarded was capital or income. (4) The "amount awarded in fact took the place of the commission which "he would have been earning if the engagement had been con-"tinued to October 20, 1949. (5) The sum of £4,000 is taxable "profits for the year in which it was actually received."

The taxpayer appealed.

N. E. Mustoe Q.C. and *G. B. Graham* for the taxpayer.

Sir L. Ungoed-Thomas Q.C. and *Sir Reginald Hills* for the Inspector of Taxes.

Cases referred to in argument not cited in the judgment: *John Smith & Son* v. *Moore* [1]; *Henderson* v. *Meade-King, Robinson & Co. Ld.* [2]; *Henley* v. *Murray* [3]; *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners* [4]; *Bush, Beach & Gent Ld.* v. *Road* [5]; *Vaughan* v. *Archie Parnell and Alfred Zeitlin Ld.* [6]; *Du Cros* v. *Ryall* [7]; *Inland Revenue Commissioners* v. *Fleming & Co. (Machinery) Ld.* [8]

HARMAN J. The taxpayer, Albert Wiseburgh, appeals against an assessment in a sum of £4,000 made on him in respect of the receipt by him of that sum on the termination of an agency

[1] [1921] 2 A.C. 13; 37 T.L.R. 613; 12 T.C. 266.
[2] (1938) 22 T.C. 97.
[3] [1950] W.N. 241; [1950] 1 All E.R. 908; 31 T.C. 351.
[4] (1922) 12 T.C. 427.
[5] [1939] 2 K.B. 524; 55 T.L.R. 862; [1939] 3 All E.R. 302; 22 T.C. 519.
[6] (1940) 23 T.C. 505.
[7] (1935) 19 T.C. 444.
[8] (1951) 33 T.C. 57.

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agreement which he had with Gordon Mills Ld., his principals. He was by calling a manufacturers' agent.

From time to time, between the beginning of the war and the end of 1951, he had been agent for 20 firms altogether, some of them for a short time and some of them for longer, but his two main principals were Messrs. Green, Hearn & Co. over a period of 12 years, and Gordon Mills Ld. his principals for six years. Another considerable agency had gone on for seven years up to 1945, but it ended there.

The taxpayer says that the loss of this particular agency was the loss of one of his capital assets, and that the £4,000 represents that asset and is not taxable as such. The Crown says, and the commissioners agreed, that this was a compensation for the loss of profit-making capacity of the agreement and compensation for loss of profits and therefore, on ordinary principles, it is as much taxable as the profits which it represents would themselves have been if he had made them.

Many cases have been cited on one side and the other, and my task is to find out whether the commissioners came down on the right side. It is said that they have decided the question as a question of fact. I do not think that, baldly so stated, that is right. Their finding must largely have been a matter of inference. The agreement began in 1942 and was for two years certain and thereafter it was continued from year to year. It was not, therefore, a permanent kind of arrangement.

The parties quarrelled in July, 1948, and the taxpayer started an action for damages in the King's Bench Division, claiming that he had been wrongfully dismissed and was entitled to damages accordingly; in addition he claimed that the defendants had not paid him the right amount even up to the date of the breach, which was stated to be July, 1948. The defendants justified, saying that they were entitled to dismiss him without notice, owing to various matters, and they put in issue whether, for the period up to the breach, there was any sum owing. There were long negotiations, and the action was eventually settled on terms which were embodied in an order, made by consent by the district registrar.

In point of form the order leaves much to be desired, but in point of substance it is not very obscure. It was agreed between the parties that the taxpayer should abandon his claim for arrears of commission up to July, 1948. It was also agreed that he should receive £4,000 as damages for breach of agreement. What was the breach of agreement alleged? It was the dismissal in July, 1948, when under the terms of the agreement the principals could not legally dismiss him except by a year's notice ending in October, 1949; in other words, that he had been prematurely dismissed by fourteen months or so, and had, therefore, been deprived of the opportunity of earning the commissions which would, or might, have accrued to him during that time. The parties assessed that at £4,000.

At one time it was said that the £4,000 really represented the pre-breach arrears which had been estimated at nearly that figure, and that in view of that coincidence I ought to look at it as such, but I see no reason why I should, or how I can do that. Parties are at liberty to make their own bargain. It is open to the taxpayer to say: "I abandon my claim for the pre-breach "period and rely entirely on wrongful dismissal." And it may be that the defendants said: "If you do abandon your first claim "we may be more ready to meet you." It did not matter to the defendants for what they paid the agreed sum; it might matter to the taxpayer, from the tax point of view, and he was quite justified in taking it in any way which he thought more beneficial from that aspect.

I accept that the defendants paid purely for the wrongful dismissal—the wrongful, premature ending of the agreement—but what does that represent? It represents the profit which would, or might, have been made out of the agreement between the breach and the due ending date. The commissioners have so found. They stated: "The amount awarded, in fact, took "the place of the commission which he would have been earning "if the engagement had been continued to October 20, 1949." I think that is the proper inference to draw from the order. The commissioners were wrong in saying that the order was irrelevant —it is a highly relevant document—but it seems to me that they arrived at the right conclusion.

If this was merely a compensation for the loss of trading profit by an agent, and if the contract would have resulted in a taxable profit to the taxpayer, if it had been allowed to run its proper course, what he has got is merely a quid pro quo for that. I do not see why he should not pay tax just as much on the compensation he got as he would have done on a profit had he earned it. It seems to me, therefore, that what he got is income, just as much as what he would have got had the agreement been allowed to run. Consequently, it seems to me that the commissioners came to the right conclusion. That is enough to end the case, but because of the elaborate arguments addressed to me I will look at the authorities.

If the taxpayer had carried on no business other than his agency for the defendants, and they provided his sole work, it might well be that its loss would have been the loss of a capital asset. It cannot, I think, depend on the volume of his work—whether one-eighth, or one-quarter, or one-third—but if it is his entire livelihood one might say that that is the man's capital asset. That is much easier to say in the case of a limited company than in the case of a private individual, as two cases illustrate. In *Van den Berghs Ld.* v. *Clark* [1] an English company received a large sum of money from a Dutch company and agreed, in return, to give up one side of its business. In *Barr, Crombie &*

[1] [1935] A.C. 431; 51 T.L.R. 393; 19 T.C. 390.

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Co. Ld. v. *Inland Revenue*,[2] a Scottish case, Lord Normand, the Lord President, points out that in the *Van den Berghs* case [3]—and indeed in the case before him—the ending of this agreement radically affected the whole structure of the company and the character of its business.

I do not, myself, think that observations about business structure apply here. The taxpayer was a manufacturers' agent. He had other agencies from time to time and carried on business as an agent, and one of the incidents of such business is that one agency may end and another begin. The fact that an agency was a key agency, and therefore was important to him and represented half of his income, seems to me to be irrelevant. He must have expected as part of the normal course of such a business that one agency would end and another start. It is said that he only had two agencies at this time, and found it very difficult to get any more after this one ended. It may be that was his own fault, because he was also representing his wife —nominally his wife, but I think himself—in a similar, competing business, and it would be difficult for him to act as agent for others in competition with his own interest as a principal for himself. However that may be, it was a normal incident in this kind of business that an agency should come to an end, and the compensation paid is, it seems to me quite clearly, income.

That side of the line is best illustrated by *Kelsall Parsons & Co.* v. *Inland Revenue*,[4] which is a fairly plain case and, perhaps, simpler than this. That, again, is a Scottish case, and Lord Normand again gives the leading judgment. There, too, the agency could be concluded at twelve months' notice. The Lord President pointed out that one of the factors in the setting up of an agency company was that it had agreements which might end and that that was a normal incident in the course of its business. The present case is, perhaps, not quite so clear as that, but it seems to me that it is a tolerably clear case. There is nothing to be said against the finding of the commissioners that this was a mere compensation for a loss of profits over the next fourteen or fifteen months. As such, it is taxable in the way that the Crown claims, and in my judgment the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Garland-Wells, Riches & Co.; Solicitor of Inland Revenue.*

J. L. D.

[2] (1945) 26 T.C. 406, 412; 1945 S.C. 271.

[3] [1935] A.C. 431; 19 T.C. 390.

[4] (1938) 21 T.C. 608, 620; 1938 S.C. 238.

[EXETER AUTUMN ASSIZE.]

*WILLIAMS *v.* OWEN.

1955
Nov. 10.

Finnemore J.

Inn—Duty to guest—Loss of guest's goods—No absolute liability for injury to goods—Motor-car destroyed by fire—No liability—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 86.
Fire—Fires Prevention Act.

One night, in circumstances unknown, a fire broke out in the garage, severely damaging the cars therein. A guest at the inn claimed damages from the innkeeper in respect of the injury to his car, which had been ruined by the fire:—

Held, (1) that, while there was an absolute liability on an innkeeper to preserve the goods of his guests from loss by theft this did not extend to "loss" by injury.

Winkworth v. *Raven* [1931] 1 K.B. 652; 47 T.L.R. 254 applied.

(2) That, in the absence of negligence, section 86 of the Fires Prevention (Metropolis) Act, 1774,[1] provided a complete defence, notwithstanding the relationship of innkeeper and guest, to a claim in respect of injury caused by an accidental fire.

Accordingly, in the absence of evidence of negligence by him or his servants, the defendant was not liable to the plaintiff in damages.

ACTION.

In June, 1952, the plaintiff, Emrys Williams, and his family were staying at The Gara Rock Hotel, of which the defendant, Commander Alban Lloyd Owen, was managing director. Attached to the hotel was a garage where some five or six cars of guests could be accommodated. Here the plaintiff garaged his Morris car. No petrol was stored in the garage; the only storage tank was outside, some six to eight yards in front of the garage and completely underground. No filling of cars with petrol was done inside the garage, since the petrol pump was outside, nor was there any evidence that any of the cars leaked petrol. In one corner of the garage was a small stove or boiler for heating water which went to the rooms above the garage where some of the staff slept. The stove was surrounded, so far as the garage was concerned, by a concrete wall 7 feet 6 inches high. It was stoked from the far side, where there was a ramp, and on the other side of which there was a fuel store. It may be that some fuel was also stacked round the stove within the concrete wall.

It was the practice to light the stove at noon or thereabouts and to stoke it up until half-past two, when the water would be

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

[1] Fires Prevention (Metropolis) Act, 1774, s. 86: "... no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall, ... accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding: ... provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void."

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hot, and then to close it down and let it burn itself out. In the normal course of events it would be out by half-past seven or eight o'clock. On June 13, 1952, it appeared that the normal practice had been followed. At about half-past eight that night another of the guests left her 1927 Baby Austin car in the garage, which then contained some five cars, including the plaintiff's. Fire broke out in the garage between half-past eleven and midnight. The garage was completely destroyed and the plaintiff's car was reduced to a ruin.

The plaintiff claimed £820 damages for the loss of his car and its contents, relying on the absolute liability of the defendant as an innkeeper or, alternatively, on his negligence in permitting a lighted stove in the garage. It was agreed that the defendant came within the category of an innkeeper and was subject to the liabilities which attach to that occupation.

John Stephenson for the plaintiff.
Desmond Ackner for the defendant.

The following cases were referred to in argument: *Morgan* v. *Ravey* [2]; *Day* v. *Bather* [3]; *Maclenan* v. *Segar* [4]; *Sochacki* v. *Sas* [5]; *Winkworth* v. *Raven* [6]; *Williams* v. *Linnitt* [7]; *Watson* v. *People's Refreshment House Association Ld.* [8]

Finnemore J. This case arises out of a fire which happened at the Gara Rock Hotel, near Salcombe, in Devonshire, on June 13, 1952. The plaintiff and his family had been, for the first fortnight in June, guests at the hotel, the managing director of which was the defendant. On that night a fire broke out in the garage which was attached to the hotel; there were about five cars in it at the time. The result of the fire was the complete destruction of the garage and the ruin of the cars which were in the garage; and, in particular, the plaintiff's Morris car which had been put there the previous night. The value of the car is agreed at £800, and the contents at some £20. The present action is brought by the plaintiff against the defendant for the sum of £820, being the loss in the fire.

I think that substantially the issues come down to two. First, it is argued by Mr. Stephenson, on behalf of the plaintiff, that the liability which attaches to innkeepers covers this case, and the defendant is responsible on the basis of absolute liability irrespective of any negligence or actual default on his part. Further, he says that on the facts the defendant, or his servants, was negligent; that the fire broke out owing to the defendant's

[2] (1861) 6 H. & N. 265.
[3] (1863) 2 H. & C. 14; sub nom. *Bather* v. *Day*, 32 L.J.Ex. 171.
[4] [1917] 2 K.B. 325.
[5] [1947] 1 All E.R. 344.
[6] [1931] 1 K.B. 652; 47 T.L.R. 254.
[7] [1951] 1 K.B. 565; [1951] 1 T.L.R. 94; [1951] 1 All E.R. 278.
[8] [1952] 1 All E.R. 289; [1952] 1 K.B. 318; [1952] 1 T.L.R. 361.

negligence, or that of those for whom he is responsible, and that, therefore, he is liable for the loss which the plaintiff sustained.

It is agreed that the defendant comes within the category of an innkeeper and that he was subject to the liabilities attached to an innkeeper. It has long been the law in this country that an innkeeper must accept the traveller as long as he has accommodation, and he must also accept the traveller's goods and chattels, within the proper and obvious limits; and those goods and chattels, which used to include the traveller's horse and carriage, now include the traveller's motor-car.

The real matter of dispute between the parties on this part of the case is whether an innkeeper is absolutely liable for injury done to goods while in his keeping, or whether he is absolutely liable only for their loss—and in particular, of course, their loss by theft. Mr. Stephenson did argue—though perhaps not with very much conviction—that as this car was reduced to a state in which it was quite valueless and, what is sometimes called in insurance cases "a total loss," it was, in any event, not merely a car which was injured, but a car which was lost. I do not think that can be right; I am sure that is not what the word means in its application to the liabilities of an innkeeper; nor, indeed, could it in any ordinary sense of the English word be said to be "lost." It was still existing after the fire, I do not say "as large as life," but identifiable, although no longer of any value as a motor-car—or, at all events, in such a state that it could only be made to run again as a motor-car at a prohibitive cost.

What is the duty of the innkeeper? He must receive travellers, and he must receive their goods. Plainly, if those goods are stolen—if they are "lost" in the literal sense; if they vanish—the innkeeper is responsible, without there being any default on his part. Does that apply to the injury which may occur to the goods while in his possession if that injury is caused without any negligence on the part of the innkeeper or his servants? This matter was discussed in cases which have been cited to me today. In 1931 *Winkworth* v. *Raven* [1] was decided, on an appeal from the county court, by a Divisional Court consisting of Swift and Macnaghten JJ. This was a case where a motor-car was put into the garage of an hotel, as in the present case, but it was the opposite element to fire—namely, cold—which afflicted the car. There was some exceptionally severe weather; there was some water left in the radiator of the car; it was badly injured; and the plaintiff sued the innkeeper. It is true that in the county court the matter seems to have been placed by the judge on the basis of a contract of bailment, but it is plain that in the Divisional Court it was argued as, and was dealt with as, a plain case of the relationship of innkeeper and guest. It is also plain that in that case it was clearly laid down

[1] [1931] 1 K.B. 652; 47 T.L.R. 254.

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that while the innkeeper, according to ancient custom, was responsible for the safe custody of the goods—that is, to prevent their being stolen and lost—he was not responsible, without negligence, if while in his custody they became injured or damaged. It has been succinctly stated in Halsbury's Laws of England, 2nd ed., vol. 18, at p. 151: "[an innkeeper] is not "an insurer of his guest's goods generally; that is to say, he is "not responsible in case of injury to, as opposed to loss of, such "goods unless negligence on his part is proved." That is following up the statement of general law, which states: ". . . "he is an insurer of his guests' goods against loss, and it does "not signify, as far as that obligation is concerned, if they are "stolen by burglars, or by the servants of the inn, or by another "guest; he is liable for keeping them safely unless they are lost "by the fault of the traveller himself." Then there follows the qualifying sentence which I have just quoted, the authority for which is *Winkworth* v. *Raven*.[2]

In that case Swift J. lays the law down quite plainly. In the course of his judgment he says[3]: "I can find no case in "which an innkeeper has been held liable for injury to goods as "opposed to loss of the goods unless default on the part of the "innkeeper has been proved. If a guest's goods are damaged "while at an inn, he must prove that such damage arose from "an act of the innkeeper concerned, or his servants, which was "negligent, that is, was done in breach of some duty which the "innkeeper owed to the guest."

Day v. *Bather*[4] was cited to me as indicating the contrary view. In that case a horse had been brought to an inn by a traveller. The horse was left at the inn while, for some days, the traveller went away. While the horse was out from the inn being exercised by an ostler it was injured, and the innkeeper, who was responsible for the ostler, was held to be liable. I think those facts are very different from the present ones. Apart from that possibly contrary authority, there is no other case which has said that the innkeeper is responsible for injury to goods in the absence of negligence. Swift J. referred to *Maclenan* v. *Segar*,[5] decided in 1917 by McCardie J., and I think it is useful to refer to that case because it does seem to me not only to explain why this otherwise rather strange anomaly grew up in our law, but also the reasonable limits which I think the courts ought to apply to it. That was a case of personal injury to a guest in an hotel, and it was found on the facts that the hotelkeeper had not taken proper precautions to keep the premises reasonably safe, quite apart from any duty which he might owe

[2] [1931] 1 K.B. 652. Note. In addition to the passage from Halsbury quoted above the following passage from the same volume, para. 214 at p. 156, was also referred to in the argument: "If goods be lost or stolen "from or damaged in an inn, the innkeeper is prima facie liable. (*Burgess* v. *Clements* (1815) 4 M. & S. 306)."

[3] [1931] 1 K.B. 652, 657.

[4] (1863) 2 H. & C. 14.

[5] [1917] 2 K.B. 325.

simply as an innkeeper. McCardie J., in dealing with this matter, said [6]: "He does not insure the personal safety of the guest. "The reason for the graver liability in the case of goods (which "is prima facie anomalous) is to be found in the social conditions "which existed when the liability first became established. The "prevalence of highway robbery and the risk of possible collusion "between the thief and the innkeeper of those early days "adequately account for the onerous burden on the latter with "respect to goods"—and he referred to Jones on Bailment, p. 95.

I think there may well be a clear distinction between saying to an innkeeper: "You are placed in this special position by the "keeping of an inn. You have got to accept the responsibility "of accepting travellers and their goods; and, moreover, you "must accept the responsibility of seeing that those goods are "not stolen." It may be that in those days there was possibly collusion between innkeepers and highwaymen; it may be, as McCardie J. suggested, that had something to do with the growth of that rule. But, in any event, that seems to me to be a very different thing from saying that if a person keeps an inn, not only must he provide accommodation and meals for the traveller, and receive his goods and see that they are not stolen; but must also see that they are not injured, and if they do become injured, although not by the innkeeper's fault or the fault of anybody under his charge (and for whom he is responsible), he will be held to be liable. I think it is accurate to say that the courts of today would hesitate in extending what is, after all, an anomalous position, in applying to innkeepers anything further than has been established in the books. I do not propose to go further into *Winkworth* v. *Raven*,[7] except to say that I think it is good law, and I agree with it. In any event, I think this court is bound by it. There is no doubt that this clear distinction was made in that case, that the innkeeper was held not to be responsible as there had been no negligence on his part, and the article in question had not been lost or stolen—it had been damaged by an unusual frost which occurred whilst it was in the hotel garage.

Another point which Mr. Ackner takes is one based on the Fires Prevention (Metropolis) Act, 1774, section 86 of which provides: ". . . no action, suit or process whatever shall be "had, maintained or prosecuted against any person in whose "house, chamber, stable, barn or other building, or on whose "estate any fire shall, . . . accidentally begin, nor shall any "recompense be made by such person for any damage suffered "thereby, any law, usage or custom to the contrary notwith-"standing . . ." I think that this liability of the innkeeper was a custom of the realm. It is true it is embodied in common law rules, but then common law is the legal expression of custom, and it seems to me that that also would be an answer in this

[6] Ibid. 328.

[7] [1931] 1 K.B. 652.

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particular case. I suppose that by 1774 the legislature had appreciated what Lord Goddard C.J. laid down in *Sochacki* v. *Sas* [8]: "Everybody knows fires occur through accidents which "happen without negligence on anybody's part." Parliament in 1774 apparently thought it right that they should make it plain that whatever customs or usages there were to the contrary, in this country a man should not be held to be responsible for a fire which occurred accidentally—which I take to mean "without "negligence on his part."

Those are two points which I think would be enough to decide that there is in this case no absolute liability on the part of the innkeeper, first, because there was injury to the car and not theft or loss; and, secondly, because, in any event, as it was a fire the Act of 1774 would limit the liability of the innkeeper, so far as a fire is concerned.

That takes us to the second part of the case. Was this fire the result of negligence on the part of the defendant or those for whom he was responsible? It is accepted by Mr. Stephenson that the doctrine of res ipsa loquitur does not apply, and that, therefore, he has to prove that there was some default on the part of the defendant. That means two things: first, that there was negligence; and, secondly, that that negligence brought about the loss in this case.

[His Lordship reviewed the evidence and continued:] It seems to me on the evidence in front of me that it is highly probable that the boiler was not hot, and that therefore there was no glowing fire for some considerable time before the happening of the fire about which we have been inquiring in this case. There is no other suggestion which has been put forward. I do not think it is incumbent upon the defendant to prove how the fire happened, though he ought to put all the evidence that he has before the court; and I do not think it is for this court necessarily to come to any decided view, if it can, as to how the fire happened. One may well rest on the dictum: "Everybody knows fires occur through accidents which happen "without negligence on anybody's part." Without anyone being able to say positively how the fire occurred, there was another possible source, and that is the Baby Austin car belonging to another guest. It was a very old car. Evidence has been given—and no one challenges that evidence—about certain features of that car of that date which would explain how it might get on fire; that is to say, by a short-circuit occurring in the wires and, if that happened, you have a full explanation of this fire. Again, as the expert called on behalf of the plaintiff, said: "If "there was a short-circuit in the Austin 7 it could be a self-"contained cause of the fire."

It is not for me to say whether I am satisfied that that was the cause of the fire, but I think, if I had to choose between

[8] [1947] 1 All E.R. 344, 345.

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the stove and the car, I should feel much more attracted by the Austin car theory than by that of the stove; because I do not see any evidence to suggest that the stove caused the fire, and I think the evidence is very strong that the stove was not in fact alight at the time that the accident happened.

On the evidence before me I am satisfied that this fire had nothing whatever to do with the stove, or with any fire that was in the stove. If that is right, it means that, in my opinion, there is no evidence here of any negligence on the part of the defendant or his servants which brought about the fire. I am not satisfied that this stove, built-in and surrounded by this wall was a dangerous or negligent thing to instal, and, in any event, I am satisfied that it did not cause this fire, however this fire did, in fact, arise.

There was one other matter which was mentioned, which I do not propose to decide now, but merely record that it was put before me by Mr. Ackner, and that is that it is possible to contract out of the innkeepers' liability. I am not prepared to say it is; I am inclined at the moment to think it is probably not possible. Anyhow, it is not necessary for the decision to which I have come, and I refer to it only in case this matter goes further, so that it can be appreciated that point was taken by Mr. Ackner, and argued by him. For these reasons I think the claim fails.

Judgment for the defendant.

Solicitors: *Bond, Pearce, Eliott & Knape, Plymouth; Nash, Howett, Cocks & Clapp, Plymouth.*

[CHANCERY DIVISION.]

** In re* COTTAM.
MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* HUDDERSFIELD CORPORATION.

1955
Nov. 17, 22.

Danckwerts J.

[1954 C. 4049.]

Charity—Aged, impotent and poor—Homes—Gift for provision of flats for persons over age of 65 *years—Flats to be let at economic rents—General charitable intention—Validity.*

A testator directed his trustees to transfer a trust fund to a corporation who should apply it for the provision of a flat or flats to be occupied by persons living within the boundaries of the county borough and "being in every case over the age of 65 years." He further directed that the flats should be let at economic rents and that the corporation should formulate such rules and regulations as it should think fit along the lines of rules and regulations in

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existence relating to certain homes for old people in the neighbourhood:—

Held, that the testator's intention was to benefit aged persons of small means by the provision of homes of a cheap character let at rents which were within their capacity to pay; and that the gift constituted a valid charitable trust.

In re Monk [1927] 2 Ch. 197; 43 T.L.R. 256 applied.

Adjourned summons.

By clause 7 of his will, dated April 14, 1949, Ernest Peter Cottam directed as follows: "After the death of [his brother] "the said Rodger Cottam my trustees shall transfer the trust "fund unto the council for the time being of the County Borough "of Huddersfield (hereinafter called 'the Corporation') who "shall apply the same (through such committee as the corpora- "tion shall in its absolute discretion think fit) for the provision "of a flat or flats to be occupied by married couples or bachelors "living within the boundaries of the said county borough and "being in every case over the age of sixty-five years And I "declare (1) That the said flat or flats shall be let at economic "rents bearing in mind the cost of providing the said flat or flats "either by building or purchasing and adapting existing buildings "and maintenance and repair of the said flat or flats and (2) That "the corporation shall formulate such rules and regulations as "it shall in its absolute discretion think fit for the letting of the "said flat or flats along the lines of but not necessarily strictly "complying with the rules and regulations now in existence "relating to the Corporation Cottage Homes for Old People and "the Roebuck Memorial Homes Huddersfield aforesaid."

The testator died on February 14, 1951, and Rodger Cottam died on May 23, 1952.

At the date of the issue of this summons the trust fund consisted of investments and cash of the approximate total value of £4,220.

The corporation informed the trustees that it was prepared to apply the trust fund in the manner prescribed by the will, and the trustees, being advised that there was some doubt whether the gift was valid, took out a summons to determine whether the gift for the provision of a flat or flats on the terms specified in the will was a valid gift to the corporation or was void as infringing the rule against perpetuity or otherwise.

B. G. Burnett-Hall for the plaintiffs.

E. J. T. Bagshawe for the corporation.

Kenneth Backhouse for one of the next-of-kin.

B. J. H. Clauson for the Attorney-General and another of the next-of-kin.

Cases referred to in argument: *In re Robinson* [1]; *In re Monk.* [2]

[1] [1951] Ch. 198; [1951] 1 T.L.R. 132; [1950] 2 All E.R. 1148.

[2] [1927] 2 Ch. 197; 43 T.L.R. 256.

DANCKWERTS J. The will in this case was made on April 14, 1949, and the testator died on February 14, 1951. The particular trust which I have to consider was to take effect on the death of the testator's brother, Rodger Cottam, and he died on May 23, 1952.

The trust is set out in paragraph 7 of the will and is in the following terms: [His Lordship read the trust provisions and continued:] It is plain that the class of persons selected for benefit by this trust by the testator is a class which falls within the definition of charity. It is for aged persons, and, therefore, prima facie, it is a charitable trust. Among other cases, *In re Robinson* [1] may be referred to as an authority for that.

But it is said on behalf of the next-of-kin that that provision in the will that the flats "shall be let at an economic rent" prevents there being any bounty in the gift, and, therefore, it is not really an effective charitable gift; the persons who are to receive the benefit of the trust are to pay a certain sum, but there is nothing in the nature of a gift to them to be found. It is plain that the fact that these persons have to pay something, or repay something, under a trust of a charitable nature does not necessarily render that trust one which is not a charitable trust. An example of that is *In re Monk*,[2] where there was a provision of a loan fund for poor people, people of the charitable class. The recipients of the loan had to repay the principal sum lent to them, although they were not to be charged interest in that particular case. It was plain that that was regarded by the Court of Appeal as a charitable trust.

In the present case it is said that the economic rent which the testator had in mind is not a full economic rent—not a full commercial rent, if I may paraphrase it in that way; because, though the rent is fixed so as to have regard to the cost of providing the flat or flats, which I suppose means taking into consideration interest on capital and maintenance and repairs, there is no provision for the inclusion of sums for the replacement of the capital value of the properties as they eventually wear out.

There is also the consideration that the corporation are to make rules and regulations on the lines of the Roebuck Memorial Homes, Huddersfield, and the Cottage Homes for Old People. Both those sets of rules relating to those two charities, which are admittedly charities, provide for a minimum income of applicants of 10s. 0d. a week in the case of a single person, married couples and two single persons, and they also provide for maximum incomes of applicants of 41s. 6d. for a single person per week, 62s. 0d. per week for married couples, and 68s. 0d. per week for two single persons. On the other hand, in the case of those two charities the homes are to be provided free of rent and rates, and gas, electricity and coke will be provided free. On the other side the rules contain various restrictions on the liberty of the

[1] [1951] Ch. 198.

[2] [1927] 2 Ch. 197.

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inhabitants of the homes, which would not necessarily appeal to people with sufficient money to pick and choose their accommodation without regard to financial difficulties.

It seems to me plain that the testator had in mind a class of persons of small means. The minimum income referred to in these regulations shows that the persons to be benefited in the case of the two existing charities are persons who, in present social conditions, where artisans are able to make £20 a week, are persons in the very low scale of income groups or income-receiving groups. Accordingly, it seems to me that the intention of the testator was that homes of a cheap character should be provided so that the economic rent, even though they pay the economic rent as required by the testator, is such as might properly be paid by people falling within the class for which these other homes deal perhaps more adequately, because in the case of the existing charities there are no rents payable at all.

It is a case which is not without difficulty, but on the whole I think the provisions of the will are not such as to prevent the prima facie charitable intention of the testator being sustained. Therefore, I come to the conclusion that this is a valid charitable trust.

Declaration accordingly.

Solicitors: *Biddle, Thorne, Welsford & Barnes for Cartwright & Fieldhouse, Huddersfield; Sharpe, Pritchard & Co. for Harry Bann, Town Clerk, Huddersfield; Francis Miller & Steele for John Nightingale & Co., Manchester; Treasury Solicitor.*

J. L. D.

[COURT OF APPEAL.]

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Nov. 4, 7, 24.

Singleton, Jenkins and Parker L.JJ.

*J. H. VANTOL LD. *v.* FAIRCLOUGH DODD & JONES LD.

Sale of Goods—C.I.F.—Cancelling clause—Prevention of shipment—Prohibition of export—Extension of shipping time "by two "months"—When operative—London Oil and Tallow Trade Association, Form 5a.

A written contract dated November 27, 1950, for the sale of 100 tons Egyptian washed cottonseed oil to be shipped during the months of December, 1950/January, 1951, from Alexandria, at a price of £146 10s. per ton c.i.f. Rotterdam contained the following clause: "Should the shipment be delayed by . . . prohibition of export ". . . the time of shipment shall be extended by two months. "Should the delay exceed two months, buyers shall have the option "of cancelling the contract forthwith or accepting the goods for "shipment as soon as possible. . . . The option to be declared as "soon as shippers announce their inability to ship. . . ."

The sellers had previously purchased 200 tons of that commodity from sellers in Egypt who held a valid but withdrawable export licence from the Egyptian Government.

On December 12, 1950, the export of all cottonseed oil was prohibited by the Egyptian Government. On January 3, 1951, the licence granted to the original sellers was renewed. On February 17 the export of cottonseed oil was again prohibited and the prohibition continued until the end of April. On February 22 the sellers notified the buyers of this; the buyers contended that the sellers were in default and they claimed damages:—

Held, that the two months' extension granted by the clause in question applied only if the shipment was delayed by the prohibition of export beyond January 31, 1951, the end of the period allowed for shipment under the contract; that the sellers had not shown that shipment could not have been made between January 3 and January 31, and that the sellers were in default.

Decision of McNair J. (ante, p. 642) reversed.

Appeal from McNair J.[1]

The following facts were set out in a special case stated by the appeals committee of the London Oil & Tallow Trade Association: By a contract dated November 27, 1950, made on form 5a of the London Oil & Tallow Trades Association, c.i.f. terms continental, Fairclough Dodd & Jones Ld. sold to J. H. Vantol Ld., "100 tons Egyptian washed cotton seed oil "f.f.a. . . . good merchantable quality. . . . To be shipped during "the months of December, 1950/January, 1951, from "Alexandria" at a price of £146 10s. per ton c.i.f. Rotterdam. The contract contained, inter alia, the following clause: Clause 11: "A. In the event of war, hostilities or blockade preventing "shipment this contract or any unfulfilled part thereof shall "be cancelled. If required sellers must produce proof to "justify cancellation. B. Should the shipment be delayed by "fire, strikes, lockouts, prohibition of exports, riots, or revolu-"tion, or any other cause comprehended in the term force "majeure other than war, hostilities, blockade, the time of "shipment shall be extended by two months. Should the delay "exceed two months, buyers shall have the option of cancelling "the contract forthwith or accepting the goods for shipment as "soon as possible, but should the shipment not be possible "within eight months from the date of shipment originally "stipulated, contract to be void. The option to be declared as "soon as shippers announce their inability to ship within the "extended period of two months, a reasonable time being "allowed for passing on such announcements. Should buyers "fail to exercise their option in due time, contract to be void. "If required sellers must produce proof to justify their claim for "cancellation or extension."

On September 27, 1950, the Egyptian Salt and Soda Co. Ld. obtained a licence from the Egyptian authorities to export at least 200 tons of cottonseed oil. That licence was valid until

[1] Ante, p. 642.

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December 26, 1950, but was subject to a term that it might be withdrawn at any time. On November 10, the sellers first purchased 200 tons of the commodity in question from the Egyptian Salt and Soda Co. Ld., the contract providing for 100 tons to be shipped during December and 100 tons during December/January. The terms were that the shipment was to be f.o.b. Alexandria and that freight was to be provided by the buyer for shipment to Rotterdam. On the same day they entered into an agreement to sell 100 tons to the Irish Oil & Cake Mills Ld. c.i.f. Rotterdam to be ready for shipment the first half of December and to be shipped by the first available steamer. Seventeen days later on November 27, they agreed to sell 100 tons of cottonseed oil to the buyers to be shipped December/January c.i.f. Rotterdam. On December 12 the Egyptian Government imposed a ban on export of cottonseed oil which applied even in the case of parties who had existing licences, and on December 14 the Egyptian Salt and Soda Co. Ld. notified the sellers that they were unable presently to ship. The Egyptian Salt and Soda Co. Ld. had previously made arrangements to ship these 200 tons which they had sold to the sellers and had booked space on board the *S.S. Mentor*, the booking stating that the *Mentor* was due to load on December 20. On January 3, as a result of persuasion and pressure brought to bear by the Egyptian Salt and Soda Co. upon the Egyptian authorities, their licence was renewed for a period of three months. Goods of the contract description and quality were available for shipment between January 4 and January 31.

The Egyptian Salt and Soda Co. Ld. were minded to ship the first 100 tons by the end of January and the balance during February, and on January 30 in pursuance of that intention they shipped 100 tons under their contract with the sellers, who appropriated that 100 tons to their first contract with the Irish Oil & Cake Mills. On February 17, however, the ban was reimposed by the Egyptian authorities and that ban remained in force until the end of April, 1951. Thus from January 3 until February 17 the ban was off but was then reimposed. On February 22 the sellers notified the buyers of this reimposition of the ban and the buyers claimed damages, alleging that the sellers were in default.

The dispute between the parties was referred to arbitration and subsequently went on appeal to the appeals committee of the London Oil and Tallow Trades Association who made an award in favour of the sellers subject to the decision of the court on the question of law whether on the facts found and on the true construcion of the contract between the parties the sellers were in default. The buyers, by way of a special case stated by the appeals committee, appealed to the High Court, and on May 5, 1955, McNair J. upheld the finding of the appeals committee. The buyers further appealed.

A. A. Mocatta Q.C. and *John Donaldson* for the buyers cited *Ross T. Smyth & Co. Ld. (Liverpool)* v. *W. N. Lindsay Ld. (Leith)*[2] and *Samuel Sanday & Co.* v. *Cox, McEuen & Co.*[3]

T. G. Roche Q.C. and *A. J. Bateson* for the sellers cited *Tennants (Lancashire) Ld.* v. *C. S. Wilson & Co. Ld.*[4]

Nov. 24. The following judgments were read.

Singleton L.J. having stated the facts said: McNair J. gave judgment on May 5, 1955, by which he upheld the award of the board of appeal, and thus decided in favour of the sellers. The buyers appeal to this court. Their main contention is set out in paragraph 42 (6) of the award in these terms: "The "imposition of the ban on the export of cottonseed oil on December 12, 1950, did not of itself bring into operation the "provisions of the 'force majeure' clause entitling the sellers "to an extension of two months. To bring the said clause into "operation, the ban must cause such delay as to prevent ship- "ment at any time during the contract period. The sellers "could have shipped the goods between January 4 and 31. They "did in fact (on their own admission) ship goods of the contract "description and of the required quantity during that period to "Irish Oil & Cake Mills Ld. The decision of the sellers to "allocate the last-mentioned goods to Irish Oil & Cake Mills "Ld. and not to the buyers was an arbitrary one."

The appeal depends upon the true construction of clause 11 of the contract, which reads: "A. In the event of war, hostilities "or blockade preventing shipment this contract or any unful- "filled part thereof shall be cancelled. If required sellers must "produce proof to justify cancellation. B. Should the ship- "ment be delayed by fire, strikes, lock-outs, prohibition of "export, riots, or revolution, or any other cause comprehended "in the term force majeure other than war, hostilities, blockade, "the time of shipment shall be extended by two months. "Should the delay exceed two months, buyers shall have the "option of cancelling the contract forthwith or accepting the "goods for shipment as soon as possible, but should the ship- "ment not be possible within eight months from the date of "shipment originally stipulated, contract to be void. The "option to be declared as soon as shippers announce their "inability to ship within the extended period of two months, "a reasonable time being allowed for passing on such announce- "ments. Should buyers fail to exercise their option in due time, "contract to be void. If required sellers must produce proof "to justify their claim for cancellation or extension." The clause has been in use for a good number of years, but so far as we have been told, there has been no previous decision upon it. The contract is a c.i.f. contract for the sale of goods to be

[2] [1953] 1 W.L.R. 1280; [1953] 2 All E.R. 402.

[3] (1922) 10 Ll.L.Rep. 409.

[4] [1917] A.C. 495; 33 T.L.R. 454.

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shipped during the months of December, 1950/January, 1951, from Alexandria to Rotterdam.

Clause 11 makes provision for two distinct contingencies: A. provides that in the event of war, hostilities or blockade preventing shipment the contract or any unfulfilled part of it is cancelled. B. is intended to cover a case in which the shipment is delayed through causes less serious than those in A. which arise through no fault of the seller. If "the shipment be "delayed" by any of the causes therein set out, "the time of "shipment shall be extended for two months." The result of this appeal depends on the construction of these words, which are the first two lines of clause 11 (B).

The contention of the sellers is that there was delay in shipping the goods by reason of prohibition of export, and that, but for the delay so caused, the goods would have been shipped on the *S.S. Mentor* on December 20. They claim that in view of that delay, the time of shipment was extended for two months —that is, until the end of March, 1951—and that before the extended time had run, the contract was repudiated by the buyers. On the facts stated in the special case, this is a formidable argument. But for the prohibition of export between December 12, 1950, and January 4, 1951, it is fair to assume that the goods would have been shipped on December 20, 1950. That they were not so shipped was due to the prohibition of export. The sellers were prevented from shipping goods in accordance with the terms of the contract so long as the prohibition lasted, and in that way delay in shipment was caused, it is said. That is the view which was taken by the arbitrators who were appointed, and which was upheld by the appeal board and by McNair J. It is said that once delay in shipment—however short the period—arises through one of the causes mentioned in 11 (B), the sellers have to make new arrangements either for the provision of the goods, or for shipping space, or for both, and, to avoid any question as to length of time during which the delay operates, the clause recognizes and provides a fresh two months' period as the reasonable and proper extension.

The submission of the buyers is that clause 11 (B) does not apply unless the shipment is delayed through one of the causes mentioned until the end—for all practical purposes—of the agreed time for shipment. They agree that the prohibition of export between December 12, 1950, and January 4, 1951, was a bar to shipment during that time and, perhaps, that it delayed shipment for a little time longer, but they say that there is nothing to show that it delayed the shipment of goods to comply with the terms of the contract during the remainder of the time provided by the contract for the shipment of the contract goods. "The shipment" in the first line of clause 11 (B), they contend, is the shipment contemplated by the parties to the contract and stated as December, 1950/January, 1951.

The commencing words of clause 11 (B) are "Should the

" shipment be delayed by " and not " Should shipment be " delayed by." " The shipment " means the shipment already described; that is, shipment during the months of December, 1950/January, 1951. Thus, unless it is shown that the shipment agreed upon was delayed by one of the causes mentioned beyond January, 1951, the provisions of clause 11 (B) do not apply. There is no such finding.

The conclusion at which I have arrived, after considerable hesitation, is that the contention of the buyers is correct. It is the word " the " in front of the word " shipment " in clause 11 (B) which satisfies me that the clause is only intended to apply if delay is caused beyond the end of the period which the parties agreed as the time for the shipment of the contract goods. To put it in another way, " delayed " in the first line of clause 11 (B) means delayed as between buyers and sellers in relation to this contract.

The clause may be of benefit to one or to the other party to the contract, or it may be of help to both. The words at the beginning of it protect the sellers if the shipment is delayed by one of the causes mentioned, and at the same time they keep the contract open, which may be to the buyers' advantage. In a later part of clause 11 (B) the buyers are given the option of keeping the contract open for a further period, an option which may well be valuable. It is important to bear in mind that the sellers do not need protection unless and until the agreed time for shipment has gone. Before they can get it, they can be called on for proof to justify their claim for extension; in other words, they must show that the shipment agreed upon by the parties to the contract was delayed by one of the causes mentioned beyond January 31, 1951.

I do not consider that help is given by the words in the later part of the clause, nor is it necessary to consider the obligations of the sellers to provide goods to comply with the contract in some other way. They had contracted to supply goods for shipment during December, 1950/January, 1951. It does not appear to me to matter whether clause 11 (B) is to be regarded as an exception to the provisions of the contract or as an extension of the time for delivery. If my reading of it is right, it does not come into operation. In my opinion, the appeal should be allowed.

Jenkins L.J. Under a contract dated November 27, 1950, and made on the London Oil and Tallow Trades Association's standard form of " Contract for Oriental Oils. C.I.F. Terms " Continental " the sellers, Fairclough Dodd & Jones Ld. sold to J. H. Vantol Ld., the buyers, " according to the rules of the " London Oil and Tallow Trades Association, about (100) one " hundred tons Egyptian washed cottonseed oil . . . to be shipped " during the months of December, 1950/January, 1951 from

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" Alexandria at £146 10s. per ton . . . cost freight and insurance " (including war risk) to Rotterdam."

Clause 11 of the contract having just been read by my Lord, I need not now read it again. Clause 14 provided for the reference of disputes to arbitration in accordance with rules endorsed on the contract, under which the reference was to be to two arbitrators, one appointed by each party to the reference, or their umpire, with a right for any dissatisfied party to appeal to the appeals committee of the Association.

None of the cottonseed oil contracted for was ever in fact shipped, and the buyers claimed that the sellers' failure to ship it on or before January 31, 1951, was a breach of contract rendering the sellers liable to the buyers in damages. The sellers, on the other hand, contended that in the circumstances hereinafter mentioned, the time for shipment had been extended by virtue of clause 11 (B) of the contract, and consequently that they were not in default. The dispute was ultimately referred to arbitration under the provisions in that behalf contained in the contract, and, the arbitrators having differed, the umpire appointed by them awarded that the buyers had no claim against the sellers. The buyers, being dissatisfied with this award, appealed to the appeals committee of the Association, who, at the request of the buyers, stated their award in the form of a special case.

I need not repeat at length the findings of fact of the appeals committee. [His Lordship summarized the facts as set out in the case and continued:] The appeals committee concluded their findings of fact by a finding to the effect that, subject to the decision of the court on the questions of law, the shipment was delayed by the prohibition of export imposed on December 12, 1950. By their award the appeals committee found, so far as it was a question of fact, and so far as it was a question of law held, subject to the decision of the court, that the imposition of the ban on December 12, 1950, operated to give the sellers an extension of two months in which to ship.

Apart from subsidiary points not now material, the question of law for the opinion of the court was (in effect) whether, on the facts found, the sellers became entitled by virtue of clause 11 (B) of the contract to this two months' extension (in which case the sellers would be entitled to succeed) or did not become so entitled (in which case the buyers would be entitled to succeed). McNair J. found in favour of the sellers, thus confirming the views both of the umpire and of the appeals committee; and the buyers now appeal to this court.

The case turns entirely upon the true construction of clause 11 (B) of the contract, and in particular of its opening words " should the shipment be delayed by . . . prohibition of export " . . . the time of shipment shall be extended by two months." The question is simply whether " the shipment " was " delayed " within the meaning of this provision by the prohibition of exports which was in force from December 12, 1950, to January 3, 1951.

If the shipment was so delayed, then the sellers became entitled under clause 11 (B) to a two months' extension of the time of shipment—that is to say, an extension from January 31, 1951, to March 31, 1951—and the judgment in their favour should be upheld on the ground that they were never in default under the contract. If, on the other hand, the shipment was not so delayed, then the sellers are liable to the buyers in damages for breach of the contract in the shape of the sellers' failure to ship on or before the date originally stipulated, that is to say, January 31, 1951.

In support of their view of the matter, which has so far prevailed, the sellers argue (in effect) that if the prohibition had not been imposed, they could have shipped at some time between December 12, 1950, and January 3, 1951, and in particular could have availed themselves of the arrangements for shipment by the *S.S. Mentor* on or about December 20, 1950, made by their vendors; that the prohibition in fact imposed on December 12, 1950, remaining in force as it did until January 3, 1951, made it impossible for them to ship between December 12, 1950, and January 3, 1951, and in particular made it impossible for them to avail themselves of the arrangements made by their vendors for shipment by the *S.S. Mentor* on or about December 20, 1950; and therefore that the prohibition, putting off or postponing as it did the possibility of effecting any shipment from December 12, 1950, to January 3, 1951, and in particular preventing shipment by the *S.S. Mentor* on or about December 20, 1950, was a prohibition of export by which "the shipment" was "delayed" according to the literal and ordinary meaning of those words. Thus, according to the sellers' argument, the language of clause 11 (B), construed simply as it stands and applied in its literal and ordinary meaning to the events which actually happened, did give them the two months' extension of the time of shipment to which the judge held them to have been entitled.

It will be seen that the effect of the sellers' argument is that any delay in shipment occurring at any moment, however early, during the period allowed by the contract for shipment of the goods, and continuing for any space of time, however short, provided, of course, that it was a delay due to one of the causes mentioned in clause 11 (B), would suffice to entitle the sellers to the two months' extension allowed by that clause. In other words, according to the sellers' argument in its widest form, the two months' extension is given by clause 11 (B) unless at every moment of time during the period originally allowed for shipment the sellers were wholly immune from impediments to shipment occasioned by any of the causes mentioned in clause 11 (B). A narrower form of the argument, which in view of the fate of the projected shipment by the *S.S. Mentor* would, if made good, suffice for the sellers' purpose, is to the effect that the two months' extension operates if the sellers can show that at any

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time during the period originally fixed some specific arrangement for effecting shipment had to be postponed or abandoned, through one of the causes mentioned in clause 11 (B).

The buyers, on the other hand, submit that what has to be delayed in order to bring clause 11 (B) into operation is " the " shipment," that is to say, the shipment which by the contract the sellers agreed to effect during the months of December, 1950, and January, 1951; or, in other words, not later than January 31, 1951. The buyers submit, further, that the shipment in this sense is only " delayed " within the meaning of clause 11 (B) if, through one of the specified causes, the sellers are unable to ship until a date later than January 31, 1951. In this context (so proceeds the argument) " delay " connotes postponement of shipment beyond the date on or before which the buyers are entitled to expect shipment according to the terms of the contract; or, in other words, delay of which, but for clause 11 (B), the buyers would be entitled to complain. The date within the period allowed by the contract on which the sellers may choose to ship concerns no one but the sellers themselves, and the mere fact that through one of the specified causes they have to postpone shipment until some later date within the period, provided that the cause of postponement does actually cease to operate in time to make it possible for them, if so minded, to ship before the end of the period, should not affect the buyers' rights.

In my judgment, the contention of the buyers should succeed. I think that in a clause such as clause 11 (B) of the contract here in question references to delay should be related to the time set by the contract for its performance. I think the proper time at which to decide whether there has been delay due to one of the causes mentioned in clause 11 (B) is the last date for shipment originally allowed by the contract, the question being whether as at that date " the shipment " has been " delayed " by one of those causes. If the sellers could in fact have shipped by that date but chose not to do so, then the only relevant delay was due to their own choice and not to any of the causes mentioned in clause 11 (B), and it is immaterial that at some time during, or for some part of, the period for shipment as originally fixed the sellers were subjected to delay from one or other of those causes.

I think, too, that the buyers' contention accords better with the scheme of clause 11 (B) as a whole. Delay brought about by one of the causes mentioned entitles the sellers to two months' extension of time measured from the expiration of the time for shipment as originally fixed. That suggests delay which has operated to prevent shipment by the date originally stipulated. Then the clause goes on to provide that " should the delay exceed " two months " certain consequences are to ensue. In that part of the clause " the delay " must clearly be the delay which has operated to entitle the sellers to the two months' extension,

and the two months referred to must be the two months constituting the extension, and measured from January 31, 1951, as the latest date for shipment originally fixed by the contract.

The consequences of the delay exceeding two months are that the "buyers shall have the option of cancelling the contract "forthwith or accepting the goods for shipment as soon as "possible." Finally, "should the shipment not be possible "within eight months from the date originally stipulated" the "contract" is "to be void." These provisions seem to me to point quite distinctly to a delay from one of the specified causes, by reason of which it proves impossible to effect the shipment by the date originally stipulated, and a two months' extension of the time originally fixed for shipment to protect the sellers from the consequences which would otherwise ensue from failure to ship by the due date, and to give them an opportunity of shipping during the extended period should it become possible for them to do so within that period; and, on the other hand, a protection of the buyers from inordinate delay by giving them the option of cancellation in the event of shipment still being impossible at the expiration of the two months' extension; and, finally, a release of both parties from their obligations under the contract in the event of the impossibility persisting for as long as eight months from the date originally fixed for shipment.

McNair J. appears to have attached considerable importance to the reference in clause 11 (A) to the event of war, hostilities or blockade "preventing shipment" as contrasted with the reference in clause 11 (B) to the event of the shipment being "delayed" by any of the causes therein specified. I do not think this change of language really affects the question one way or the other. I can deduce nothing more from it than that the draftsman appears to have regarded the events of war, hostilities or blockade, specified in clause 11 (A), as impediments of a permanent character to the performance of the contract, while looking upon the various other events dealt with in clause 11 (B) as possibly only transient in their effect. To "delay," after all, means much the same as "to prevent temporarily." Accordingly, I would allow this appeal.

Parker L.J. I agree. The main point at issue is a short, though not an altogether easy, point of construction, namely, as to the meaning of the opening words of clause 11 (B). The rival contentions are these. The sellers maintain that they are entitled to a two months' extension if they can show that the prohibition on export, however short the duration and effect, has in fact delayed the shipment which they would otherwise have made. If this be the correct interpretation, then on the facts of this case the sellers, having shown that they would have shipped on the *S.S. Mentor* on December 20, 1950, but for the ban on export imposed on December 12, are entitled to a two months' extension to March 31, albeit that as between January 3,

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1951, when the prohibition was lifted, and January 31, they could have shipped the goods. Accordingly, they were not in default in March when the buyers claimed arbitration and thus repudiated the contract.

The buyers, on the other hand, contend that the opening words of clause 11 (B) mean that before the two months' extension comes into being, the prohibition on export must have continued, or its effect must have persisted, up to and beyond January 31, 1951, so that the prohibition must have been the effective cause of non-performance by that date. On this view, the sellers were in default, since goods of the contract description and quantity were available between January 3 and 31, 1951, and in fact such goods were shipped by the sellers on January 30, 1951, to the Irish Oil and Cake Mills Ld. In approaching the construction of these words it is, I think, important to bear in mind that this is a force majeure clause. Whether viewed as a clause which extends the time for shipment or as an exception clause, it is a clause which operates to prevent what otherwise might be a breach from being a breach. Such a clause would normally, at any rate, not be construed as being operative, unless in its absence the party protected would have been in breach.

The first thing one notices on reading the opening words of clause 11 (B) is the definite article before "shipment." Neither side attached any importance to this, and though I think that its presence assists the buyers' rather than the sellers' contention, I myself do not attach any great importance to it. "Shipment," however, must mean "shipment in accordance with the con-"tract," that is, in the present case, by January 31, 1951. When, then, is such shipment delayed? Surely only when the time for shipment has expired. That, as it seems to me, is the natural meaning of the words. No doubt, from the sellers' point of view, it can be said that shipment is not merely delayed when the contract period expired, since the prohibition on export prevented them from shipping the goods on the *S.S. Mentor* as they had planned. From the buyers' point of view, however, the shipment cannot be said to have been delayed until the contractual period for shipment expired. I think that the delay contemplated must be a delay as between the parties. If it were intended that the clause should operate whenever the domestic arrangements of the sellers were interfered with, express words to that effect would be necessary.

As I have said, I think that the construction put on clause 11 (B) by the buyers is the natural one, but some, albeit slight, assistance can, I think, be obtained from clause 11 read as a whole. In the first place, if the sellers' contention is correct, it follows that whereas a temporary revolution which delayed their shipping plans would result in an automatic extension of two months, temporary hostilities would not, since hostilities are solely dealt with in clause A, under which, it is conceded, the contract remains in being unless the hostilities or their effect last

throughout the contract period for shipment. It may be said that it is not likely that hostilities would be of only a short duration, but it is by no means impossible, in which case the sellers' contention produces, to say the least, an odd result.

In the second place, the word "delay," where it occurs in the second sentence of clause 11 (B), is clearly referring to a continuing delay. I appreciate that it is there referring to a later stage, namely, when the two months' extension has already come into operation. Nevertheless, it seems to me a more logical scheme is produced if "delayed" and "delay" are read in the same sense. Otherwise, the result would be that whereas if the effect of any prohibition continued up to, say, one week before the end of the two months' extension, the sellers would be in breach if they did not ship during that week, yet if the prohibition and its effect only lasted two days and ceased, say, a month before the expiration of the contract period of shipment, they would not be in breach unless they failed to ship in three months.

I appreciate fully the arguments of the sellers based on the use of the word "delayed" in clause 11 (B), as compared with the word "preventing" in clause 11 (A). No doubt it is a principle of construction that the use of different words in separate clauses dealing with the same or a similar subject-matter prima facie points to the words being intended to bear different meanings. Here, however, I think that the meaning of clause 11 (B) is sufficiently clear to rebut any presumption afforded by that principle. So far as concerns the buyers' argument based on the absence of a finding that the sellers could not have bought goods of the contract description and quality afloat, I agree with the judge in thinking that that argument fails. In the result, I would allow the appeal.

Singleton L.J. I think the proper order is: Appeal allowed with costs, here and below, and judgment to be entered for the buyers.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Stephenson, Harwood & Tatham; Thomas Cooper & Co.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

1955
Nov. 14.

* PRACTICE DIRECTION (WRIT OF POSSESSION).

Practice—Writ of possession for recovery of land—Application for leave to issue—Rent Act information—R.S.C., Ord. 47, *r.* 1.
Landlord and Tenant — Rent restriction — Possession application. Execution—Sheriff—Writ of possession.

Consequent upon the decision of the Court of Appeal in *Barclays Bank Ld.* v. *Roberts* [1] these further directions are given:—

Where the defendant or any other persons are in actual possession of the premises of which possession is sought, an affidavit applying for leave to issue a writ of possession must contain the following information in addition to that indicated by the form in the practice books:

(a) Whether the premises or any part thereof is a dwelling-house.

(b) If so (i) what is the rateable value of the dwelling-house; (ii) whether it is let furnished or unfurnished and, if furnished, what is the amount of furniture therein.

(c) Any other matters which will assist the master in determining whether any occupier is protected by the Rent Acts.

F. Arnold Baker,
Senior Master.

November 14, 1955.

[1] [1954] 1 W.L.R. 1212; [1954] 3 All E.R. 107.

[CHANCERY DIVISION.]

1955
Oct. 28;
Nov. 2, 23.

Harman J.

* ANGLO-FRENCH EXPLORATION CO. LD. *v.* CLAYSON (INSPECTOR OF TAXES).

Revenue—Income tax—Profits of trade—Company—Resignations from agency and secretaryship to another company—Payment by third party of sum in consideration of resignation—Whether taxable as trading receipt.

The taxpayers, a mining finance company, provided agency, secretarial and other similar services in London and Johannesburg for a number of companies and the receipts and outgoings in respect of such services were included in its assessment to tax under Schedule D, Case I, of the Income Tax Act, 1952.

Together with the trustees of one F., the taxpayers held a substantial shareholding in the K. company, a South African company for which they provided agency and secretarial services for a remuneration. In 1949 the taxpayers and the F. trustees sold

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their shares in the K. company to certain purchasers who, in accordance with the agreement of sale, paid to the taxpayers £20,000 in consideration of their vacating their office as secretaries and agents; of that sum they retained £16,138 and paid the balance to the F. trustees. The sum retained was credited to reserve account in the balance sheet as "amount received during 1949 as "compensation for loss of office."

On being assessed to income tax in respect of this sum, the taxpayers appealed to the general commissioners, who found that it was a trading receipt and dismissed the appeal. On appeal:—

Held, that on these special facts the sum in question was a trading receipt, and chargeable to tax, as it was earned by a transaction in the ordinary course of the taxpayer's business; though it was not part of the purchase price of the shares, it was only earned because of the holding of the shares and by way of inducement to the taxpayers to part with them.

APPEAL from the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The case stated, so far as relevant, provided:

At meetings of the Commissioners on October 18 and 25, 1954, the Anglo-French Exploration Co. Ld. (hereinafter called "Anglo-French") appealed against an estimated assessment to income tax made in respect of the profits of its trade or business for the year ended April 5, 1951, in a sum of £50,000, less capital allowances £100.

The question for the determination of the commissioners was whether or not, in the circumstances, a sum of £16,138 4s. 2d. (part of a total sum of £20,000) received from Philip Hill Securities Corporation Ld., was a trading receipt which should be included in the computation of its profits for income tax purposes.

The circumstances, which had been agreed between the parties, were as follows:

Anglo-French was a public company incorporated in the United Kingdom in 1889 under the Companies Acts, 1862 to 1886. Its registered office was in, and control of the company was exercised by the board of directors from, London. It had a branch office in Johannesburg. It carried on the business of a mining finance company and its profits were assessed to tax under Schedule D, Case I.

For many years, also, Anglo-French had provided agency, secretarial and other similar services in London and Johannesburg for a number of companies, and the receipts and outgoings in respect of those services were included in Anglo-French's Case I assessment. In 1949 Anglo-French were providing such services both in South Africa and London for three companies and in London, only, for a further five companies.

Anglo-French had either (a) provided such services for companies without holding shares in the companies concerned, or (b) held shares in companies for which it did not provide such services, or (c) provided such services for companies in which it

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had also held shares. The names of the eight companies included that of "Kleinfontein Estates & Township Ld. [Year "of Commencement 1899]." There had been (with three immaterial exceptions), for upwards of the past fifteen years, no changes in the companies for which Anglo-French had so acted. The annual rates of fees and rents receivable by Anglo-French from the above-mentioned companies for the provision of secretarial services and office accommodation, as at March/April, 1949, was set out in a schedule to the Case.

Kleinfontein Estates & Township, Ld. (hereinafter referred to as "Kleinfontein Estates") for whom Anglo-French provided secretarial services in London and Johannesburg and in which Anglo-French held shares, was at all material times a public company incorporated in South Africa and carrying on business there.

From June 19, 1931, the terms and conditions on which Anglo-French provided such services to Kleinfontein Estates in Johannesburg were regulated by a formal agreement between the two companies, which, by its terms provided that it should continue in force from year to year until determined by either party giving six months' calendar notice. The agreement further provided, inter alia, that Kleinfontein Estates should by way of remuneration pay to Anglo-French £1,200 per annum and a further sum of £60 per annum for rental of office accommodation. This remuneration was subsequently, by mutual agreement, increased to £1,500 per annum.

In addition to acting as secretary of Kleinfontein Estates in Johannesburg and providing all necessary secretarial services, Anglo-French also provided similar services for Kleinfontein Estates in London. The fee paid by Kleinfontein Estates to Anglo-French for these services in London was £60 per annum.

In May, 1949, Anglo-French, together with another friendly shareholder (the estate of the late Sir George Farrar), held a majority of the shares in Kleinfontein Estates. Anglo-French had never had a controlling interest in Kleinfontein Estates.

In 1947 negotiations took place for the sale of Anglo-French's share in Kleinfontein Estates but, in the events which happened, these negotiations were subsequently broken off.

In May, 1948, and March, 1949, further negotiations took place regarding a possible sale by Anglo-French of its shares in Kleinfontein Estates. On this occasion the offer to purchase (which was in no way connected with the 1947 negotiations) was made on behalf of Philip Hill Securities Corporation Ld. (hereinafter referred to as "Philip Hill").

Ultimately, by a letter dated March 29, 1949, Philip Hill made a formal offer to purchase from Anglo-French and certain other shareholders, at the price of 35s. each per share, not less than 70,000 shares of 5s. each fully paid in Kleinfontein Estates. By clause 6 of the terms and conditions set out in the letter Anglo-French was to tender its resignation as agents and

secretaries to Kleinfontein Estates, and Philip Hill was to pay to Anglo-French on the tender of that resignation a sum of £20,000. This offer was accepted by Anglo-French.

The participation of the trustees of the estate of the late Sir George Farrar was confirmed by a letter to the Anglo-French manager in Johannesburg in which they stated that they would be willing to sell to Philip Hill, at 35s. per share, the shares in Kleinfontein Estates held by them. A circular was sent to the shareholders, who had not participated in the transaction, informing them that Anglo-French and the George Farrar trustees had accepted an offer from Philip Hill of 35s. per share for their respective shares in Kleinfontein Estates amounting in all to 70,491 shares of 5s. each out of a total of 85,000 shares. They were also informed that, in consideration of its vacating the office of secretary and agent of Kleinfontein Estates, Anglo-French had been paid a sum of £20,000.

The transactions were finally completed and the resignation of Anglo-French from the office of secretary and agent of Kleinfontein Estates and the resignation of the London Committee of Kleinfontein Estates were also tendered and accepted with immediate effect.

Having resigned from their office with Kleinfontein Estates, Anglo-French duly received the sum of £20,000 from Philip Hill. After paying a proportional part to the George Farrar trustees in accordance with its agreement with them, Anglo-French retained £16,138 4s. 2d. That sum was credited to reserve account in the published balance sheet of Anglo-French and described as "Amount received during 1949 as compensation "for loss of office." Reference to this sum was made in the report of directors in the same year as follows: "During the "year the company relinquished its office as secretaries and "agents to Kleinfontein Estates and Township Ld. An amount "of £16,138 received as compensation for loss of office has been "placed to the credit of general reserve."

On behalf of Anglo-French it was contended: (a) that in order to ascertain whether a payment is a capital or a revenue receipt every case must be determined on its own particular facts; (b) that the agreed facts in this case indicate that the sum of £16,138 4s. 2d. was part of the price, viz., £20,000 paid by a third party (Philip Hill) to Anglo-French in consideration of its agreeing to give up an agency contract and that, accordingly, the case was distinguished from the type of case where the payment was received by an agent from his principal; (c) that, having regard to its terms and the surrounding circumstances, the said agency contract together with the right to exercise the duties thereunder was a capital asset of Anglo-French and its surrender at the instance of Philip Hill was a transaction analogous to a sale of a capital asset; (d) that the said sum of £16,138 4s. 2d. was therefore a capital receipt and not a trading receipt of Anglo-French; (e) that the appeal should be allowed.

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It was contended by the Crown: (a) that the said sum of £16,138 4s. 2d. was received by Anglo-French as compensation for the loss of one of its agencies in the ordinary course of its business and not in consideration of a sale or any such analogous transaction; (b) that in fact the said agency contract and the right to perform the duties thereunder did not constitute an asset, which Anglo-French could or did sell, and further, that the fact that the payment of compensation for its loss was made by a third party was immaterial; (c) alternatively, as Anglo-French was a mining finance company, that if any such sale or analogous transaction did take place, which was not admitted, the proceeds thereof were profits which arose from a financial dealing; (d) that in either event the said payment of £16,138 4s. 2d. was a revenue receipt and therefore a taxable profit; (e) that the appeal should be dismissed.

The Commissioners held that the £16,138 4s. 2d. was a trading receipt of the appellants and must be included in its profits for the purpose of income tax and the appeal failed.

Anglo-French appealed.

H. H. Monroe for Anglo-French.

Roy Borneman Q.C. and *Sir Reginald Hills* for the Crown.

Cases referred to in argument not cited in the judgment: *Shove* v. *Dura Manufacturing Co. Ld.*[1]; *Inland Revenue Commissioners* v. *Fleming & Co. (Machinery)*[2]; *City of London Contract Corporation Ld.* v. *Styles*[3]; *John Smith & Son* v. *Moore*[4]; *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners*[5]; *Henderson* v. *Meade-King, Robinson & Co. Ld.*[6]; *Van den Berghs Ld.* v. *Clark*[7]; *British Insulated and Helsby Cables Ld.* v. *Atherton*[8]; *Henley* v. *Murray*[9]; *Calvert* v. *Wainwright*[10]; *Short Bros. Ld.* v. *Inland Revenue Commissioners*[11]; *Inland Revenue Commissioners* v. *Newcastle Breweries Ld.*[12]

Cur. adv. vult.

November 23. Harman J. The facts of this case are not in dispute and are sufficiently set out in the case stated. The question is whether the inference which the commissioners drew from those facts is a right one. They concluded that the receipt in question was a trading receipt taxable as such. The appellants claim that this was a capital receipt immune from tax. I cannot,

1 (1941) 23 T.C. 779.
2 (1951) 33 T.C. 57.
3 (1887) 4 T.L.R. 51; 2 T.C. 239.
4 [1921] 2 A.C. 13; 37 T.L.R. 613; 12 T.C. 266.
5 (1921) 12 T.C. 427.
6 (1938) 22 T.C. 97.
7 [1935] A.C. 431; 51 T.L.R. 393; 19 T.C. 390.
8 [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 155.
9 [1950] W.N. 241; [1950] 1 All E.R. 908; 31 T.C. 351.
10 [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475.
11 (1927) 12 T.C. 955.
12 (1927) 42 T.L.R. 185, 609; 12 T.C. 927.

I think, do better by way of prelude than quote the observations of Rowlatt J. at the beginning of his judgment in *Chibbett* v. *Joseph Robinson & Sons* [1]: "This case, like all cases of a similar "nature, is very troublesome; because all these cases turn upon "nice questions of fact, and at least I find very great difficulty "in apprehending any permanent and clear line of division "between the cases which are within and the cases which are "without the scope of the Income Tax Acts. I think everybody "is agreed, and has been agreed for a long time, that in cases "of this kind the circumstance that the payment in question is "a voluntary one does not matter. As Sir Richard Henn Collins "said, you must not look at the point of view of the person who "pays and see whether he is compellable to pay or not; you have "to look at the point of view of the person who receives, to see "whether he receives it in respect of his services, if it is a "question of an office, and in respect of his trade, if it is a "question of trade, and so on. You have to look at his point of "view to see whether he receives it in respect of those considera-"tions. That is perfectly true. But when you look at that "question from what is described as the point of view of the "recipient, that sends you back again, looking, for that purpose, "to the point of view of the payer: not from the point of view "of compellability or liability, but from the point of view of a "person inquiring what is this payment for; and you have to see "whether the maker of the payment makes it for the services "and the receiver receives it for the services." To a like effect are the observations of Jenkins L.J. twenty-five years later in *Henley* v. *Murray* [2]: "As the many cases on this topic show, it "is often very difficult to determine the character of a payment "made to the holder of an office when his tenure of the office is "determined or the terms on which he holds it are altered, and "the question in each case is whether, on the facts of the case, "the lump sum paid is in the nature of remuneration or profits "in respect of the office or is in the nature of a sum paid in "consideration of the surrender by the recipient of his rights "in respect of the office." A number of cases was cited to me. In some the decision was in favour of the taxpayer and in others in favour of the Crown. It was suggested on both sides that one or other of these cases governed the present one. I do not take this view. Every case of this kind must, in my judgment, turn on the special facts appearing in it. This was evidently the view of the Lord President, Lord Normand, in *Barr, Crombie & Co. Ld.* v. *Inland Revenue Commissioners*,[3] a case of this class, when he used these words: "It has been truly said that every "case must be considered on its own facts, and that no legal "criterion for distinguishing between capital payments and "income payments is readily applicable." Mr. Monroe, for the

[1] (1924) 9 T.C. 48, 60.
[2] (1950) 31 T.C. 351, 367.
[3] (1945) 26 T.C. 406, 411.

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taxpayer, submitted to me that the real distinction was between a payment made under a contract, that is to say a compensation for the loss of advantages which the contract brought, on the one side, and on the other payment made *for* the contract, that is to say, the purchase price paid on its acquisition by a third party. This seems to be an echo of Rowlatt J.'s judgment in *Inland Revenue Commissioners* v. *Northfleet Coal and Ballast Co. Ld.*,[4] as to which Lawrence J., in *Bush, Beach & Gent Ld.* v. *Road*,[5] says this: "The sum paid, in my view, represented "profits which the appellant company would or might have "made under the contract, not the purchase price of the "contract itself," and then he referred to Rowlatt J.'s judgment in the *Northfleet* case.[4] I do not think that this distinction, if it be a true one, is relevant to the facts of the present case.

On the one hand there is a line of cases such as *Van den Berghs Ld.* v. *Clark*[6] and *Barr, Crombie & Co. Ld.* v. *Inland Revenue Commissioners*[7] which seem to show that a sum of money paid to a company, which puts an end to its trading or to a branch of its trading, is a capital payment, whereas a sum paid such as those in *Kelsall Parsons & Co.* v. *Inland Revenue Commissioners*[8] and *Bush, Beach & Gent's* case,[9] which does not alter the profit-making capacity of the company or its financial structure, is an income payment. I find it very difficult to understand this distinction which seems to go at least very near to saying that the question depends on the importance to the company of the asset in question. I cannot suppose that the answer depends on a mere question of amount. Nor do I see why the duration of the contract should make any difference, though this has been suggested as a test, for instance in the *Barr, Crombie* case.[10] Rowlatt J., in his judgment in *Chibbett's* case,[11] already referred to, says this: "If it was a payment in respect of the termination of their "employment I do not think that is taxable. I do not think "that is taxable as a profit. It seems to me that a payment "to make up for the cessation for the future of annual taxable "profits is not itself an annual profit at all. I do not know "whether it has arisen or been discussed, and perhaps the less "I say about it the better, but I should not have thought that "either damages for wrongful dismissal or a payment in lieu of "notice, at any rate if it was for a longish period—I will not say "a payment in lieu of notice, I will say a voluntary payment in "respect of breaking an agreement which had some time to run— "would be taxable profits. But at any rate it does seem to me "that compensation for loss of an employment which need not "continue, but which was likely to continue, is not an annual "profit within the scope of the Income Tax at all", and if this

[4] (1927) 12 T.C. 1102, 1108.
[5] (1939) 22 T.C. 519, 524.
[6] [1935] A.C. 431.
[7] 26 T.C. 406.
[8] (1938) 21 T.C. 608.
[9] 22 T.C. 519.
[10] 26 T.C. 412.
[11] 9 T.C. 48, 61.

were the law the question would perhaps be easier to answer, but this statement has been criticized in two later cases, namely, *Hunter* v. *Dewhurst* [12] and *Bush, Beach & Gent. Ld.* v. *Road*,[13] as going too far, so that it is not open to me to decide the case with that guide.

It seems to me that the task of the court is to analyse the real nature of the payment and to judge by the result whether this is a trading receipt or no. It was pressed on me by the Crown that the company itself had described the payment in its accounts as compensation for loss of office and that, as the loss of this office did not cripple the profit-making structure of the company, the cases showed that it must be treated as an income receipt. In my judgment it will not help merely to give the payment a name and decide on that ground: see Lord Moncrieff's observations in the *Barr, Crombie* case.[14] He says this: "And "again, had it been the law that, whether the agreement contain "a true record or a false record of the situation, anything set "forth by the parties in their agreement could be fastened on by "the Inland Revenue and taken as concluded against them, that "again might conclusively have supported the commissioners' "decision upon the case. But that emphatically is not the law. "Taxpayers when faced with demands for tax may put forward "their view of their case as tabled in their private agreements by "way of defence or by way of concession. Their defence as so "supported will not avail them if the facts do not support it in "substance, while their concession cannot be urged against them "unless the concession is one which is supported by the facts."

For the taxpayer it was argued that this was the purchase price paid by a third party on the sale by the company of a capital asset and was therefore capital. I do not think the true view lies here either. This was a mining finance company and its stock-in-trade consisted of shares in other companies which it bought and sold. It also had another branch to its business which consisted in the performance of duties as secretary or registrar for a fee to a number of companies in some of which it held shares and in others it did not. It was no part of the day-to-day business of the appellants to buy and sell these secretaryships. They are not indeed things which can be bought and sold in the ordinary sense. The reason why the company was able to realize this sum is to be found in its peculiar situation. It held, together with another friendly shareholder (the estate of the late Sir George Farrar) a majority of the shares in this company. It also held a contract to act as secretary to the company. So long as the appellant and its ally held the majority of the shares and nominated the board of the company this was a valuable asset as the directors would not terminate it, but if either shareholder were to dispose of his holding the contract was worth no more than six months' purchase. How,

[12] (1930) 16 T.C. 605, 653.
[13] 22 T.C. 519.
[14] 26 T.C. 406, 413.

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then, was the appellant company enabled to obtain something like twelve years' purchase? Simply by refusing to sell its shares except on the terms that it should receive this sum in addition to the purchase price. In other words, the accession of the appellant to the offer made by the acquiring concern was essential to that concern and it was enabled to get more for its shares because of that fact. The same consideration applied to the other large shareholder, and it is significant that a proportion of the £20,000 paid by the acquiring concern and described as compensation for loss of office went not to the appellant but to the other shareholder. This alone makes it clear that the sum was not compensation for loss of the office of secretary, for the estate of Sir George Farrar had no part in that office. Part of the consideration was the resignation of the four directors' nominees of these two shareholders and an agreed part of the sum was in fact paid to a Mr. Day, another director who resigned. When I look at the document appended to the case, it appears that the offer was conditional on the delivery to the purchasing company of 70,000 shares, but that the directorships of the two main vendors and the secretaryship of the appellants were to be given up on delivery of 43,000 shares. A curious position might thus have arisen if more than 43,000 and less than 70,000 shares had been offered. This did not arise, but it shows that the payment cannot be correctly described as compensation for loss of office.

Thus, in fact, the two main shareholders were able to obtain something more than the 35s. a share which the other shareholders received. The parties, however, agreed that these moneys should not be treated as part of the consideration for the shares, and I think I must proceed on that footing. Even so, this payment was a sum which the appellants were able to exact from the purchasers of the shares by reason of the fact that the appellants' concurrence in the scheme was essential to its success in that 70,000 shares were not available without it. Apart from the holding of the shares, the secretaryship was worth little or nothing. It was only the appellants' special position that enabled them to obtain this money. It was in fact a sum earned in the course of the company's trade, namely, the sale of shares, and, even though not part of the purchase price, was only earned because of the holding of the shares and by way of inducement to part with them. On this analysis, as it seems to me, this was money earned by the company in the course of its trade and therefore a trading receipt and must be charged to tax accordingly. I am therefore of opinion that the commissioners came to a right conclusion and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Coward, Chance & Co.; Solicitor of Inland Revenue.*

J. L. D.

[DURHAM ASSIZES.]

* McDONALD *v.* BRITISH TRANSPORT COMMISSION.

1955
Oct. 27, 28.

Pilcher J.

Negligence—Onus of proof—Safe system of work—Failure to provide safe plant — Railway wagon in dangerous condition — "Dock use "only" wagon—Whether defendants exercised reasonable care.

In an action at common law by a servant against his master for negligence in failing to provide safe equipment for him, once it is established that the master has provided equipment which is dangerous, the onus shifts to the master to satisfy the court that he has in fact exercised those duties which by law fall upon an employer of labour in regard to the safety of his servants.

ACTION.

The plaintiff, Kenneth McDonald, was a dock foreman who for a long time had been in the employment of the defendants. On September 11, 1953, a wagon was drawn up alongside a platform or "keep" in the defendants' warehouse at the West Hartlepool docks and the plaintiff, in the course of his employment, stepped over a gangway leading from the keep to the wagon and took two or three steps on the floor of the wagon. In putting his left foot down on to what he expected to be the solid floor he found there was a large hole about 2 feet long and 1 foot wide through which his leg went, and he sustained injuries. Pilcher J. found that the wagon was in a dangerous condition.

The wagon was one of about 2,600 "Dock use only" wagons in use at these docks. Such a wagon had finished its useful life on the ordinary railway system of the country and was then appropriated to a dock. The fact that the floor might be out of repair was not an important matter so far as the carriage of freight was concerned, and between June and September when the port was very busy "dock use only" wagons were in perpetual demand and it was customary to defer minor repairs, such as a hole in the floor of the type described, until the congestion brought about by the arrival of timber ships had subsided. It would be economically difficult for the defendants to pick out all wagons which needed minor repairs during the busy period. Such wagons would be much more likely to be allowed to continue in circulation during the busy period than during the slack period of the year. It was not disclosed when this wagon had last been examined, reported upon or sent into the works for inspection. It might have been going round the docks for months with this hole in the floor, and it was equally possible that the hole was made only a few days before it was last loaded.

The defendants and their officials in the docks and the dock workers all knew that it was not uncommon to find a wagon of

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

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which the bottom planking was seriously damaged and sometimes holed in the fashion in which the bottom of this wagon was holed.

The plaintiff claimed damages for the negligence of the defendants in failing to provide a safe place of work and safe equipment for him.

Rupert Rawden-Smith for the plaintiff.
A. B. Boyle for the defendants.

In addition to the cases referred to in the judgment *Naismith* v. *London Film Productions Ld.** was cited in argument.

Pilcher J. stated the facts and continued: Once a condition of danger is established, the onus then shifts in a case of this kind on to the employer to satisfy the court that he has in fact exercised those duties which by law fall upon an employer of labour in regard to the safety of his servants. Under certain sections of the Factories Act, 1937, an employer is required to take such steps as are "reasonably practicable" to ensure the safety of his servants. The onus in that matter rests upon him. I am not sure that the matter has ever been directly decided where an employer's common law obligation is in question, but in *Callaghan* v. *Fred Kidd & Son (Engineers) Ld.*[1] Scott L.J. said[2]: "If it were necessary to decide the question of onus, the "obvious fact that the difficulty or ease of doing what is neces- "sary to maintain safety is so much more within the knowledge "of the management than of their workpeople makes us disposed "to hold that it is for the defence, whether in a prosecution or an "action, to establish the proposition of fact involved in the words "of limitation of the section," the words there being "reasonably "practicable." I have read this passage from Munkman on Employers' Liability, 2nd ed., pp. 154–155, because I have not been referred to these cases. It is there said that in *Taylor* v. *R. & H. Green and Silley Weir Ld.*,[3] and in *McCarthy* v. *Coldair Ld.*[4] the Court of Appeal has taken a similar view to that expressed by Scott L.J. in regard to the onus resting upon an employer under the Factories Act. If a situation of danger is shown to exist and the onus rests under the Factories Act upon an employer to show that he has done what was reasonably practicable to obviate it, I do not see why the same onus should not rest upon an employer at common law to show in parallel circumstances that he has exercised due care for the safety of his servants.

The question which is really before me in the present case is whether or not the evidence called on behalf of the defendants is sufficient to discharge that onus. The defendants have a system

* [1939] 1 All E.R. 794.
[1] [1944] K.B. 560; 60 T.L.R. 409; [1944] 1 All E.R. 525.
[2] [1944] K.B. 560, 565.
[3] [1951] 1 Lloyd's Rep. 345.
[4] [1951] 2 T.L.R. 1226.

of inspection and repair. The ordinary working of that system, for economic reasons, results in trucks in a dangerous condition being allowed to circulate during the busy period of the year, and it is said that, without incurring great expense, it is impossible for the defendants to remedy that situation. Asquith L.J., in *Edwards* v. *National Coal Board*[5] dealt with this matter under the Coal Mines Act, 1911, and said[6]: "'Reasonably practicable' "is a narrower term than 'physically possible' and seems to me "to imply that a computation must be made by the owner, in "which the quantum of risk is placed on one scale and the "sacrifice involved in the measures necessary for averting the "risk (whether in money, time or trouble) is placed in the "other; and that if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to "the sacrifice—the defendants discharge the onus on them."

I have to make up my mind here whether the difficulties which the defendants would encounter, and the expense they would incur in keeping up the same standard of inspection and repair during the busy months as they do during the slack months, justify them in saying that they have in all the circumstances exercised reasonable care for the safety of their servants. There is one other point. I do not know what the defendants had done in regard to this particular wagon. I understand they are in possession of documents which might throw some light on the history of this wagon with regard to repairs; I was told that they would be difficult and troublesome to get at, and that I can well believe, but it seems to me that the defendants, who are found to have exposed their servant to danger and risk, should satisfy the court that they have taken all reasonable steps with regard to the safety of their servants, and they should produce all the documents and evidence in their possession in order that the court may determine whether they have fulfilled or possibly failed in their duty. Here, I have not all the available information on that point. One can sympathise with the defendants. No doubt it is more economical for them to allow wagons to go about during the busy period with less inspection and repair than to maintain during such period the closer system of inspection and repair which prevails during the slack period.

In my view, the defendants have not discharged the onus which lies upon them of satisfying me that closer inspection and more frequent repair during the busy period was on balance practically or economically unreasonable to expect. They are, therefore, liable.

[His Lordship then found that the plaintiff knew all the dangers which might attend an inadvertent step on the floor of a wagon of this kind, and that he was not looking where he was

[5] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[6] [1949] 1 K.B. 704, 712.

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going or taking any care, and the damages to which he would otherwise be entitled would have to be reduced by 50 per cent.]

Judgment for the plaintiff for £265.

Solicitors: *Pattinson & Brewer; M. H. B. Gilmour.*

[CHANCERY DIVISION.]

1955
Nov. 10.

Wynn-Parry J.

* *In re* VAN LESSEN.

[1955 V. 84.]

Will—Construction—"Colony"—Bequest of postage stamp collection—"British Colonies"—Ambit of gift.

The testator, a philatelist of considerable experience, by clause 3B of his will dated October 10, 1939, gave his "collection of stamps "of Great Britain and of such of the British Colonies except Malta "as may be in my collection to" a named person.

"British Colonials" is a technical philatelic term including all those stamps listed in Stanley Gibbons British Empire Catalogue, viz., those of all counties in the British Commonwealth and the mandated territories and such countries as those which are now the Republic of Ireland, Egypt and Sudan.

On the question of the ambit of the gift:—

Held, that the testator in clause 3B of the will was using the language of philatelists; that extrinsic evidence was therefore admissible as to the meaning of "British Colonies" in the language of philately; that the phrase "British Colonies" was a paraphrase of and equivalent to the phrase "British Colonials" as used by philatelists; and that, accordingly, the gift embraced all the stamps in his collection of all countries in Stanley Gibbons British Empire Catalogue.

In re Maryon-Wilson's Estate [1912] 1 Ch. 55; 28 T.L.R. 49 applied.

In re Brassey's Settlement [1955] 1 W.L.R. 192; [1955] 1 All E.R. 577 distinguished.

Adjourned summons.

The testator, Ryko Rentjo Van Lessen, who died on November 13, 1951, by clause 3 of his will dated October 10, 1939, provided: "B. I give my collection of stamps of Great Britain "and of such of the British colonies except Malta as may be in "my collections to Roland Lee Beamont [the first defendant] ". . . E. I give the residue of my stamp collection to my nephew "Michael Derrick Van Lessen" [the second defendant].

The present summons was issued by the plaintiff for the determination, inter alia, of the question of what postage stamps in the testator's collection were included in the gift contained in clause 3B of the testator's will and, in particular, whether it comprised postage stamps of the following description: British Dominions, Empire of India, Palestine, British Post Office in

Morocco and Levant, Ireland and Irish Free State, Egypt and the Sudan.

P. W. E. Taylor for the plaintiff.
John Monckton for the first defendant.
Owen Swingland for the second defendant.

Cases cited in argument are referred to in the judgment.

WYNN-PARRY J. The question with which I have to deal on this summons arises on the language of clause 3B of the will. By clause 3 the testator, who was a philatelist of considerable experience and had what would appear to be a very extensive collection of postage stamps, was designing to dispose of the whole of that collection.

He divides the collection into classes. By paragraph A of clause 3 he deals with what he calls "my collection of stamps "of Holland and of the Dutch Colonies of Curaçao Dutch East "Indies and Suriname." Then he disposed in paragraph B with the stamps with which I am concerned in these words: "I give my collection of stamps of Great Britain and of such "of the British Colonies except Malta as may be in my "collections to Roland Lee Beamont," whose address he gives. Then in paragraph C he disposed of the excepted stamps, the stamps of Malta, by giving them to Sydney Wallace Bradley. In paragraph D he disposed of his collection of stamps of France, Belgium, Luxembourg and such of the French Colonies as might be in his collection. Finally, in paragraph E, he provided: "I give the residue of my stamp collection to my "nephew Michael Derrick Van Lessen."

The difficulty is created by the use of the phrase "stamps of "Great Britain and such of the British Colonies except "Malta. . . ." The word "colonies" is a word which has received no exhaustive definition either in the statutes or by the courts. It is quite clear from the review which Mr. Monckton made of a number of statutes and the definition clauses therein, that the word "colony" can be and is given either a limited or a very extended meaning according to the purposes of the Act. So far as the courts are concerned, their attitude can best be indicated by the observations of the Court of Appeal in *In re Maryon-Wilson's Estate*.[1] Cozens-Hardy M.R. said: "The "word 'colony' is defined in various Acts of Parliament to "which our attention has been called, but only for the purposes "of those Acts. The definitions are not uniform, and I doubt "whether much assistance can be derived from them. The "Interpretation Act, 1889, contains a definition of the word "'colony' in any subsequent Act of Parliament unless the "contrary appears. That definition is against the appellant, and "would not include the provinces of Canada. But of course

[1] [1912] 1 Ch. 55, 62; 28 T.L.R. 49.

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" the definition has no direct application to a will." He added that the dictionaries to which attention had been called did not help. Fletcher Moulton L.J. said [2]: " It is impossible to doubt " that the phrase ' British colony or dependency ' is one of very " uncertain meaning." Farwell L.J. said [3]: " ' Colony ' has no " definite technical meaning in a deed or will, and it is unneces- " sary to attempt to find one for the purposes of this case."

In view of those observations, it becomes necessary to consider the background of the testator and of those whom he designed to benefit by this clause. He was, as I have said, a philatelist of considerable experience. The evidence further shows that it was he who had first roused the interest of the legatee under clause 3B of the will, in stamp collecting. Having regard to the circumstance that the word " colony " is a word of doubtful meaning, that at once raises the question whether or not the testator in this clause was using the language of a philatelist. It was pointed out quite rightly by Mr. Swingland that there was later in the will an investment clause, clause 8, in which occur the words " . . . or otherwise in the United Kingdom or " India or any colony or dependency of the United Kingdom " and any foreign country. . . ." It is also true that having regard to the recent decision of Danckwerts J. in *In re Brassey's Settlement*,[4] that it would not be possible to construe the word " colony " in that clause otherwise than in such a narrow sense as to exclude any part of the British Commonwealth having dominion status. Mr. Swingland submitted that that showed that the testator had made his own dictionary, that I ought to give the same narrow meaning to the word " colony " or, at any rate, to give a narrow meaning to the word " colony " in clause 3B, and that, therefore, no extrinsic evidence as to the use of such a phrase as " British Colonies " by philatelists was admissible. That, of course, would provide a short answer to the whole problem, but in my view it would be wrong to treat clause 3B as governed by the language of clause 8. In my judgment, the correct view is that the testator was using in clause 3B the language of philatelists.

It becomes necessary, therefore, shortly to examine the admissible evidence to see whether that throws any light on this phrase " my collection of the stamps of Great Britain and of such of the " British Colonies except Malta as may be in my collections." A number of experts has been consulted on the matter, but I do not propose to traverse their evidence in detail. I observe that a Mr. Yates who has made an affidavit in this matter, who is a Fellow of the Royal Philatelic Society of London and a Member of the City of London Philatelic Society, who has been a collector and exhibitor of stamps for a period of approximately 40 years, expresses in his affidavit the view that the term " British " Colonies " (in the language of philatelists) " includes all those

[2] [1912] 1 Ch. 55, 63.
[3] Ibid. 66.
[4] [1955] 1 W.L.R. 192; [1955] 1 All E.R. 577.

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" stamps which are listed in Stanley Gibbons British Empire " Catalogue." Messrs. Stanley Gibbons were in fact consulted and, in a letter of June 5, 1953, they wrote: " When a stamp " collector refers to a collection of British Colonies he undoubtedly " refers to all those countries which are listed in our British " Empire Catalogue."

The testator made his will in October, 1939, and the whole of the stamps in dispute would have been found in that British Empire Catalogue current at that date. Moreover, by an arrangement between the parties, a number of catalogues and publications relating to stamp collecting were referred to. Among them were a number of periodicals published in the autumn of 1939 and some as recently as 1951. What stands out from a perusal of the relevant entries in those publications is that there is in use among philatelists a convenient phrase, " British Colonials," and that phrase is taken by philatelists to cover the stamps of all countries in the British Commonwealth and mandated territories, and even such countries as those which are now the Republic of Eire and Egypt and the Sudan. The phrase is clearly wide enough to cover the whole of the stamps in dispute in this matter.

Then arises the question whether I can treat the phrase " my " collection of stamps of Great Britain and of such of the British " Colonies except Malta . . . " as, with that exception, being equivalent to what philatelists conveniently refer to as " British " Colonials " ? In my judgment, on consideration, the phrase " the stamps of Great Britain and of . . . the British Colonies " is a paraphrase and equivalent to the phrase " British Colonials " as used by philatelists. Therefore, in this case I propose to give that meaning to the phrase " British Colonies " in clause 3B of the will.

Declaration accordingly.

Solicitors: *Benham; Synnott & Wade; Vanderpump & Sykes; Wood, Nash & Co.*

J. A. G.

[HOUSE OF LORDS.]

H. L. (E.)†

1955

Nov. 7, 8; *Dec.* 8.

* BAMBRIDGE . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue — Income tax — Transfer of assets to company incorporated abroad—Death of transferees—Settlement of shares in company—General bequest of shares—Liability of beneficiary to tax—" Associated operation "—Finance Act, 1936 (25 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18 (1) (2).

Will—Effect—Vesting of interests under it—Independent of probate.

By subsection (2) of section 36 of the Finance Act, 1936,

† *Present*: LORD MORTON OF HENRYTON, LORD MACDERMOTT, LORD TUCKER and LORD COHEN.

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directed to preventing avoidance of income tax by transactions resulting in the transfer of income either alone or in conjunction with associated operations, to persons abroad: "For the purposes "of this section an associated operation means, in relation to any "transfer, an operation of any kind effected by any person in "relation to any of the assets transferred or any assets repre- "senting, whether directly or indirectly, any of the assets trans- "ferred, or to income arising from any such assets. . . ."

In 1933 the taxpayer's parents transferred certain assets to a Canadian company, receiving shares and debentures in the company in return. By two identical settlements made in 1934 both transferred those shares and debentures to trustees on trust to pay the income from each settlement to the settlor during his (or her) life, and on the death of the settlor to pay the whole income to the other spouse during his (or her) life, and on the death of the surviving spouse to pay the whole of the income to the taxpayer during her life. The settlements were revocable. The father died in 1936 without having revoked his settlement. The mother revoked her settlement in 1937. She died in 1939 and by her will made in 1938 the taxpayer became entitled, under a general bequest, to a life interest in her residuary estate, which included the shares and debentures formerly comprised in her mother's settlement. The Crown claimed that the income of the company was deemed to be the taxpayer's income for income tax purposes by virtue of section 18:—

Held, (1) that the taxpayer was liable to tax in respect of the securities received under her father's settlement, since his rights were acquired by means of the transfer in conjunction with the settlement, which was an "associated operation" within the meaning of section 18 (2).

(2) That she was also liable to tax in respect of the securities received under her mother's will, the making of which was an "associated operation" within section 18 (2) and "effected . . . "in relation to . . . the assets transferred" and there was no justification for distinguishing a general from a specific bequest. Further the taxpayer acquired her interest by means of the will and not of the grant of probate.

The deaths of the parents were not "associated operations" but merely incidents leading to the falling into possession of the rights.

Decision of the Court of Appeal [1954] 1 W.L.R. 1460; [1954] 3 All E.R. 682 affirmed.

Appeal from the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.).

This was an appeal from an order of the Court of Appeal made on November 18, 1954, allowing an appeal by the respondents, the Commissioners of Inland Revenue, and dismissing a cross-appeal by the appellant, Elsie Bambridge, from an order of the Chancery Division (Harman J.) dated June 16, 1954. By the order of the Chancery Division an appeal by the appellant on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was in part allowed and in part dismissed and their determination was partly reversed and partly affirmed. The effect of the order of the Court of Appeal was to affirm their determination in its entirety.

The facts are fully stated in the opinion of Lord Cohen.

Sir Andrew Clark Q.C., *R. E. Borneman Q.C.* and *Roderick Watson* for the appellant.

John Pennycuick Q.C., *Sir Reginald Hills* and *E. B. Stamp.*

Besides the cases referred to by Lord Cohen, *Inland Revenue Commissioners* v. *Duke of Westminster* [1] was cited.

Their Lordships took time for consideration.

Dec. 8. LORD MORTON OF HENRYTON. My Lords, I am entirely in agreement with the speech which is about to be delivered by my noble and learned friend, Lord Cohen, and I do not desire to add anything to it.

LORD TUCKER. My Lords, I have had the advantage of reading in print the speech which is about to be delivered by my noble and learned friend, Lord Cohen. I agree with it and have nothing which I wish to add.

LORD COHEN. My Lords, the appellant, who is the daughter of the late Mr. and Mrs. Rudyard Kipling, appeals against assessments to income tax and surtax made on her in respect of the income tax years 1948–49 and 1949–50, pursuant to section 18 of the Finance Act, 1936, as amended by section 28 of the Finance Act, 1938. That section, the side note of which is "Provisions for preventing avoidance of income tax by transactions resulting in the transfer of income to persons abroad," is, so far as material to the question at issue on this appeal, in the following terms:—"For the purpose of preventing the "avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets "by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable "to persons resident or domiciled out of the United Kingdom, "it is hereby enacted as follows:—(1) Where such an individual "has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by "virtue of which he has, within the meaning of this section, "power to enjoy, whether forthwith or in the future, any income "of a person resident or domiciled out of the United Kingdom "which, if it were income of that individual received by him in "the United Kingdom, would be chargeable to income tax by "deduction or otherwise, that income shall, whether it would "or would not have been chargeable to income tax apart from "the provisions of this section, be deemed to be income of that "individual for all the purposes of the Income Tax Acts: . . . "(2) For the purposes of this section an associated operation "means, in relation to any transfer, an operation of any kind

[1] [1936] A.C. 1; 51 T.L.R. 467.

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"effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

Subsection (3) lays down rules for the determination of the question whether an individual has, for the purposes of the section, power to enjoy income of a person resident or domiciled out of the United Kingdom, but as the appellant admits that she has that power it is unnecessary to set out the terms of that subsection, or of subsection (4) which contains further directions as to how that question is to be determined.

The facts which gave rise to the assessments in the present case can be shortly stated as follows:—On December 14, 1933, Mr. and Mrs. Kipling respectively sold to a Canadian company called Kamouraska Investments Ld. (hereinafter called "Kamouraska") all their Canadian and United States investments, receiving as consideration therefor capital stock and debentures of Kamouraska. On January 12, 1934, Mr. Kipling settled his shares and debentures in Kamouraska upon trusts whereunder, so far as material, Mr. Kipling received a first life interest with remainder to Mrs. Kipling for life with remainder to the appellant for life. The settlement contained a power of revocation reserved to Mr. Kipling which was never exercised. On the same date Mrs. Kipling made a similar settlement of her holding of shares and debentures in Kamouraska, but it is unnecessary to set out the effect of that settlement since it was revoked by Mrs. Kipling on June 16, 1937. Mr. Kipling died on January 18, 1936. On December 6, 1938, Mrs. Kipling made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to the appellant. The said will contained no specific reference to Mrs. Kipling's shares and debentures in Kamouraska. She died on December 18, 1939, without having revoked or altered her will, which was duly proved in the Principal Probate Registry on February 19, 1940.

No claim under section 18 was made by the Inland Revenue authorities in respect of any year prior to the financial year 1948–49, but in respect of that year the assessment which I have mentioned was made. This was no doubt the result of the decision of this House in *Congreve* v. *Inland Revenue Commissioners* [1] which decided that section 18 applied notwithstanding that the taxpayer whom it was sought to charge was not a party to the transfer.

The appellant appealed against the assessments for this and the next following year and on December 30, 1952, the commissioners dismissed her appeal, but at the request of the

[1] [1948] L.J.R. 1229; [1948] 1 All E.R. 948.

appellant stated a case for the opinion of the High Court pursuant to the Income Tax Act, 1952. The matter came before Harman J. on June 16, 1954. He dismissed the appeal so far as it related to the securities formerly the property of Mr. Kipling but allowed it so far as Mrs. Kipling's securities were concerned because there was no specific reference to the securities in the will and, in his view, therefore the will could not be said to have been made *in relation to* any of the assets transferred. From this decision so far as it affected the property derived by the appellant from her mother the respondents appealed, and the appellant lodged a cross-appeal so far as the property derived by her from her father was concerned. The matter came before the Court of Appeal on November 18, 1954. That court allowed the respondents' appeal and dismissed the appellant's appeal. It is from this decision that the appellant now appeals.

It is common ground between the parties that the sales to Kamouraska by Mr. and Mrs. Kipling on December 14, 1933, were transfers, to which section 18 of the Finance Act, 1936, applied. It is also common ground that the settlements of January 12, 1934, by Mr. and Mrs. Kipling were "associated "operations" within the meaning of section 18. But the appellant alleges that to make her liable under section 18 the respondents must establish that her power to enjoy the income of Kamouraska was wholly the result of the transfer either alone or in conjunction with associated operations. She claims that the respondents have failed to establish that this was the position in her case.

So far as Mr. Kipling's holdings in Kamouraska are concerned, she says that her power to enjoy the income of Kamouraska was not wholly derived from the transfer of December 14, 1933, and the settlement of January 12, 1934, but was attributable also to the death of Mr. Kipling in her lifetime without having revoked the settlement. It being admitted that Mr. Kipling's death could not be said to be an "associated operation," she says that it follows that her power to receive the income was not derived wholly from the transfer and associated operation.

As regards Mrs. Kipling's holdings in Kamouraska, she says that her title depends on the will of Mrs. Kipling, and that the making of that will is not an "associated operation" within the meaning of section 18: (a) because her power to enjoy the income was dependent on Mrs. Kipling dying in her lifetime without having revoked her will and (b) because the will contained no specific reference to Mrs. Kipling's holdings in Kamouraska, and, accordingly, the will could not be said to be, in the words of subsection (2), "effected . . . in relation to any of the assets "transferred." The appellant adds that even if your Lordships are against her on this point, still she should succeed in her appeal because the appellant's power to enjoy the income of Kamouraska was derived not only from the will but also from the probate thereof.

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My Lords, the leading judgment in the Court of Appeal was given by Jenkins L.J. On the points with which he deals I find myself in such complete agreement with his reasons for rejecting the appellant's submissions that I am content to adopt his reasoning as my own and to say only that it seems to me as clear as it did to him that: (1)[2] "An interest in remainder, "or, for that matter a contingent interest, given by a settle- "ment is given by means of the settlement and not by means "of the happening of the event which brings the interest into "possession or, as the case may be, fulfils the contingency," and (2)[3] "I fail to see how a will which disposes of property "can reasonably be said not to have been made 'in relation "'to' the property of which it disposes; nor can I see any "justification for distinguishing between property specifically "disposed of and property comprised in a residuary gift, and "holding that the will relates to the former but not to the "latter." The first of these citations is sufficient to dispose of the appellant's argument so far as her interest under her father's settlement is concerned. The combined effect of the two citations would suffice to dispose of her arguments as regards her interest under her mother's will but for two points apparently not taken in the Court of Appeal to which I must refer shortly— (1) that the will was not, and could not be, an "associated "operation" because it could be revoked and even while unrevoked had no operative effect during the lifetime of the testatrix, and (2) that the appellant's power to enjoy the income of Kamouraska was derived, not only from the will but also from the probate thereof.

As regards the first point, I am unable to accept the view that, pending the death of a testator, a will is not an operation of any kind effected by a person in relation to any of the assets comprised therein. No further action by the testator is required to make it effective after his death in relation to the assets comprised in his estate, and the fact that it is impossible in his lifetime to be sure what assets will be affected by its provisions seems to me immaterial. On his death the assets affected are identified and the will is an operation effected by the testator in relation to the assets so ascertained. (See in this connection section 24 of the Wills Act, 1837.) If, as in this case, those assets included "assets transferred or . . . assets representing ". . . assets transferred," it necessarily follows that the will is an "associated operation" within the meaning of section 18 (2).

I turn now to the second point. Sir Andrew Clark said that probate is not an "associated operation" because it is done by the High Court and not by any person and under the section an operation cannot be an "associated operation" unless it is effected by some person. I do not think this argument helps him,

[2] [1954] 1 W.L.R. 1460, 1464–5; [1954] 3 All E.R. 682.
[3] [1954] 1 W.L.R. 1460, 1466.

since, as Mr. Pennycuick said, the probate was no part of the appellant's title to enjoy the income of Kamouraska. He called our attention to a passage in Williams on Executors, 13th ed., p. 57, and to a decision of the Privy Council in *Meyappa Chetty* v. *Supramanian Chetty*,[4] where the judgment was given by Lord Parker of Waddington which clearly established that an executor derives his title and authority from the will of a testator and not from any grant of probate. He also referred us to the decision of this House in *Cooper* v. *Cooper*,[5] which shows that the interest of beneficiaries under a will and the interest of next-of-kin in an intestacy both vest at death subject only to the payment of the debts and the administration expenses of the testator or intestate.

We are not concerned here with the title of the executor, but the case last mentioned, in my opinion, establishes that the appellant's power to enjoy the income depends on the will of the testatrix and not on the probate of that will. She might have difficulty without production of probate in proving her right if it was disputed, but, as was said in the passage I have cited from Williams on Executors, though an executor cannot rely on his title in any court without production of the probate, probate is merely operative as the authenticated evidence of the executor's title. So, too, if a beneficiary has to prove her title, it seems to me that probate is merely a question of evidence and not of title.

My Lords, for the reasons given by Jenkins L.J. and for those I have added above on the points which were not taken in the Court of Appeal, I would dismiss this appeal with costs.

I am asked by the noble and learned Lord, Lord MacDermott, to say that he agrees with the conclusion I have reached and the reasons I have given therefor.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.; Solicitor of Inland Revenue.*

F. C.

[4] [1916] 1 A.C. 603, 608.

[5] (1874) L.R. 7 H.L. 53.

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